THE RESPONSIBILITY OF THE STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW TO ADDRESS THE TRAFFICKING IN NEPALESE GIRLS INTO PROSTITUTION

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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Abstract

Trafficking in girls into prostitution is a global problem and has been destroying the lives of thousands of innocent victims resulting in physical and mental violence and various kinds of diseases. It violates the human rights of the victims, many of which are non-derogable under any circumstances. Nepalese victims trafficked into prostitution are a group of such victims who have been trafficked in brothels in India in large number every year because of the grim socio-legal discrimination at home. The apathy, neglect and discrimination practices by the States (Nepal and India), including the judiciary, on this problem have further increased suffering of the victims. This thesis argues that as parties to the various international human rights laws, it is the responsibility of Nepal and India to fulfill their commitments by making their national laws effective in order to prevent trafficking and protect human rights of the victims without any discrimination.
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# Table of Contents

**Introduction**  
1

**Chapter One- The Causes**  
1. A brief historical accounts of the problem  
   14  
2. Causes of trafficking in Nepalese girls  
   16

**Chapter Two- Human Rights Consequences of Trafficking**  
1. Introduction  
   29  
2. Violation of non-derogable rights  
   30  
   2.1 Right to life  
   32  
   2.2 Right against slavery and servitude  
   38  
   2.3 Right against torture or cruel, inhuman or degrading treatment  
   42  
   2.4 Right to recognition as a person before the law  
   47  
3. Violation of other human rights  
   53  
   3.1 Right to non-discrimination  
   53  
   3.2 Right to highest attainable standard of physical and mental health  
   57  
       3.2.1 Violation of physical health  
       58  
       3.2.2 Violation of mental health  
       62  
   3.3 Right to marry and found a family  
   64  
4. Conclusion  
   66

**Chapter Three: National Law Against Trafficking**  
1. Introduction  
   68  
2. Nepalese laws  
   69  
   2.1 Constitutional provision  
   70  
   2.2 *Muluki Ain* (Country Code) against trafficking  
   72  
   2.3 Special Act against trafficking  
   74  
   2.4 Other relevant legal provisions  
   81  
   2.5 Judicial interpretation  
   83
Introduction

Trafficking in Nepalese girls into the commercial sexual exploitation, within and outside the country, has been a reality for long time. Mostly invisible to the mainstream society (mainly because of the social taboo attached with issues of sex outside marriage), the dehumanising nature of this exploitation has emerged from the visible socio-legal and cultural discrimination, and economic deprivation suffered by the female population in Nepal. This thesis addresses the legal consequences and the responsibilities of the States relating to the problem of cross-border trafficking in Nepalese girls into prostitution, which mostly involves the transportation of Nepalese young girls, particularly under the age of 18, into the brothels in India.

This problem of trafficking in Nepalese girls into the brothels in India is alarmingly high. There are no accurate figures available, however, an informed source suggests that

1 There are some reports, which suggest that the internal sex market and exploitation in Nepal has been in rise. As one author has described that, “sex is cheap on Nepal’s highways. Demand is high, but it’s the supply side that pays the price. Hundreds of women and young girls are risking their health and lives in the poorly paid but highly exploitative trade.” See Hemlata Rai, “Drive through sex” Nepal Times (Kathmandu: February 2001), see online: http://www.nepalnews.com.np/ntimes/feb23-2001/sexarticle.htm; see also Linnet Pike, "Innocence, Danger and Desire: Representations of Sex Workers in Nepal" (1999) Global Reproductive Health Forum: Re/Productions, online: http://www.hsph.harvard.edu/organizations/healthnet/Sasia/repro2/|LINNET_edited.html [hereinafter Sex Worker in Nepal].
3 See for the detail discussion on this point, Chapter One, below, at 14-29.
more than 200,000 Nepalese girls\(^5\) and women are currently working as prostitutes in brothels in India, and about 10,000-15,000 girls\(^6\) are trafficked annually. Girls who have escaped from the brothels in India have described their life full with forced confinement, repeated rape, severe beatings, widespread diseases, unpaid forced labour, and near starvation,\(^7\) all constituting a flagrant violation of basic human rights norms. National laws of Nepal and India have prohibited trafficking in girls into prostitution; however, their limited purposes, considerable shortcomings, and ineffective implementation have exacerbated the problem.

**Global nature of the problem of trafficking in persons, including trafficking into prostitution**

Generally speaking, trafficking in persons suggests the movement of persons from one place to another by force or deceit. United Nations estimates that 4 million people are trafficked each year\(^8\) resulting in US$ 7 billion in profits to criminal groups.\(^9\) The purpose of trafficking in persons, including the trafficking of women and girls, can be one or more of the slavery like practices, such as prostitution, forced marriage, forced labour (domestic or factory or any

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\(^{5}\) See "Girls Trafficking: Guard Against Flash Trade", *Spotlight* (Kathmandu Nepal: August 14-20) at 16-21 [hereinafter Guard Against]. In the said article it was reported that the Maiti Nepal, a leading non-governmental organisation fighting against girls trafficking, has estimated that number of Nepalese girls in Indian's sex industry ranges from 150,000 to 300,000 and half of them are infected by HIV/AIDS.

\(^{6}\) Radhika Coomaraswamy UN Special Rapporteur on Violence Against Women, "Nepal and India should work to eliminate Trafficking" *The Kathmandu Post* (Nepal: November 4 2000). The said paper has quoted her as saying "10,000-15,000 Nepalese girls are trafficked from Nepal to India every year."

\(^{7}\) See Dinesh Raj Saytyal, *Maiti Farkiyaka Cheliharu* (Kathmandu: Agroforestry Basic Health and Cooperative/ Nepal, 1999) at 21 [translated by author] [hereinafter Maiti Farkiyaka].


\(^{9}\) See Joythi Kancis et al. eds.; *Trafficking in Women 3 in Focus 30* (OCT.1998) online: http://www.foreignpolicy-infocus.org/briefs/v013/v3n30wom.html.
other forms). However, this comprehensive understanding of ‘trafficking in persons’ has been a controversial and unsettled issue for long at the international level because of the lack of definite meaning and scopes of this problem. 

Predominantly, trafficking in persons had been addressed in terms of movement of women and girls into forced prostitution, and the other manifestations of trafficking such as forced marriage, forced labour (domestic or factory or any other forms) had not been given enough thought. This is clearly reflected in the 1949 Convention on Trafficking, which has not provided the definition of trafficking in persons and has limited its concern to the prevention of trafficking into forced prostitution and the protection of victims for the same. Many have rejected this narrow definition and scope of the Trafficking Convention, and demands have been growing at international level for having a comprehensive and clear definition, so as to encompass every form of trafficking under one definition. The other areas where human trafficking is prevalent are, forced marriage, forced domestic or factory labour, or working in debt bondage in any kind of work, such as in sneak bars or in nude bars. These are the different forms of trafficking, which should have been accommodated in


11 Now there is a specific definition of trafficking in persons, which has defined its meaning and scope. See infra note 15.

12 The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, articles 1 & 2, 96 U.N.T.S 271, entered into force July 25, 1951 [hereinafter Trafficking Convention]. India acceded this Convention on 9 Jan. 1953 and Nepal ratified the same on 27 Dec. 1995. The conformation of ratification of this treaty by Nepal is not found in United Nations web-site, but the date and the authentic report of ratification of Nepal is made available to me by Mr. Kedar Poudal, Joint-Secretary, International and Foreign Relation Section, Ministry of Law and Justice, His Majesty the Government of Nepal. The ratification by Nepal is further conformed by another Joint Secretary of the same Ministry Mr. Shiva Kumar Giri, currently Doctoral student, Faculty of law, University of Toronto. Nepal Human Development Report, 1998 has also reported the ratification of Trafficking Convention by Nepal, see Nepal Human Development Report 1998 (Kathmandu: Nepal South Asia Centre 1999) at 150.

the definition of trafficking in persons in order to address the problems more effectively from the international level because of its global existence.\(^{14}\)

However, recently adopted Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime\(^{15}\) (Protocol to Prevent Trafficking) has widen the meaning of trafficking in persons for the purpose of this protocol, which has yet to come into effect. Article 3(a) of the Protocol defines 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

This definition has substantively widen the meaning and scopes of trafficking in persons and addresses the criticism of the Trafficking Convention where except for trafficking in persons into forced prostitution, other manifestations of trafficking in persons have not been included into the scope of the Convention. However, the said Protocol has included exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude within the meaning of trafficking in persons. The flexible terms, such as forced labour or services, slavery or practices similar to

\(^{14}\) Violence Against Women, ibid.

\(^{15}\) Adopted by the General Assembly of the UN on 15 November 2000 and opened for signature from 12 to 15 December 2000 at the Palazzidi Giustizia in Palermo, Italy, and thereafter at UN headquarters in New York until 12 December 2002. Nepal and India have not signed and ratified this protocol until 27-03-2001, see UN Convention Against Transnational Organised Crime, UN DOC. A-55-383.
Slavery can be broadly interpreted to include every forms of deceptive, fraudulent, and forced movement of persons from one place to another for the benefit of others.

Other most contentious and hotly debated issue in trafficking in women/girls has been the controversy over the inclusion or exclusion of voluntary prostitution and consent to trafficking, which have also dominated the feminist discourse on this subject. Two of the most vocal and well-known international non-governmental organisation (NGO), fighting against trafficking in women/girls world wide, has sharply opposite views on this point.

The Global Alliance Against the Trafficking of Women (GAATW) does not consider all forms of prostitution as wrong, and suggests a definition of trafficking in women where force should be the fundamental parameter to decide the act of trafficking. It defines trafficking in persons as "all acts involved in the recruitment and/or transportation of a person within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion." One author has suggested that such a definition opens the door for consensual trafficking for prostitution or any other forms of coercive labour. Coalition Against Trafficking in Women has strongly rejected that definition and has advocated for strong action against any form of trafficking in women and of prostitution whether they are consensual or non-consensual. Coalition Against Trafficking in Women "aims to abolish prostitution as organised gang rape and a violation of women's human rights," and suggests

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17 Ibid.
18 See Redirecting the Debate, supra note 10 at 83-84.
that voluntary prostitution in fact portrays prostitute as a subhuman, helpless, and choice-less victim of male domination.²⁰

Susanne Kappeler raises some fundamental questions about consent and borrows C.A. Mackinnon theory, as consent in the context of women and children's historical and legal relationships with men, and says that it is an entirely inappropriate concept.²¹ "The age of consent is perhaps the most cynical misnomer in the history of women. Is a woman in a position to consent? And what is it she is said to consent? Bondage, exploitation, and violation."²² However, it can be argued that a complete negation of women's ability to give consent suggested by such a radical feminist approach in every male female relation would perpetuate women's subordination and support patriarchal arguments, as they are unable to decide what is good and bad for them. On the other hand, in the question of trafficking into prostitution, free consent seems to be dubious term if one examines the consequences leading someone to that profession. It can be rightly argued that had there been any viable alternative employment or economic opportunities or right information about the nature and the consequences of prostitution, many may not have consented to that work even in case of voluntary prostitution. As one former sex worker describes, "there is nothing like free choice to be a prostitute. All prostitute forced to involve into this profession."²³

The debate over the moral question whether prostitution is right or wrong has further misleadingly dominated the discussion of trafficking in girls/women into prostitution. It has been a known fact that the large number of the victims of human trafficking ends up in the

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²⁰ Ibid.
²¹ See Susanne Kappeler, "The international slave trade in women, or procurers, pimps and punters" (1990) 1 Law & Critique 219-235.
²² Ibid. at 225.
commercial sex industries, whether it is forced prostitution, or pornography, or any other form of sex trade. To address this problem effectively, trafficking into prostitution should not be confusingly mixed with voluntary prostitution. If a mature person travels or migrates from one place to other for the purpose of working in prostitution, that cannot be regarded as trafficking in persons into prostitution. As Special Rapporteur has rightly suggested that, "at the core of any definition of trafficking must be the recognition that trafficking is never consensual. It is the non-consensual nature of trafficking that distinguishes it from other forms of migration" and, therefore, trafficking into prostitution is a crime from the face and must be dealt with by strong legal action and consensual prostitution must be addressed independently from it.

It is unfortunate that the complete division of anti-trafficking groups into two at the international level gives very limited hope to forge effective campaign against trafficking into prostitution globally. Adding more to this controversy, the division is spread at the national level, dividing an already very shaky anti-trafficking movement at the grass root level. In other words, the opposite arguments over the same visible problem emerging from the feminist movement would delay the achievement of having a comprehensive legal regime with clear action plan against trafficking in girls/women into prostitution globally. However, it is possible today onward than ever before to address the global problem of trafficking in girls/women into prostitution more effectively because of the adoption of new international law (Trafficking Protocol) with clear definition of trafficking in persons. Its effectiveness entirely depends on the member states of UN as to how urgently they would ratify this protocol and implement it.

See Violence Against Women, supra note 13 at Para. 12
Trafficking in girls into prostitution

Among the various forms of trafficking in persons as discussed before, trafficking in girls into prostitution is one of the recognised international crimes, representing a severe form of contemporary slavery. Hundreds of thousands of young girls around the world are abducted, lured, deceived, and sold into prostitution. Their price is fixed on the basis of their colour, beauty, age, and virginity. They rarely can escape or negotiate their working or living conditions because of their vulnerability and complete subordinate position.

Traffic in girls is continuously occurring across the borders; such as, from Nepal to India, Bangladesh to Pakistan, and Burma to Thailand, and within the country especially from rural to urban areas, such as in Thailand, and in India. Driven by the desire to maximize profit and by the fear of HIV/AIDS, traffickers acting on behalf of brothels owners infiltrate ever more remote areas of many parts of developing world seeking unsuspecting recruits. Virgin girls are particularly sought after because they bring a higher price and pose less of a threat of exposure to STDs and HIV/AIDS.

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26 For example: as reported by the Asia Watch, "the worst brothels in the Southern Thai town of Ranong are surrounded by electrified barbed wire and armed guards," see Asia Watch and The Women's Rights Project, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand (Human Rights Watch, 1993) at 3 [hereinafter Modern Slavery].

27 Global Reports on Women, supra note 25. at 196.


29 Global Reports on Women, supra note 25 at 257.

30 Ibid. at 205; See also Modern Slavery, supra note 26.


32 See Trafficking of Nepali Girls, supra note 2 at 1-2, 67-68; Modern form of Slavery, supra note 26 at 2-5.
The consequences of the widespread existence of trafficking in girls into prostitution have been the violation of victim's inherent and inalienable human rights, such as (but not limited to), right to life; right against torture, inhuman and degrading treatment; right against slavery, servitude and forced labour; right to recognition as a person before the law; right to highest attainable physical and mental health; and right to marry and found a family. Even more, the health effects of prostitution on young girls are severe and devastating as they undergo horrific physical and mental violence mainly because of the repeated forced sexual intercourse. Their hazardous working condition, complete subordinated position and vulnerability exposes them to sexually transmitted diseases (STDs), including HIV infection, which leads to deadly AIDS. The barbaric practice of trading of girls as a sex commodity further violates the non-discrimination principle of international human rights law on the basis of sex.

There are several international human rights laws prohibiting trafficking in girls for prostitution, prominent among them are the Convention on the Rights of Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the Convention on Elimination of All Forms of Discrimination Against Women (Women's Convention), the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others (Trafficking Convention), and the Supplementary Optional Protocol on

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33 See for detail discussion on this point Chapter Two, below, at pp. 34-37, 57-65.
37 See supra note 34.
38 See supra note 12.
Trafficking in Women and Children on the Convention Against Transnational Organized Crime (Optional Protocol on Trafficking).³⁹

The complete unanimity of international law and municipal laws outlawing enslavement and slavery like practices have made the laws against forced prostitution and all inhuman abuses attached to it, a part of customary international law.⁴⁰ The unprecedented acceptance of CRC, which forbids all forms of child sexual exploitation and prostitution, puts mandatory obligations on the state parties to prevent the same from happening and punish the culprits. These developments oblige every country of the world to fight against trafficking in girls for prostitution, and punish those who engage and profit from these practices irrespective of whether or not they have ratified any relevant international treaties.⁴¹

My thesis argues that the problem of trafficking in Nepalese girls into prostitution in India has been one of the most neglected issues of the states (Nepal and India), irrespective of the fact that this practice has been severely violating human rights of the victims; many of these rights are non-derogable under any circumstances. I argue that to address this problem effectively, the neglect of the states, particularly by the judiciary, in refusing to adequately implement even the existing national laws, must be dealt with, and the victims ought to be regarded as equal human beings as others endowed with rights.

I also argue that the inadequacy and the ineffectiveness of the national laws to address the underlining socio-legal causes of this problem is the principal reason of the violation of human rights of the victims trafficked into prostitution. If Nepal and India honour their promise before the international community, deposited while becoming a party to

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³⁹ See Trafficking Protocol, supra note 15.
⁴¹ Ibid. at 446.
international human rights laws, and fulfil their due responsibilities accordingly by giving effect to them at the national level, the magnitude of the problem of trafficking as well as the suffering of the victims will be substantially reduced.

My approach of analysing the problem of trafficking in Nepalese girls into prostitution is mostly based on the human rights approach where I am defending their rights under various international human rights laws and arguing for the State obligation to prevent trafficking in girls and protect human rights of the victims trafficked into prostitution. While arguing my thesis, I am greatly influenced by the feminist method of analysis of legal and social problems, which has uncovered the gendered nature of the persistent discrimination and subordination of girls/women in the society. Trafficking in girls still remains widespread even after the normative legal position of national and international laws, guaranteeing equality and non-discrimination on the basis of sex. For example, it has been the situation that irrespective of the fact that National Constitutions of Nepal and India have guaranteed equality and non-discrimination and protection of human rights to all as enshrined in the international human rights laws, thousands of victims trafficked into prostitution have been openly denied protection of these rights because of their sex and being trafficked into prostitution, and they have remained to be the most suppressed and neglected class of the female population in Nepalese and Indian society. I have argued and analyzed violation of human rights of Nepalese victims trafficked into prostitution with the support from the medical information, descriptive data or documentation of physical and mental violence suffered by these victims in the brothels as well as in the society after they are rescued or released from the brothels.
Besides introduction and conclusion, I have divided this thesis into four chapters. In the first chapter, I have briefly discussed the historical accounts of the current problem of trafficking in Nepalese girls into brothels in India. This is followed by the study of some of the most pressing underlining socio-legal, economic, and other causes of the trafficking in Nepalese girls into prostitution.

In the second chapter, the discussion is focused on the severe consequences of trafficking in Nepalese girls into prostitution, which is the violation of victims’ human rights in a large scale, resulted from the continuing neglect of the states to address the widespread causes of trafficking in Nepalese girls. I have portrayed coercion, sexual exploitation, and severe physical and mental violence suffered by the victims trafficked into prostitution and the consequences of that as the violation of their inalienable human rights, many of which are non-derogable. Here, my objective is to give human right-based legal framework to physical, mental, and social consequences suffered by the victims due to their coercive or fraudulent trafficking into prostitution. This approach would also help to provide legal background for victims or others on behalf of them to take the consequences of trafficking into prostitution as violation of specific human rights for appropriate redressal.

The consequences of trafficking in girls into prostitution discussed in the second chapter as the widespread violation of human rights have directly resulted from the failure to implement and the shortcomings of the national laws against trafficking. Therefore, in the third chapter, I have studied Nepalese and Indian constitutional and statutory provisions against trafficking in girls into prostitution along with some of the Supreme Courts decisions in order to see the judicial approach to this problem. The study of national laws also has
revealed the situations where national laws are inadequate to handle the various aspects of this problem, such as health and compensation to the victims.

In the fourth chapter, I have studied the international legal developments relating to the trafficking in girls into prostitution. There are several international human rights instruments ratified by Nepal and India where trafficking in girls into prostitution is strictly prohibited and specific duties are imposed upon the states parties to protect the rights of the victims. As it has been mentioned before that my thesis argue that if states honour their promise made before the international community, while becoming a party to international human rights laws, and fulfil their due responsibilities accordingly by giving effect to them, the magnitude of the problem of trafficking as well as the suffering of the victims will be substantially eliminated.
Chapter One: The Causes

1. A brief historical accounts of the problem

Trafficking of Nepalese girls into brothels in India for prostitution has been a major human rights issue in Nepal. Though the law against human trafficking exists in the Muluki Ain (Country Code of Nepal, containing civil and criminal matters) since 1963, this issue had not received public attention until recently. A huge public outcry and negative media campaign witnessed in 1996 when 124 trafficked girls victims of forced prostitution, most of them infected with AIDS, were brought back from India through the NGOs initiatives. Both Houses of Nepalese Parliament erupted with rage that these returned victims would spread AIDS and create sex terror on the streets of Nepal. The media misused the constitutional guarantee of free press by spreading defamatory information and by questioning the rights of these girls to return home, a fundamental right of every citizen of Nepal.

However, interestingly, no one has ever raised the question against thousands of men who visit those brothels in India or get AIDS through other means in Nepal. The whole development on this issue reveals the pathetic level of patriarchy and sex discrimination that exists in Nepal, even though the Constitution of the Kingdom of Nepal 1990 guarantees right to equality and non-discrimination on the basis of sex as a fundamental right.

If one looks in the historical development of this problem, a root is found with the autocratic dictatorial Rana regime that ruled Nepal from 1846-1950. The Ranas and their associates used to bring poor Tamang and Sherpa girls from the hilly areas for their sexual pleasure and for domestic work. After this regime was overthrown in 1951 with a popular

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43 Rescuing Sex Workers, Ibid.
movement, many of these Ranas moved to India taking with them most of their domestic and sex servants.\textsuperscript{45} It is believed that the Ranas could not keep these girls for a long time because of their deteriorating economic conditions.\textsuperscript{46} These poor and ignorant girls living in an unfamiliar place fell into the hands of pimps and had to accept prostitution as a means of their survival. Their different look, fair skin, and obedient nature quickly made them popular in the brothels. Initially, the girls who were trafficked for prostitution belonged to a particular caste or tribe from the hilly regions of Nepal. However, this situation has been changing because of the high demand of Nepalese girls in Indian sex market, leading the traffickers to penetrating into new areas to find young girls.\textsuperscript{47} It has been argued that these events marked the unfortunate beginning of sexual slavery of Nepalese girls into the brothels in India.\textsuperscript{48}

The problem escalated when few of these initial victims visited their villages as traffickers and lied about their actual work. They encouraged many to follow them for better job and better life. Their new clothes, money, and visible gold ornaments convinced many families to send their daughters in India for better job, without knowing the extent of torture their beloved one would face. Slowly, this developed as a profitable business and thousands of traffickers, pimps, politicians, and police are encasing out of this modern form of human trade.\textsuperscript{49}

\textsuperscript{45} See Renu Rajbhandari, "Policies and Administration Related on Trafficking in Nepal", in Hugh Johnston & Sona Khan eds., \textit{Trafficking in Persons in South Asia} (Canada: Shastri Indo-Canadian Institute, 1998) at 80-81; Chelhibati, \textit{supra} note 2 at 5.
\textsuperscript{46} Girls Trafficking, \textit{supra} note 2 at 3.
\textsuperscript{47} See generally \textit{Community Surveillance System Against Trafficking of Girls and Women} (Kathmandu: Institute for Legal Research and Resources, ILRR 1996); See specially Chelhibati, \textit{supra} note 2 at 5.
\textsuperscript{48} See Chelhibati, \textit{Ibid.} Besides the beginning of prostitution of Nepalese girls in India like this, religious and superstitious practices in the western part of Nepal have imposed on a particular caste a rule by which the eldest daughter of a family must be offered to a deity, and who remains unmarried and becomes prostitute later in her life. These girls are not victims of trafficking, but the victim of class and sex discrimination perpetuated under the garb of patriarchal religious and traditional practices. See \textit{e.g.} Sex Workers in Nepal, \textit{supra} note 1.
\textsuperscript{49} See generally Trafficking of Nepali Girls, \textit{supra} note 2 at 41-44.
2. Causes of Trafficking in Nepalese girls

To study a given problem and proceed to seek legal remedies, one needs to examine what are the causes of that problem. The causes of trafficking in Nepalese girls into prostitution range from socio-economic and cultural domination to socio-legal discrimination of girls for a long time. These have been briefly discussed below under various sub-headings.

2.1. Illiteracy and Ignorance

Education gives individuals the ability to read, write, and understand the nature of any event happening around. It is the strength and power to achieve one's goal in life and develop personality accordingly. This is the strongest weapon to destroy ignorance, superstition, discriminatory traditional practices, and modernize the cultural and social values with humanistic approach. When the world has moved from minimum literacy to the super cyberspace based education, Nepal still has around 60 percent of its population illiterate, completely unable to read and write.50 Within that population, there is a widespread discrepancy between male and female literacy rate. Statistics show overall female literacy rate is 25 percent compare to that of 55 percent in case of male.51 In 1995, out of the 928 thousands children not enrolled in schools, approximately two thirds were girls.52 Out of the total number of children enrolled at the primary level, 60 percent were boys compared to 40 percent girls.53 Using the 1994 rates of promotion, repetition and dropouts, it is expected that,

51 Ibid. at 76.
52 Ibid. at 78.
53 Ibid.
out of the total students enrolled in 1995, 63 percent will drop out from primary school
before the completion of primary grade, the maximum of them would be girl students.\textsuperscript{54}

High illiteracy has basically disadvantaged Nepalese girls in having access to any of
the few opportunities available in the country, such as jobs in government offices or in
private companies. Illiteracy has been the main cause of their ignorance and they are easily
being deceived under the pretext of better life. The lack of education has curtailed their
ability to carefully analyse the reality of any false promises and deception. For example, a
victim has reported that when she was trafficked, the perpetrator (her husband) told her that
they were going to another city in Nepal to meet their parents, but in fact landed in
Bombay.\textsuperscript{55} She did not know where she was until she was told that she had already been sold
for prostitution. She said, had she been able to read the road sign, she would have known
where she was being taken and protested in between before been taken to other place.

The other crucial area badly affected by the lack of education is the health of girls in
general, and particular, of their sexual and reproductive health. The taboo around the subject
of sex and total unavailability of sex and health education has kept these girls in darkness
about their sexual and reproductive functions. Unawareness of the methods of transmission
of sexual transmitted diseases, HIV/AIDS and their effects on their life put them in
vulnerable situations. If they are aware of all these danger through sex and health education,
they can at least try to protect themselves from contracting these diseases, even if they are
victims of trafficked into prostitution.

\textsuperscript{54} Ibid.
\textsuperscript{55} See "Betrayal by your own people: The reason behind trafficking" \textit{A quarterly newsletter, Maiti Nepal} (Kathmandu: January-March 2000) at 1-3.
2.2. Cultural and Social Injustice

Nepal is predominantly a Hindu state and caste and sex discrimination are embedded into the cultural and social fabric of the society. Though the practice of child marriage, bigamy and unmatched marriage\textsuperscript{56} are illegal\textsuperscript{57} under the present Nepalese law, these practices are still prevalent in the rural areas where 85\% of the Nepalese population live. Marital rape is not considered as a crime under the law\textsuperscript{58} and domestic violence is not considered an offence unless it results into death. Even the majority of the judges don't think violence against women as a matter of public concern.\textsuperscript{59}

Preference for son over the daughter strongly exists even today. A woman unable to give birth to a son is ostracized not only by the family but also by the society at large. One can find instances where couples having 3-4 daughters are still trying for a son. Generally, the girls and women in the family eat after the sons and men in the family and get less nutritious food. In case of girls, preference is given to daughters being trained in household activities like cooking, cleaning and rearing of children, whereas the sons are sent to school. Girls are considered to be "property of another house", and investing on them for education and health is regarded as an unproductive investment. The discrepancy and disparity seen in the education data proves this line of argument. Preference for son over daughter also has a strong religious support. There is a belief that, only a son can perform the last rites of the parents for their soul to be liberated from their body. These are the practices supported by the cultural and social fabric of the society.

\textsuperscript{56} An unacceptable age difference between bride and groom.
\textsuperscript{57} \textit{Muluki Ain, 1963} (Nepal), chapter on Bihabari, s.1, 2 [translated by author] [hereinafter Muluki Ain].
\textsuperscript{58} \textit{Ibid.} at chapter on Rape, s.1.
\textsuperscript{59} See Balbase Narayan, Pyakuryal Sucheta, \textit{A study on Gender and Judges} (Pro-Public, Kathmandu: August 1999) [hereinafter Gender and Judges].
The worst has been the situation when because of the existence of all these
discriminations for a long time, many girls internalize their lower and subordinated status in
the society as an unchangeable social reality and are eager to leave their villages because
they do not see their future there. The traffickers have manipulated this situation and they
become easy target for deceptions of anyone who promises a better life and future for them.

2.3. Poverty and Unemployment

The overall economic condition of Nepal reveals mismanagement and corruption cobbled
with scarce resources, and this has resulted in visible poverty in all sectors of Nepalese life.
Nepal is one of the least developed countries in the world having USS 210 as Gross National
Product (GNP) per capita in 1998.\textsuperscript{60} The natural and geographical problem adds fuel to this
situation. 85 percent of the Nepal's territory is hills and mountains and to develop
infrastructure in that area is very costly.\textsuperscript{61} These are the areas where physical and human
development is in primitive stage. 84 percent of the Nepalese population get their subsistence
from the agricultural economy.\textsuperscript{62} The agricultural production in hills and mountains region is
very low compared to that of plain area because of the lack of irrigation and unscientific
methods of farming. Most of the trafficked girls belong to these hills and mountains where
life is very difficult.\textsuperscript{63}

The limited better-paid job market in Nepal is out of the reach of these girls because
of their lack of skills and education. When they come from the villages to find job in the city,
they accept domestic work or any kind of low paid labour job at carpet or garment factories.

\textsuperscript{60} The Progress of the Nations 2000-Statistical Tables, online: http://www.unicef.org/ponoo/statistics.htr.
\textsuperscript{61} See online: World Fact Book http://www.bartleby.company/151/172.html.
\textsuperscript{62} Ibid.
\textsuperscript{63} See Girls Trafficking, supra note 2 at 16.
According to one report on victims, it has been revealed that above 40 percent of trafficked victims were working in carpet factories, mostly located in the Kathmandu, the capital of Nepal.\textsuperscript{64} These factories are working as transit point for many girls later to be trafficked into the brothels in India. The low paid and exploitative working condition provides an opportunity to the traffickers to deceive these ignorant girls to agree to leave such a low-paid job for a better job in a new place. The case study of Maya and Parvati\textsuperscript{65} shows that because of severe hardship, poverty, and lack of employment opportunity in their village, 105 k.m. north from Kathmandu, they left their village with few other girls, and started working in a Tibetan hand-made woollen carpet factory at Kathmandu. After six months of their work, an old woman who lived many years of her life in Bombay offered to take them for better job in Bombay. Big house, silk cloths, and gold ornaments of that old woman had impressed them a lot, and they believed that, they would get the same. Unfortunately, they ended up being sold to an infamous brothel in Sanagachhi, Calcutta in India. Later, Maya was taken from Calcutta and re-sold in Bombay by her husband who turned to be a trafficker.

There is widespread assumption, even in western media that poor parents in Nepal sell their daughters knowingly for prostitution.\textsuperscript{66} Such situation may have rarely occurred or that may be just a false assumption unsupported by the fact from the research as claimed by some well-known social workers in Nepal.\textsuperscript{67} Identical comparison with trafficking problem of one country to another may not be always true. It is true that poverty is prevalent in Nepal,

\textsuperscript{64} See Trafficking of Nepalese Girls, supra note 2 at 25.
\textsuperscript{65} See Gauri Pradan, "The Road to Bombay: Forgotten Women", Red Light Traffic, supra note 4 at 33-34.
\textsuperscript{66} See Redirecting the Debate, supra note 10 at 69.
\textsuperscript{67} Laxmi Pokharal and Dinesh Satyal of ABC/Nepal (a well-known NGO working against the trafficking in Nepalese women/girls into prostitution), both working with rescued victims of trafficked into prostitution and associated with many other activities of prevention of trafficking vehemently claimed that they have not found any parents who have sold their daughters to traffickers and suggested that such an assumption is false; See e.g. Laxmi Pokharal, "The Factual Information on Girls Trafficking", in ABC/Nepal, Creating Awareness Against Girls Trafficking (ABC/Nepal: 1998) at 39; See Chalibati, supra note 2 at 39.
but the family values and joint family structure is highly protected under the Nepalese
culture. Knowingly selling their daughter for prostitution would bring unacceptable shame,
which can destroy the respect and dignity of a family. It is the better job, fake marriage, or
any other forms of deceptions that lead their family to send their daughter, or a girl to decide
herself, for the new place and who land up in brothels in India.

2.4. Legal and Judicial Discrimination

Nepal has undergone a constitutional change in 1990, after the people's movement that
brought down 30 years of absolute rule of Nepalese monarch. Under the present Constitution
of the Kingdom of Nepal 1990, people are sovereign authority and King enjoys figurehead
status under the parliamentary democratic system. The Constitution explicitly guarantees
right to equality as a fundamental right to all its citizens without any discrimination on the
basis of sex or gender. It further has a provision under which parliament can pass a
protective discriminatory law in favour of women. According to the Constitution, a law that
contravenes the basic principles of the constitution is null and void.

Nepal has acceded to and ratified 16 international human rights treaty instruments,
including CRC, Women's Convention, and ICCPR and its first and second optional protocols,
without any reservation. Besides all these developments, even today, there are 36 domestic
laws relating to marriage, divorce, citizenship, birth registration, inheritance, intestacy,
property, adoption, tenancy, employment, and some penal provision, which contain
discriminatory legal provisions contrary to the spirit of the Constitution, and many

68 Constitution of Nepal, supra note 44 at arts. 3,4.
69 Ibid. art.11(1).
70 Ibid. art.11(3).
71 Ibid. art. 131.
72 Human Development, supra note 50 at 150.
international human rights instruments to which Nepal is a contracting party.\textsuperscript{73} Specially, due to the lack of right to inheritance to the property as enjoyed by sons, girls have to depend upon their father and husband for every minimum economic needs. This situation compels them to look for economic opportunities to meet their needs and desires. Thus, the legal discrimination on right to inheritance to property has diminished girls' independent economic and legal status in the society and makes them vulnerable to trafficking.

Many individuals and NGOs have challenged discriminatory provisions unfavourable to girls/women before the Supreme Court, but the Supreme Court has consistently upheld the norms of Hindu religion and its structure, and refuses to declare them inconsistent to the equality provision of the Constitution.\textsuperscript{74}

A recent publication of a research finding reveals the unacceptable gender insensitivity of our judges on the question of violence against women. Followings are some examples:\textsuperscript{75}

"a) 70 percent of them think women don't have rights over their body.

b) 57 percent of them think a husband giving a slap to his wife in the course of marriage is not an act of cruelty."

The same study has found that in trafficking cases, 58 percent of the verdicts were held not guilty. Even in the guilty verdicts, the courts awarded only the minimum sentences to the culprits.\textsuperscript{76}


\textsuperscript{75} Gender and Judges, supra note 59 at 25,17,19.

\textsuperscript{76} Ibid. at 84-88.
These are the disturbing statistics of the Nepalese Judiciary. An institution, which is supposed to be the guardian of the people's rights, is living in the old traditional values heavily discriminatory to the female population. This attitude of the judiciary has helped to encourage traffickers to get away from the justice and continue to trade girls with impunity. The insensitivity of the judiciary has also helped to perpetuate patriarchy, and even inhuman form of human rights violation against women/girls, such as trafficking in girls for prostitution, are being pushed at the bottom of the priority of the state.

2.5. Open Border with India

Nepal and India share 1,740 k.m. long open border under the 1950 "Peace and Friendship Treaty". Nationals from both countries, on a reciprocal basis, can reside, own property, participate in trade and commerce, and move freely in each other countries. They don't have to carry passport or visa or any kind of identification as long as they are not harassed by the border police in suspicion of one not being a citizen of either of the countries. This has allowed many criminal gangs to function freely, and cross the border of one country after committing crime in another country and enjoy the benefits derived from the territorial limits of law enforcement agencies.

Open border has caused a lot of social, economic, and security problems, and it is widely accepted that, it facilitates easy trafficking of Nepalese girls into the brothel in India. In many situations, traffickers and their victims move easily across the Indian side, and onus is on individual police officers to stop and question suspicious-looking travellers. Police normally don't perform their duty, and in some cases, even if some of them try to do their

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77 Dinesh Bhattarai & Pradip Khatiwada, Nepal India, Democracy in the Making of Mutual Trust (Sastri-Indio Foundation 1993) at 199-200.
78 The Nepal India Peace and Friendship Treaty, 1950 article 7, Cf. Ibid. [hereinafter Nepal India Treaty].
best, it is impossible to stop and interview every traveller when people can just go from one side of the border to other without any requirement to stop at the check point. Often, traffickers use marriage as a method to avoid any kind of harassment by police, as the police cannot prevent a husband from taking his wife across the border.

2.6. Lack of Political Commitment and State Complicity

Even though the trafficking of Nepalese girls into the brothels of India has become an international human right issue, the political establishment in Nepal has not taken up this issue as a subject of national priority. Apart from the NGOs and INGOs demonstrations, deliberations, and rehabilitation work, the government has done significantly nothing, either to stop trafficking or rehabilitate the victims. This lack of urgency to solve the problem of girls trafficking does not remain with the government but can be found across the party line, because not a single political party has given any importance to this issue.

Women's rights movement in Nepal is still in its primitive stages and their voice is buried under the rubble of male political priority and power game. The political participation of women who constitute more than 50% of the population as a whole has completely been neglected issue in Nepal. Out of 205 members of House of Representative, the Lower House of Parliament in Nepal, only 12 are women. In judiciary, at the Supreme Court level for the first time in April 2001, a woman has ever been appointed as a judge. As statistic

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79 See Trafficking of Nepali Girls, supra note 2 at 55.
80 See Girls Trafficking, supra note 2 at 42-43; Durga Ghimire, Sexual Exploitation of Nepalese Girls (ABC/Nepal 1997) at 9; See also Politics and Trafficking, Role of Parliamentarians to combat trafficking (Kathmandu: MAITI Nepal, October 1999) [hereinafter Politics and Trafficking].
81 Status of Women, supra note 73 at 361.
82 Human Development, supra note 50 at 144.
shows, in 75 Districts and 16 Appellate Courts in Nepal, 1.3% judges are women compared to 98.7% of men judges. Supra note 59 at 71.

As obvious from the magnitude of the problem of trafficking in girls into prostitution, this issue needs to be addressed as a national crisis and accordingly the plan of action should be taken. On the contrary, it has been widely reported that many high level political personalities are directly involved with this trade. See Trafficking of Nepali Girls, supra note 2 at 59-64; "Politicians Protecting Traffickers" Sunday Despatch, The Kathmandu post (Nepal: May 10 1998). Supra note 59 at 71.

Human Rights Watch/Asia has published a report on this issue and charged many well-known political personalities involved in trafficking. The successive governments have not taken any action against them. One name mentioned by the report as a trafficker, has become a Member of Parliament from the ruling party side, which shows the high political connection with this trade.

The indifferent attitude of the government has become even more apparent in the well-publicized event of 124 trafficked victims returning from the brothels in India. The government of Nepal was timely informed by the government of India about the rescue of those girls of Nepali origin. Network Group Against AIDS Nepal had timely written and requested the government for proper handling of such an issue of sensitivity. For five months, the government did nothing, and when NGOs had arranged their returning process

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Supra note 59 at 71.


See Trafficking of Nepali Girls, Ibid.

The former Inspector General of Police Mr. D.B. Lama accused by the report as involved with trafficking groups presently is a Member of Parliament, representing Rasuwa district at the House of Representative from the ruling Nepali Congress party, Ibid. at 79.

See "Nepal Pharkiyaka Chaliharu" (ABC/Nepal 1997) [translated by author] [hereinafter Pharkiyaka Chaliharu].

The copy of the official letter addressed to the Government of Nepal by the Network Group Against AIDS, Cf. Ibid. at 2,3.
and got them in Nepal, instead of helping the victims, government joined with misinformed public and condemned those social organisations for bringing victims with AIDS in Nepal.89

A law against trafficking in persons enacted in 1963 shows the acknowledgement of the problem on part of the Government of Nepal. However, until today the government has not implemented any workable policies and programmes regarding the prevention and rehabilitation of victims of trafficking. Apart from little anti-trafficking rhetoric, the government does not have or has not released any data about missing or trafficked girls from Nepal. The Nepalese Government has never dared to ask the Government of India regarding the health and other human rights violations of Nepalese girl children/women living under the conditions of slavery in the brothels in India.

The department of police in both the countries is notorious for corruption and mishandling of human rights cases. Their complicity with traffickers and pimps is well documented.90 Indian police openly take money from traffickers, brothel owners and pimps, and allow brothels to continue.91 This is the direct violation of the anti-trafficking laws in India. As it has been reported, there is a registration process in case of new arrival of trafficked girls.92 Global Reports on Women describes the situation like this, "in this process, the madam would notify the police of the arrival of a new victim in her establishment for any pay or bribe for their silence. The madams routinely pay between Rs. 5000.00 to 25,000.00(USS 166-833) to the police station on scale with her purchase price."93 For minor, the police take more money because the punishment under the law is high in case of minor's

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89 See Rescuing sex Worker, supra note 42; See also "Ministry is unaware about the returned girls", The Kantipur (Kathmandu: 27 July 1996)[hereinafter Ministry Unaware].
91 See Trafficking of Nepali Girls, ibid.
92 Ibid.
93 Global Reports on Women, supra note 25 at 245.
prostitution. They even provide document attesting higher age of the minor to save madams from prosecution, because under the Indian Anti-Trafficking Act, voluntary prostitution of adult in the private place is not considered as a crime.

In Nepal, the situation is not better from any sense. The police, bureaucracy, political organisations and judiciary are all considered by the public to be the corrupt institutions. People have less faith and respect over almost all individuals working in these institutions. It is reported that in many villages traffickers are well-known people and they regularly pay money to local police and politicians as a commission to avoid arrest. There are hardly a few cases where police have apprehended any trafficker and brought before the court. It is the victim or her family's initiative by which some traffickers are sent into the jail. Even when the police suspect and arrest a trafficker, they collect some bribe and let them scott free. It is an easy way of getting a huge bribe because in case of conviction the accused for trafficking would face 20 years of imprisonment. A high acquittal rate, and even in case of conviction, minimum sentencing patterns raise a serious doubt of integrity of police, public prosecutor, and judges, who are responsible for handling the cases of trafficking.

If one examines the causes of trafficking in girls from Nepal from the demand and supply side, what is discussed above under the six points represent supply side. However, supply side would cease to exit unless there is a constant demand in the market and vice-versa. Demand encourages supply to grow and as profit increases because of high demand, the different methods of supply will also grow. Thus, the argument, which explains the root

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94 Ibid.
95 Ibid.
96 See Trafficking of Nepali Girls, supra note 2 at 51-52.
97 See Infra note 264.
98 See Gender and Judges, supra note 59 at 88-89.
causes of trafficking in girls on the basis of poverty, is incomplete because that neglects the fact that there is a ready market of customers. The rapid growth of demand of Nepalese village young girls in Indian sex markets has led to more girls being lured and deceived into the brothels and many other forms of sexual exploitation.\textsuperscript{99} The global study of the trafficking in young girls into sex market, which also includes Nepalese context, indicates that there are two important factors of demand of young girls into this illegal trade.

1. There is a huge multi-billion dollars sex industry all over the world.\textsuperscript{100} It always strives for new face, especially young one, for prostitution, pornography, strip dance, sneak bar, or any other sexual purposes. As has been discussed, for Nepalese girls, thousands of brothels openly operating in India have been the main cause for their continuing trafficking.

2. The increasing probability of AIDS and STDS among the sex workers has pushed clients or customers to demand younger girls from the remote villages where these diseases are believed not to have reached. Besides this, a superstition belief that any person infected with AIDS or venereal diseases can be cured, if he has sexual intercourse with a virgin girl, has put a high price tag on virgin girls.\textsuperscript{101} This has encouraged traffickers to penetrate into many new areas to find young girls, increasing the number of girl children trafficked into brothels.


\textsuperscript{100} Donna M. Hughes, "The Internet and the Global Prostitution Industry", in Donna M. Hughes, Claire Roche eds., \textit{Making the Harm Visible: Global Sexual Exploitation of Women and Girls} (Coalition Against Trafficking in Women: February 2000).

Chapter Two: Human Rights Consequences of Trafficking

1. Introduction

The continuing neglect to address the underlying causes of trafficking for prostitution by the states (Nepal and India) has resulted into the severe violation of human rights of Nepalese victims trafficked into prostitution. The extent of this violation includes, but not limited to, the violation of right to life; right against torture or cruel, inhuman or degrading treatment; right against slavery or servitude; right to recognition as a person before the law; right to non-discrimination; right to marry and found a family; and right to higher standard of physical and mental health.

As it has been recognised that the human rights are not only "the idea of our time" but they also assert that every human being on earth is "entitled to have basic autonomy and freedoms respected and basic needs satisfied." Furthermore, the idea of human rights is not just an abstraction; it has specific content as specified in various international human rights covenants and conventions, which are promulgated and accepted by the countries of the world.

The severe violation of the human rights of the victims trafficked into prostitution, as discussed hereinafter, has widespread consequences on their health and social well-being. The extent of the violation of the human rights suffered by these victim ranges from the economic, social, and cultural rights to the civil and political rights, many of which are non-derogable under any circumstances under the international human rights law.

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102 For detail discussion on this topic, above, at 14-29.
104 Ibid. at 2.
105 Detail discussion on this point is found, below, at 31-53.
The important point to be remembered here is that the principal reasons for the continuation of the violation of the human rights has been the States' (Nepal and India) failure to fulfil their duty to protect against and to prevent from violation to happen, as they have agreed and promised before the international community.\textsuperscript{106} Trafficking in girls from Nepal and their large presence in India for many years clearly underscores States' neglect to adopt and implement laws and that has been the principal factor for the existence of this problem.\textsuperscript{107} This chapter addresses the consequences of such neglect in life of victims as it perpetuates large-scale violation of human rights.

This chapter is divided into two parts. In the first part, I have analysed the violation of non-derogable rights of the victims trafficked into prostitution with descriptive data, revealing victims actual conditions in the course of trafficking, life in prostitution, and life after the prostitution. The similar data is used for the discussion in the second part where the focus is on the violation of some other important rights of the victims.

2. Violation of non-derogable rights:

The International Covenant on Civil and Political Rights (ICCPR), by its name itself, deals with the civil and political rights of individuals, which are often called first generation rights. “The most signally important feature of the ICCPR is that it is a universal instrument which contains binding legal obligations for the states parties to it. The rights enshrined within it represent the basic minimum set of civil and political rights recognized by the world community.”\textsuperscript{108} All rights guaranteed under the ICCPR derive from the inherent dignity of the

\textsuperscript{106} See ICCPR, \textit{supra} note 34; CRC \textit{supra} note 35; Women's Convention, \textit{supra} note 34.
\textsuperscript{107} See for the failure to implement National laws, Chapter Three, below.
human person and cannot be derogated unless; there is a national emergency, which has threatened the life of the nation. Even in case of such a situation, when derogation of human rights are permitted, the derogation cannot exceed the exigencies of the situation; must be immediately informed to other states parties; and cannot be discriminatory solely on the basis of sex, race, colour, language, religion or social origin. However, some rights guaranteed by the ICCPR, such as right to life; right against torture or cruel, inhuman or degrading treatment; right against slavery or servitude; and right to recognition as a person before the law are non-derogable under any circumstances and shall always be available to every person living in the states parties to the Covenant.

In other words, the significance of the ICCPR lies with the fact that this is the first and foremost international human rights treaty, which has protected these rights, initially recognised by the UDHR, as non-derogable, and no human being shall be denied to exercise them. Their derogation is unjustifiable under any circumstances because of their sacrosanct position in human lives as they directly attach to the physical integrity and dignity of individuals. However, contrary to this provision, Nepalese victims trafficked into prostitution have been suffering from the violation of these basic human rights protected as

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109 See preamble of the ICCPR.
110 See ICCPR, supra note 34 at article 4(1).
111 Ibid.
112 Art. 4 (1) of the ICCPR allows derogations of rights "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." But the derogation of some rights is restricted by article 4 (2) of the ICCPR, which say, 'no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.'
113 Ibid.
non-derogable rights, rights which are highly regarded as an essential conditions for human dignity and survival, and, therefore, inherent and inalienable.\textsuperscript{114}

2.1 Right to life

The right to life has been called as ‘the supreme human right’.\textsuperscript{115} People need or claim all other human rights because they want to live and to have a respectful and meaningful live. If the possibility of the enjoyment of life is discarded or frustrated, the guarantee of all other rights makes no sense. As one author has suggested that, “civilized society cannot exist without legal protection of right to life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.”\textsuperscript{116} Therefore, Art. 3 of the UDHR declares, “[e]veryone has the right to life, liberty and the security of person” and the right enumerated in this article has been given a binding legal status by the ICCPR under Art. 6(1) where it declares, “every human beings has the inherent right to life.” Its non-derogable status is further strengthened by deeming it in the categories of \textit{jus cogens} under international law.\textsuperscript{117} The reason behind making it non-derogable and deeming it \textit{jus cogens} is evident from the fact that every life is important, sacred, and precious and, therefore, every human being has to be protected and allowed to enjoy her/his life.

\textsuperscript{114} Ibid.
\textsuperscript{115} Human Rights Committee, General Comment 6, Para. 1, see online: http://www.law-lib.utoronto.collective agreement/diana/compilation/comp.html; See also Manfred Nowak, \textit{U.N. Covenant on Civil and Political Rights, CCPR commentary} (Kehl, Germany: N.P. Engel Publisher, 1993) at 104 [hereinafter CCPR commentary].
\textsuperscript{117} See e.g. CCPR commentary, \textit{supra} note 115. at 105.
The words such as, “everyone” and “inherent” used in the article 6(1) of ICCPR have significant meaning as they correspond to the fact that the right to life is meant for everyone, whether a person is a citizen of a concerned country or not, and it is the inherent in everyone, which in other words corresponds to the natural right of human beings. No other rights in the Covenant have been characterized as inherent and this important distinction corresponds to the fact it is available to everyone just because they are human beings.\(^{118}\)

Even though this provision of the ICCPR unambiguously declares the inherent right to life for everyone, in general, the scope and meaning of this right has been narrowly understood while limiting it with the political crime committed by the state or in question of capital punishment, and state’s failure to address violation or wilful negligence that inhibits situations for its enjoyment by others in other circumstances, especially by the women and girls, has not been given enough consideration.\(^{119}\)

This discriminatory lapse justifies feminist critics to international law where they claim it be andocentric and indifferent to women’s concern.\(^{120}\) For example, the word 'everyone' used in the text should necessarily include the victims trafficked for prostitution and the extent of violence and exploitation perpetrated against them diminishes their possibility to enjoy ‘inherent right to life’ guaranteed for every person by the ICCPR. It is unfortunate to note that, even though, the number of victims trafficked into prostitution is phenomenal worldwide and the effects of commercial sexual exploitation of these victims is

\(^{118}\)See generally, Right to Life, supra note 116 at 114.

\(^{119}\)At least in case of political crime, victim has some political confrontation with the state and, therefore, victim's right to life is taken away. In case of trafficking, girls' loose the enjoyment of right to life not because they have done something wrong.

\(^{120}\)See generally Hillary Charlsworth, “Feminist approaches to International Law” (1991) 85 American Journal of International Law 613.
devastating on their lives and direct violation of their inherent right to life, this form of violation has not received adequate attention from the States Parties to the Covenant.

In recent time, however, with the positive engagement of Human Rights Committee (HRC Committee), established under the ICCPR, the normative meaning of inherent right to life has broaden. For example, the HRC has noted that, “the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.” On the background of this interpretation, the Committee has asked states parties to adopt measures to reduce infant mortality and to increase life expectancy by eliminating malnutrition and epidemics. In the same line of argument, it can be added that state need to take all-possible measures eliminate trafficking in girls into prostitution by which possible victims can be protected from being infected by life threatening diseases and many other forms of physical and mental violence. One of its concluding observation, HRC has even asked state party that, “priority should be given to protecting women’s right to life by taking effective measures against violence.” The possibility of bringing different forms of the violation of right to life, including violation of right to life of trafficked victims, has been opened with these progressive interpretations of right life by HRC, which need to be broadly implemented.

It needs to be understood by the States Parties that life is not only be taken away by the capital punishment or direct excessive act of the state, but it can also be taken away by allowing or forcing some one to work in a hazardous environment. Prostitution of young girls threatens the life of the victims immediately in some cases and in some other affects over a

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121 See General Comment 6, HRC/Gen. 1/Rev. 2/ 29 March 1996.
122 Ibid.
123 See Concluding observation of the HRC: Colombia, 01/04/97, CCPR/C/79/Add 76, Para. 37.
long period of time. Forced sexual intercourse or indiscriminate rape by adult men can kill young girls, as their physical body is unable to sustain the assault. In other cases, they are easy target of number of STDs including HIV infection that leads to deadly AIDS, an incurable disease ending victim's life appallingly. There are many examples of Nepalese trafficked victims crushed by HIV/AIDS in brothels who are living their last days in Nepali Rehabilitation Centres run by the NGOs. It is reported that at Patan (one of the city in the Kathmandu Valley) trafficked victims Sangeeta, Saira, Suntali, Geeta, and Chamali all still in their teens and suffering with AIDS, are counting the last days of their life.  

Rehabilitation Centres run by Women's Rehabilitation Centre (WOREC), Maiti Nepal, Child Workers in Nepal (CWIN), Agroforestry, Basic Health and Co-operatives (ABC) Nepal are full with HIV/AIDS victims resulted from the trafficking into prostitution.

As it is mentioned before, that trafficked girls in prostitution are at greater risk of HIV infection because they have to involve with indiscriminate and unprotected commercialized sex work. Their regular and compulsory work even during menstruation, often experience of tearing and bleeding during sexual intercourse, are dangerous risk time for HIV infection. A study conducted as early as in 1985 shows that 88 percent prostitutes in Kigali, Rwanda, in Nairobi 66 percent among 64 lower socio-economic stratum prostitutes, and 31 percent among 26 higher socio-economic stratum prostitutes had HIV prevalence.  

In Thailand,

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HIV prevalence among female sex workers was approximately 30 percent in 1993. The annual HIV incidence among female sex workers in Thailand is also high, ranging from 24 to 29 percent. The Indian Council of Medical Research had estimated in 1994 that there were a total of about one million commercial sex workers in India, and it had also predicted that there would be around 2.5 million sexually transmitted HIV infections in India by year 2000. UNAIDS/WHO Epidemiological Fact Sheet has reported that among sex workers tested in Mumbai (previously Bombay), HIV prevalence had reached 51 percent in 1993.

In November 1998, Nepal's National Centre for AIDS and STD Control (Centre for AIDS) reported 1,175 cases, but according to an unofficial estimate, 20,000 to 25,000 Nepali are infected with HIV mostly from sexually transmitted infections. The said Centre for AIDS reported in 1997 that out of 488 persons with HIV positive 455 were either sex workers or their children. Among 124 Nepali girls returned from Bombay brothels in 1996, 49 percent were found to have HIV positive. These shocking facts show the extent of threat to the life faced by the trafficking victims of prostitution, which violates their 'inherent' right to life.

As it has been demonstrated with many examples that HIV/AIDS has become one of the main causes for untimely death or long-term disability for many victims trafficked into prostitution. Besides this, total restriction on their movement, and large-scale physical and mental violence suffered by the victims in brothels violates their right to liberty and security.

127 Ibid.
128 Ibid.
129 cf. Trafficking of Nepali Girls, supra note 2 at 65; "Road side counselling against HIV/AIDS", The Kathmandu Post (Nepal: November 18 2000), this report has quoted Dr. John B. Chittic, researcher at Harvard University, saying that "it is estimated that between 60 and 85 percent of girls working in these brothels (Indian brothels) have been infected with HIV. This is because most men does not use condoms."
130 UNAIDS/World Health Organization, India. epidemiological fact sheet on HIV/AIDS and sexually transmitted infections (2000 update) [hereinafter UNAIDS/WHO on India].
131 See Anisa Schubert, "Girl trafficking for prostitution in Nepal, part 4, health implications" online: http://www.geocities.com/anishasworld/reports/traffic4.html at 1-12, [hereinafter Health Implications].
132 Ibid.
of a person, which has direct bearing on the full enjoyment of inherent right to life. In other words, it is the illegal enslavement of the girls for the commercial sexual exploitation, which has severely damaged their inherent right to life.

In addition to the violation of non-derogable right to life guaranteed by the ICCPR, trafficking girl child into prostitution also violates Art. 6 of CRC where Art 6 (1) recognises every child's inherent right to life. Art. 6(2) require states parties to "ensure to the maximum extent possible the survival and development of the child". This provision is directly violated as the prospect of survival and development of girl child in prostitution is minimum due to the widespread physical, sexual, and economical exploitation.

The measures to be taken for the effective enjoyment of right to life may be different for every individuals depending upon their socio-economic conditions. Right to life may have restrictive meaning for those economically fortunate people, where state, except for providing physical security, it should not interfere with their life by allowing them to enjoy this right according to their capacities. However, for those who are less fortunate to be able to exercise socio-economic freedom, it is also a positive right where basic conditions must be met by the state by removing obstacles and creating opportunities so that they can realise right to life in true sense. Recently, HRC has issued its General Comment where its has asked States parties to furnish information on particular impact on women of poverty and deprivation that many pose a threat to their life. This represents a new initiative of the HRC to give true meaning to right to life by encompassing economic deprivation as one of the major cause of women’s inability to exercise inherent right to life. This is true in the present case as severe economic deprivation is one of the main causes of trafficking in

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134 See HRC, General Comment 28, 2000, Doc. No. CCPR/C/32/Rev.1/ADD.10 [hereinafter General Comment 28].
Nepalese girls into prostitution, which subsequently adds severe constraints to exercise inherent right to life because of widespread diseases and disabilities.

2.2 Right against slavery and servitude

The severe consequences of trafficking in girls for prostitution has not limited its effects of violating right to life but it also violates another non-derogable right for instance right against slavery and servitude. Slavery or servitude is the most severe expression of power one human being exercise against another, which represents the most direct assault on the very essence of human personality, dignity, and respect.135

Fight against human slavery and servitude in case of trafficking for prostitution started from the beginning of 19th century and it is regarded as one of the first collective struggle against human rights violence at the international level. Its global presence, even today with inhuman face, out-rightly violates not only Article 4 of the UDHR where it is said that "no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms" but also Art. 8 (1) and (2) of ICCPR which can not be derogated and also has acquired status of *jus cogens* under customary international law.136 Art. 8(1) and (2) respectively state that "no one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited", and "no one shall be held in servitude." In its recent General Comment, HRC has addressed trafficking in women and children and forced prostitution under article 8 of the ICCPR and asked states parties to furnish information regarding the measures taken to eliminate this practice within and across the borders.137

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137 General Comment 28, *supra* note 134.
"Slavery occurs where one human being effectively "owns" another, so the former person can exploit the latter with impunity," whereas, servitudes considered being broader term than slavery, which refers to "other form of egregious economic exploitation or dominance exercised by one person over another, or slavery-like practices." \(^{139}\) UN Sub-Commission on Prevention of Discrimination and Prevention of Minorities have mentioned the followings phenomena as modern slavery: "traffic of women between North and South to satisfy "exotic" prostitution demands, exploitation of children and drug addicts for the international sex business, extortion and exploitation of illegal migrant workers, forced labour by children, traffic in children and modern forms of debt bondage in large agricultural undertakings in third world." \(^{140}\) The most of the phenomena mentioned in this list corroborates the fact that the trafficking in girls into prostitution represents one of the principal forms of modern slavery.

Jo Bindman of the Anti-Slavery International has suggested the major characteristics of the slavery, which are "violence with impunity, sometimes to death, loss of freedom of movement and transfer to another owner/master for money or goods without informed consent." \(^{141}\) Trafficking of Nepalese girls in brothels in India and their forced confinement, indiscriminate physical and mental exploitation by the brothels owner, pimps, traffickers, and others for their sole benefit (sexual and monetary) satisfies the above definition of slavery and servitude. \(^{142}\) Here traffickers with the help of police and pimps sell human beings to

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\(^{139}\) Ibid.


\(^{142}\) See generally Anne Gallagher, "Contemporary Forms of Female Slavery" in Kelly D. Askin & Dorean M. Koenig eds., *Women and International Human Rights Law*, Volume 2 (New York: Transnational Publishers,
brothel owners like cattle in the market for money and brothels owner openly used these
human beings indiscriminately as a sex commodity to maximize their profit.

It is reported that brothel owners operate their sex trade with the illegal claim that
they have bought girls by paying money between Rs. 20,000 to 50,000 (USS 700-1700) and
so they have a right to use them in sex market to extract that money with interest and profit
for their investment. Until that is achieved, girls are forced into prostitution for many
years, during that time many are sold from one brothel to another according to their
"efficiency", nature of compliance, and beauty as these are the fundamental fetching grounds
in the sex market. Such practice of buying and selling of human being resembles, in many
respects, the barbaric nature of African slavery prevalent two centuries ago. Here also many
girls are kidnapped or coercively dragged into forced prostitution, they are bought, sold, held
in detention, and exploited to the maximum level for the owners' economic gain.

This situation also resembles provision Art. 1(1) of the Slavery Convention, 1926,
where slavery is defined as "the status or condition of a person over whom any or all of the
powers attaching to the right of ownership are exercised." The only difference in cases of
trafficking in girls for prostitution is that, here, brothels owner exercise total defacto
ownership over the victims although it is illegal under the existing laws. Transportation of
girls is similar to the slave trade, which includes all acts involved in the capture, acquisition
or disposal of a person with the intent to reduce her to a slave. Anne Gallagher argues that
hundreds of thousands of women mostly from developing countries tricked, sold, coerced or

Inc. 2000) 487[hereinafter Contemporary Slavery]; Kell D. Askin suggests for using "sexual slavery" or
“sexual enslavement” instead of “slavery” or “enslavement” in order to accurately identify and appropriately
canonise the sexual nature of the crime, see generally Kelly D. Askin, "Women and international
humanitarian law" in Kelly D. Askin & Dorean M. Koeing eds., Women and International Human rights Law,
volume 1 (New York: Transnational Publisher Inc., 1999) at 83[hereinafter Women and Humanitarian Law].
143 See Trafficking of Nepali Girls, supra note 2 at 36-37.
otherwise procured into a situation of prostitution from which they cannot escape represent one of the contemporary forms of slavery.\textsuperscript{144}

The position of trafficked girls is so completely dominated by the brothels owner that they cannot refuse to have sexual intercourse with anyone even if they know that the customer before them is chronically ill or affected with infectious diseases. Kelly D. Askin argues that “If a person is unlawfully held or detained, and not free to make their own choices or decisions about their bodies, including whether to refuse sexual services or to make decisions as to how the services should be provided (such as requiring a condom, refusing oral or anal sex, insisting on no beatings, etc.), that should satisfy the definition of slavery.”\textsuperscript{145} It is also reported that Nepalese girls are kept in brothels without adequate food and minimum medicine as many Nepali girls who have returned from brothels in India have revealed that they used to get only one meal from the brothel owner and tips provided by the customers were the only source for their second meal.\textsuperscript{146} It was further reported that in some brothels day used to start at 8:00 A.M. and go up to 2: P.M. next morning and victims’ eating and sleeping time changed according to the pressure of the business.\textsuperscript{147} This is similar to slavery where owner decides the life and fate of enslaved person.

The justification of indebtedness of trafficked victims claimed by the brothel owners, as a sword hanging over the victims, is untrue and surest way to strangle girls in brothels perpetually. Neither girls nor their family have ever got any part of that so-called debt money or ever known how much was it or to whom it was paid or when that will be clear.\textsuperscript{148}

\textsuperscript{144} Contemporary Slavery, \textit{supra} note 141 at 488-489.
\textsuperscript{145} Women and Humanitarian Law, \textit{supra} note 142 at 84.
\textsuperscript{146} Trafficking of Nepali Girls, \textit{supra} note 2 at 33-41.
\textsuperscript{147} Ibid.
Furthermore, the fact shows that in all cases, victims are forced to work under coercive tactics as long as they are young and not infected by incurable diseases.\textsuperscript{149} It is not the payment of the so-called debt that released them, but their deteriorating health and inability to earn money. This is evidenced from the many instances in recent time where once victims known to have been infected with HIV positive were thrown out from brothels.\textsuperscript{150} This is another example, which further proves that the pretext of debt is not to collect the actual debt but to keep girls in brothels as long as they are capable to earn money for owner.

\textbf{2.3 Right against torture or cruel, inhuman or degrading treatment}

There is a unanimous opinion among right-minded people and states, that infliction of torture or cruel, inhuman or degrading treatment should not be justified under any circumstances. Even in cases of lawful death sentence, proponents of such punishment have supported speedy execution so as to avoid physical and mental torture of the death row prisoner for a long period of time. There are instances where long delay of execution of death sentence considered being cruel and inhuman against convict and commuted to life imprisonment.\textsuperscript{151} “The prohibition of torture, i.e., the right to physical and spiritual integrity, has taken on a special status in the protection of human rights under international law.” \textsuperscript{152}

Art. 5 of UDHR declares, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The prominent position of this right is reflected in its identical reiteration in ICCPR where it has been made non-derogable.\textsuperscript{153} For example, right

\textsuperscript{149} See Horror of child prostitution, \textit{supra} note 124; Maiti Farkiyaka Chaliharu, \textit{supra} note 7
\textsuperscript{150} See Trafficking of Nepali girls, \textit{supra} note 2
\textsuperscript{151} The Supreme Court of India has done this in \textit{Javed Ahmed Abdul Hamid v. State of Maharashtra}, AIR 1985 SC 231. The court observes that "the condemned man who had suffered more than two years and 9 months....with the sentence of death heavily weighing on his mind would entitle him the commutation."
\textsuperscript{152} See CCPR Commentary, \textit{supra} note 115 at 126.
\textsuperscript{153} See ICCPR, \textit{supra} note 34 at articles 7, 4(2).
to life may be curtailed by law with due process\textsuperscript{154}, with specific limitations- such as children below the age of 18 years, and pregnant women can not be put to death\textsuperscript{155}- but right against torture or cruel, inhuman or degrading treatment cannot be overridden by the states parties under any circumstances. "The uniform treaty condemnation of torture, the unanimity in the opinion of scholars and the various efforts to improve the protection of the individual against torture provide a strong indication that the proscription of torture is not merely a part of customary international law but that it has become 	extit{jos cogens}."\textsuperscript{156} However, the victims trafficked for prostitution has been facing severe forms of physical and mental torture and many other forms of cruel, inhuman or degrading treatment in brothels, constituting flagrant violation of this right.\textsuperscript{157}

Looking at the scope and meaning of torture, it can be argued that definition of torture given by the 1984 UN Convention Against Torture (CAT) has limited "torture" to the acts of public officials that intentionally inflict severe physical or mental pain or suffering in order to fulfil a certain purpose, such as the extortion of information or confessions or punishment, intimidation or discrimination of a person.\textsuperscript{158} However, prominent commentator on ICCPR Prof. Manfred Nowak has suggested that the definition of torture given by the CAT is not binding for the article 7 of the ICCPR but as an interpretational aid\textsuperscript{159} as the ICCPR has not limited the scope of the right against torture to the act of public officials. Explaining the scope of article 1(1) of the CAT, Prof. Nowak suggests that to be torture under it "one or several of the essential elements such as, intent, fulfillment of a certain purpose and/or the

\textsuperscript{154} Art. 6(1) ICCPR does not ban death sentence for the most serious crimes in accordance with the law in force at the time of the commission of the crime subject to the limitations imposed by the other provisions of the Covenant.
\textsuperscript{155} ICCPR, supra note 34 art. 6 (5).
\textsuperscript{156} Rolf Kuhner, "Torture" (1985) 8 Encyclopedia of Public International Law 512, 510-513.
\textsuperscript{157} See generally Women and Humanitarian Law, supra note 142 at 79-82.
\textsuperscript{158} See The Convention Against Torture, 1984, article 1(1); see also CCPR Commentary, supra note 115 at 129.
\textsuperscript{159} See CCPR Commentary, ibid.
intensity of severe pain” must be present.160 “Other actions or omissions are not considered to be torture but rather, depending on the kind, purpose and severity, cruel, inhuman or degrading treatment; in these cases, a certain minimum of pain or suffering is imposed.”161

Following the interpretation of the Prof. Nowak, three conditions must be met before any severe mental or physical suffering inflicted by the act of public official could be termed as torture under CAT: active undertaking, intent, and purposefulness. Considering these conditions for the present case, it can be argued that the severity of the practice of trafficking in Nepalese girls into brothels in India constitutes torture. For example, there is an active involvement of the police (public officials) to sustain brothels in their respective jurisdiction, and with their help and support, a severe and continuing physical and mental pain is inflicted on innocent girl children through prostitution for the purpose of monetary gain for perpetrators, which also includes police.162 They are subjected to serial rape and other forms of sexual torture with planned intention of the perpetrators for their benefit. This situation certainly violates the article 7 of ICCPR and also fulfils the criteria lay down by the article 1(1) of the CAT.

Forcing someone to engage in prostitution itself is a cruel, inhuman and degrading treatment as it generates violence, physical and mental suffering, and societal stigma. It is reported that once girls are bought into the brothels, they are segregated according to their ethnicity, virginity, and beauties and accordingly price is fixed for customers.163 In the beginning most of the newly brought girls are kept in 'training centre' where they “broken in”

160 Ibid. at 130.
161 Ibid.
162 See Chapter One, above, at 24-27.
163 See Trafficking of Nepali girls, supra note 2 at 33-35.
through process of rapes and beating as almost all trafficked girls initially refuse to work as a prostitute. “Psychological abuse, threats and intimidation are as integral part of the process and are used exclusively with girls who are purchased as virgins and can, therefore, be sold for higher prices if their training does not include rape.”

This process of breaking down or 'training' through the psychological abuse continues even after first customer until she becomes completely dependent on gharwali (madam or owner of brothel) and staffs of brothel. In some case, if resistance is persistent, a common method is employed by calling victim abusively or degradingly that “she is dirty or defiled”, “you fallen flesh trader or prostitute”, while other (madam or staffs) try console her by telling that she is a part of family. These are some of the cruellest forms of tactics used against Nepalese trafficked victims in brothels in order to weaken their physical and mental strength to the lowest level from where they lose their self-confidence. Such a deep humiliation, which they are forced to undergo, is the worst form of degrading treatment. A strong feeling of being a prostitute or dirty persona according to the predominant social perspective of prostitution, internalized by trafficked victims, ostracises and isolates them from their family and society. The state of trafficked victims in such situation also violates the first article of the UDHR that states, "all human beings are born free and equal in dignity and rights."

The process of breaking down continues, if psychological intimidation didn’t work to bring girl into business, and, thereafter brothels staff resort to severe physical torture or allow

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164 See Trafficking in Women, supra note 10 at 334; Recently, International Tribunal on Former Yugoslavia has declared rape as a crime against humanity and convicted war crime accused on the ground of rape against Muslim war victims. Dragoljub Kunarac, 40, was sentenced to 28 years after being found guilty of more than a dozen counts of torture and rape as a crime against humanity and as a violation of the laws or customs of war. See "Landmark war-crime ruling bans sex slavery", Globe & Mail (Toronto: 25 February 2001, A1); In Aydin v. Turkey, the European Court of Human Rights held that rape constituted torture under Art. 3 of the European Convention of Human Rights. See (1998) 25 EHRR 251 Para. 82.

165 Trafficking of Nepali Girls, supra note 2 at 35-40.

166 Ibid.

167 See generally Common Abuses, supra note 148 at 171.
customers to do so.  Here the method can include beatings, gang rapes, and other form of cruel torture such as burning by cigarettes. According to Preeti Pai Patkar, Indian human right activist working for sex workers’ rights, “there were special interior lanes in areas like Falkland Road in Bombay where rooms and whole buildings were maintained especially for torturing newly-procured women. Younger girls and children are reportedly hidden in attic spaces in these buildings”.

Besides these, the overall working environments of brothels in India are gusty and by general look corresponds cruel, inhuman and degrading for any human inhabitant. Brothels are isolated from the minimum civic and health facilities provided to other people in different parts of the city. Between 15-20 girls are huddled in a relatively small, dark, ill ventilated, dingy room for their living and conducting business divided in between by cloth curtain for every girl. 20-25 people share normally one toilet, which constantly smells of pervasive human excreta. Almost every corner of the brothels is full of wet and slushy rubbish dumps which add to the unbearable smell of whole area. In addition to this external environment, the polluted drinking water and contaminated food available in the brothels area finally bring in many diseases such as diarrhoea, malaria, severe stomach ache, tuberculoses (T.B.), skin infections which makes life even more painful and inhuman for trafficked victims.

\[\begin{align*}
\text{\textsuperscript{168} Trafficking of Nepali Girls, supra note 2 at 35-40.} \\
\text{\textsuperscript{169} Ibid.; See also Trafficking in Women, supra note 10 at 333-334.} \\
\text{\textsuperscript{170} Trafficking of Nepali Girls, Ibid.} \\
\text{\textsuperscript{171} See Gracious Thomas, AIDS in India (Jaipur and New Delhi: Rawat Publications, 1994) at 116-7 [hereinafter AIDS in India].} \\
\text{\textsuperscript{172} Trafficking of Nepali Girls, supra note 2 at 33-41.} \\
\text{\textsuperscript{173} AIDS in India, supra note 171 at 117.} \\
\text{\textsuperscript{174} Ibid.} \\
\text{\textsuperscript{175} Guilty Without Trial, supra note 31 at 72-73.}
\end{align*}\]
Putting someone in this position by coercion and not providing minimum medical facilities constitutes torture and inhuman treatment. Furthermore, the appalling torture, inhuman and degrading treatment suffered by these victims without legal protection also represents a situation as if they constitute different group of human beings, not to be regarded as a part of those who can enjoy non-derogable rights guaranteed and accepted by human rights law.

2.4. Right to recognition as a person before the law

The recognition of everyone before the law, as a human being is one of the supreme human rights. Legal recognition and its effective implementation ensure individual’s capacity to claim rights and seek protection from the state. Citizen’s rights may not be claimed by non-citizen in all cases\textsuperscript{176} but fundamental human rights such as non-derogable rights discussed in this chapter, can not be denied to any person by any governments. Right to recognition as a person before the law is the starting point or the first right from where all other rights emanate. The enjoyment of this right has been denied to the Nepalese Victims trafficked for prostitution as the examination of their actual conditions reveals that they have been treated by the state and perpetrators not as individual persons endowed with rights and capacity to exercise rights as a person before the law.

Art. 6 of the Universal Declaration of Human Rights (UDHR)\textsuperscript{177} declares, “Everyone has the right to recognition as a person before the law.” This provision of UDHR is

\textsuperscript{176} Such as right to vote; right to work in the government service, or right to free higher education may be reserved for the citizen only in many countries.

\textsuperscript{177} The Universal Declaration of Human Rights (UDHR) is regarded as the mother of the modern human rights instruments in the world. It has inspired many of the present international human rights treaties as well as national constitution of many countries in the world so much that they have accepted and applied many of its provisions into them and have given binding legal authority. This wider acceptance of UDHR has considered to have given it the status of customary international law. See Lawrence O. Gostin & Zita Lizzarini, *Human rights
identically incorporated into the International Covenant on Civil and Political Rights (ICCPR) under Art. 16 and made non-derogable by Article 4(2) of ICCPR. This right guarantees every person a fundamental human right to be legally recognised as a person under all circumstances. It is said, "if one's humanity is not legally recognised, one will lose legal recognition of, and therefore be effectively denied, one's other human rights." This could be the reason why the African Charter on Human and People's Rights has guaranteed recognition as a person before the law together with the prohibition of torture and slavery. Slavery and torture represent a direct attack on the foundation of human personality and aim to degrade a human person to an object and create a situation where a person does not remain an independent human being.

The example often cited is of Jews in Nazi Germany, their denial of legal recognition and suffering of massive human rights violation. Such situation no more exists, and, therefore, it has been noted that this right of the ICCPR has generated little jurisprudence from Human Rights Committee (HRC) compared to many other human right norms. However, it is a narrow understanding of such an important provision and, therefore, it cannot be suggested that this right is no longer breached or there are no individuals suffering from the violation of this right. In fact, the victims of breach of this right are so dominated and disempowered that either they are unable to claim it or they are completely unaware about the existence of this right. Nepalese victims of trafficking into prostitution are one


Civil and Political Rights, supra note 138 at 201.
See e.g. CCPR Commentary, supra note 115 at 282-283.
Civil and Political Rights, supra note 138 at 204.
Ibid.
such a group of individuals where their right as a person before the law has been denied by the states (India and Nepal), directly or indirectly under different circumstances.\textsuperscript{183}

After the recent HRC interpretation of the right to recognition as a person before the law, the violation of this right can be more comfortably argued in case of Nepalese victims trafficked into prostitution. In that interpretation, HRC has suggested that, “the right to everyone under article 16 to be recognised everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status.”\textsuperscript{184} HRC further declared that this right implies “the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground.”\textsuperscript{185} Trafficked victims enslaved in brothels are completely denied from exercising any civil rights available to other people in the society. As it has been discussed before, they are forcefully kept in the brothels as sex commodities for commercial sexual exploitation. HRC also has asked state to provide “information on laws or practices that prevent women from being treated or from functioning as full legal persons and measures taken to eradicate laws or practices that allows such treatment.” In the contemporary time, trafficking into prostitution represents one of such practices, where the victims are prevented from enjoying their lives as full legal person.

It has been widely reported that trafficking of Nepalese girls is unabatedly thriving in India because of the illegal collusion by police with traffickers, pimps, and brothel keepers. There exists widespread practice of complete denial of the legal existence of these victims and lack of protection from the law as enjoyed by others in the society, in terms of investigation of crime committed against them, providing essential health care, and

\textsuperscript{183} See Chapter Three, below, at 81-96, 110-118.
\textsuperscript{184} See General Comment 28, \textit{supra} note 134 at Para. 19.
\textsuperscript{185} \textit{Ibid.}
legitimate compensation. Denial to provide similar protection provided to others in the society, because of their being in prostitution is the violation of the right to recognition as a person before the law.\textsuperscript{186}

In other words, the manner in which cases related to trafficking for prostitution are disposed proves more than the violation of right to non-discrimination in the application of law. It is the issue of denial by the state to fully accept legal existence of thousands of girls/women because of their status as prostitute or sex workers. They suffer the most atrocious crime against humanity, such as repeated rape, physical and mental torture, near starvation, living and working in condition of slavery or servitude, and even after all these suffering, they don't get minimum justice from the state.

Here are some more specific examples to demonstrate as to how consequence of trafficking has been the violation of the non-derogable right to recognition as a person before the law. It has become a practice in India and Nepal that violence committed against victims in the course of trafficking and later in brothel has never been given due considerations by the police or concerned authorities while investigating the crime. Especially, it is a common knowledge to many in India that there are brothels in every major city. Child prostitution, cross-border trafficking in girls/women for prostitution is frequently reported in media along with the physical and mental atrocities. However, there has not been a single reported example where these offenders have ever been convicted for their crime. A rapist can be sentenced to minimum 7 years to life imprisonment if he commits the same crime outside brothels\textsuperscript{187} whereas he has been set free to do the same inside brothel. This is a violation of existing laws in India. But the violation has become a norm because of open neglect shown

\textsuperscript{186} See for more discussion on this issue, Chapter One, above, at 22-27 and Chapter Three, below, at 109-117.
\textsuperscript{187} Indian Penal Code, 1850 (India) s. 376 (1)(2).
by the police and other concerned authorities to investigate the cases related to the victims of trafficking in prostitution.

If a case of trafficking of Nepalese girls is investigated under Indian Penal Code or Immoral Traffic Prevention Act, brothels owner or staff or customers can be prosecuted for rape and forcing some one into prostitution. However, there are some instances where even judiciary has allowed investigating authorities to ignore criminal investigation against traffickers or brothels owners and, instead, address child prostitution by the Juvenile Justice Act for rehabilitation. Even when police raid rescued 473 girls in 1996 from the brothels in Bombay as directed by the High Court, none of their cases were registered for criminal investigation. Out of them, 124 girls were sent back to Nepal with court order, after spending five months in rescued home without investigating any of the crimes committed against them in brothels. These victims were in position to provide all the evidence to arrest and prosecute perpetrators but neither the police nor court was interested to do so. Instead for directing for criminal investigation, the court directed that minor girls be sent back to their respective home states where they be rehabilitated. This was a clear denial of the right to recognition as a person because of which crime suffered by them was covered. The facts from this event do not necessarily suggest court’s involvement in corruption by which court ignored the necessity of criminal investigation, but it shows court’s denial to see them as equal human

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188 Ibid. s.375 defines “rape as the act of sexual intercourse with a women when the act is against her will; without her consent; or with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or injury; or with her consent when she is incapable of understanding the consequences of her consent; or with or without her consent when she is under sixteen years of age.” All victims satisfy most of the requirements prescribed in these sections. Most of them are under 16 years of age, which alone fulfils the requirement to constitute rape in brothels.
189 Ibid. s. 376.
190 Vishal Jeet v. Union of India, AIR 1990 SC 1412 at 1416.
191 People at Large v. State of Maharashtra, High Court of Judicature, Bombay, Suo Motto writ petition no 112 of 1996 [hereinafter People at Large].
192 Maiti Farkiaka Chaliharu, supra note 7; Health Implications, supra note 131 at 6-10; Ministry Unaware, supra note 88.
193 See People at Large, supra note 191; See also online: http://www.prerana.org/faq7.html
being who deserves rights and justice as well as equal protection of law prescribed by the statutes. This was not an isolated case against Nepali victims, but none of the specific cases of Indian victims of trafficking for prostitution had also been investigated.

There are very few cases available at the Supreme Court and High Courts level concerning trafficking in women/girls into prostitution in India. In one case, Supreme Court went on to say that "the measures to be taken in regard to illicit trafficking should be more preventive rather than punitive."194 This statement may have spoken the social reality but blatantly denies protection from criminal law to the victims of prostitution. Courts have very little power to change socio-economic condition of the people and when they fail to give effect to the statutory provisions of criminal law by dwelling into philosophical debate of social science when the question was to implement statutory provision, they deny fundamental civil rights and justice to the victims.

Denial of the recognition of victim as a person before the law is even grimmer in Nepal as the post-trafficking status of the victims of trafficking for prostitution is completely ignored by the Nepalese laws. Anti-trafficking law provides imprisonment for traffickers in case of conviction. Except for that, there is no provision in the law imposing legal duty to rehabilitate or compensate the victims suffered from the physical and mental violence. Victims are left alone to face all other problems arising out of their being in forced prostitution such as, social stigma, health problems and impact of that on their ability to earn for the survival. This is one of the serious issues, as girls/women in prostitution are thrown out from the work in their early age with weakest and de-capacitated body. Many of them require urgent help and support as many of trafficked victims are HIV/AIDS patients or chronically ill. Some may need help and support throughout their life. The complete silence

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194 Ibid.
of the law in all these crucial issues constitutes a denial of their right to recognition as a person before the law.

3. Violation of other human rights

The practice of trafficking in girls violates many other important human rights in addition to the non-derogable rights discussed earlier in this chapter. Important rights protected by the International Bill of Human Rights 195 and other human rights instruments, such as right to non-discrimination; right to highest attainable standard of physical and mental health; and right to marry and found a family are some of the rights severely violated because of this practice.

3.1. Right to non-discrimination

The widespread neglect and discrimination suffered by the trafficked victims by the denial of legal protection by enacting appropriate law on the one hand, and, on the application of existing law on other has violated right to non-discrimination on the equal protection of law guaranteed by the human rights instruments. International human rights law has given importance to the right to non-discrimination. The maximum emphasise given for the protection of this right underlines the substantive belief that discrimination is the main cause of widespread abuse or violation of all human rights. Trafficked victims wrongly levelled as a prostitute, which evokes high ostracism in Nepalese and Indian society, are severely humiliated and discriminated in the family and society. Their stigmatization and segregation increases even more if they are infected with HIV/AIDS. People wrongly believe it is just a

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195 The practice has been to call the combination of UDHR, ICCPR, and ICESCR the International Bill of Human Rights.
disease of those who indiscriminately and unfaithfully practice sexual behaviour on their own with anyone.

The first article of UDHR declares equal dignity and rights of all human being. Art. 7 of the UDHR states, "All are equal before the law and entitled without any discrimination to equal protection of the law." This principle of non-discrimination to the equal protection of law enunciated by UDHR has been widely incorporated into many international treaty instruments.

Noticeably, Art. 26 of the ICCPR has incorporated this provision by specifying, for the first time, discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The provision says that the law shall prohibit any discrimination on any of the grounds specified above and provide equal and effective protection against discrimination. Art. 2(2) of the ICESCR also guarantees right to non-discrimination by underlining the same grounds specified by the ICCPR for non-discrimination. Women's Convention has taken exceptionally strong stand against discrimination against women (which also includes girl children), which reflects from the name of the Convention itself as the Convention on the Elimination of All Forms of Discrimination against Women. With the acceptance of this Convention, States Parties condemn discrimination against women in all forms; and agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women. However, even after all these developments, it is widely reported in many countries that pervasive practices of discrimination continued on the grounds of sex and status of the person. Trafficked victims are facing acute form of discrimination on the basis of sex, and their status as sex worker or forced prostitute.

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196 Women's Convention, supra note 34 article 1.
Victims of this group with HIV/AIDS further constitute a highly segregated group of people who not only face discrimination from the family and community but also from health professionals. There are instances reported in Nepal and India that even some doctors and other health professionals have refused to treat them. In a conservative society like Nepal, there is a taboo around the subject of sexuality, and HIV is linked with immoral sexual conduct. A profound ignorance about HIV has made life of many trafficked girls miserable. This has badly affected their access to health facilities even in treatment of other diseases. The lack of confidentiality and respect for privacy of victims’ life is widespread which adds to the societal stigmatization. This increases the isolation of trafficked girls already suffering from the physical, mental, and psychological trauma.

Nepalese trafficked victims also face extensive discrimination not only in their families-once they are returned home—but also at brothels. Their unfamiliarity with new place and language increase their vulnerability, and pimps, brothel owner, police, and customers exploit that at the maximum level for their benefits. It is reported that Nepali girls are kept in pillow house, segregated from the others in brothels and commercially exploited more than the normal practice. Discrimination on the application of anti-trafficking law to protect Nepali victims of trafficking in India is pervasive. The complete denial to implement anti-trafficking law to stop the violence against the victims of trafficking underlines the discriminatory practice of police and judiciary. It also shows the discriminatory attitude of law enforcement authorities towards the victims of trafficking for prostitution.

\[\text{Health Implications, supra note 131 at 3-4.}\]
\[\text{See generally, Jill Hannum, } AIDS in Nepal (New York: AmFAR Published in association with Seven Stories Press, 1997)\text{ at 43 [hereinafter AIDS in Nepal].}\]
\[\text{Trafficking of Nepali Girls, supra note 2 at 33-34.}\]
\[\text{Kenneth Roth suggests that “if a state’s inaction in the face of violence is nearly complete, there is no need to make an argument in terms of discrimination.”, See Kenneth Roth, “Domestic violence as an international}\]
crimes committed against them are neglected as if nothing has ever happened. The protection of statutory anti-rape law, otherwise applicable to general public, has been denied to the trafficked victims. Selectively applying law and refusing to protect victims from the violations violate right to non-discrimination on the application of law guaranteed by the various international human rights law.

In Nepal, as it is discussed in the second chapter, the socio-economic subordination and widespread socio-legal discrimination of girls in the family and community have caused and nurtured their vulnerability. Traffickers have largely exploited this situation in their favour and deceived girls into prostitution. It has been reported that many girls do not want to return their home even if they are given the opportunity to do so. This rather unusual situation speaks of shame and guilt faced by the victims because of they being into prostitution, which leads to condemnation in their family and society. The fear of humiliation and condemnation prevents them from returning home.

In addition to this, no Nepalese law or regulation defines prostitution even though law presumes their existences. The Rape Chapter of Muluki Ain (Country Code of Nepal) harshly discriminates prostitute in case of crime of rape committed against them. Section 3 of the said chapter provides 6-10 years imprisonment in case of rape against a woman, whereas in case of rape of a prostitute, the penalty is a fine of Rs. 500.00 (US$ 7.00) or one year imprisonment. This provision could be applied against trafficked victims if rape is committed against them in Nepal after they returned home from brothels. The reason behind this is that at first, law does not differentiate between trafficking for prostitution and other from of prostitution. Second, trafficked victims have lived their life in brothel and unless they


For detail on this topic, above, at 14-29.
complain before the law enforcement authority and prove themselves to have been trafficked for prostitution (which does not happen in many cases), they could be considered as prostitute under the present law. These practices, and provisions of law violate right to non-discrimination on the application of law guaranteed to all women including the Nepalese victims of trafficking for prostitution by the international human rights law.

3.2. Right to highest attainable standard of physical and mental health

The importance of health in human life is indisputable. Good health is a pre-eminent condition for a meaningful human life. Lack of minimum health and human conditions can substantially limit the enjoyment of fundamental human rights. Poor health is the synonymous with poor life. Trafficked victims for prostitution suffer from the worst physical and mental health conditions. Their deteriorating health lies in the massive violation of their human rights.

Overall health burdens of trafficking victims for prostitution are enormous, and that violates their right to highest attainable standard of physical and mental health protected by the international law. Art 12 (1) of ICESCR has guaranteed "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Women's Convention has understood the pervasive discrimination practice in case of women's health care policies and practices and has demanded the states parties to take "appropriate measures to eliminate discrimination against women in the field of health care,--access to health care services—." CRC has gone a step ahead and attempted to protect right to health of children in a strong term. Art. 24 of CRC says “[s]tates parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of
illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." None of these rights guaranteed by the international human rights law are provided and protected, when one sees the widespread diseases and inaccessibility to health services faced by the Nepalese victims trafficked for prostitution.

3.2.1. Violation of physical health

The case of Tulsa is one of the widely published classic examples of Nepali trafficked victims. She was 9 years old when she was sold in brothel at Kamathipura, Bombay India.\(^{202}\) She was raped and tortured by more than dozen men everyday until she reached the last stage of her life at the age of 13 years.\(^{203}\) She suffered from three venereal diseases and three tuberculoses (T.B.) when she was rescued in 1982.\(^{204}\) She was brought back to Nepal where her crushed body is wheelchair bound and living last days of her life at Cheshire Home in Kathmandu.\(^{205}\) There are many examples like Tulsa where small girls are mercilessly sold into sex market and either they die or return home with incurable diseases.

As it has been discussed before, the victims' right to life has been threatened by the AIDS epidemic largely found in brothels. Widespread violence and complete disregard to the right against torture, inhuman or degrading treatment practice in brothels have created a number of physical and mental health problems among trafficked victims. Health problem begins with the horrific physical violence mainly because of the indiscriminate repeated forced sexual intercourse for which many of the young victim's are unprepared. The

\(^{202}\) See Horror of child prostitution, supra note 124
\(^{203}\) Ibid.
\(^{204}\) Ibid.
\(^{205}\) Ibid.
immediate physical effects of the forced intercourse to girls are infections from many STDs, as this is the age when reproductive system of girls is particularly vulnerable for infection.\textsuperscript{206}\ The cells and secretions of the physiologically immature reproductive tract are much less able to resist invasion than in adults and are damaged by sexually transmitted microorganisms. They are exposed to sexually transmitted infections (STI), including HIV infection.

STDs are common among trafficked victims as the nature of their work demands that they cannot deny and negotiate to have safer sex. The Indian Health Organisation (IHO) has reported, after its clinical survey, that 80 percent of sex workers (which include trafficked girls) are infected with one STD, with 50 percent having two or more STDs together.\textsuperscript{207} It has been further reported that the most common STDs found are syphilis, chancroid, gonorrhoea, donovanosis, venereal warts, and herpes genitals.\textsuperscript{208} Every STD is capable to create immediate and long-term physical and mental suffering. HIV infection is the worst form of STI as it leads to painful and untimely death. Women/girls situated in prostitution are more prone to be affected with HIV because they have to have unprotected sex with many people. The presence of one or more STDs in sex workers also increases the possibility of HIV infection through sexual intercourse. It has also been found that female is biologically more vulnerable to HIV infection during heterosexual intercourse.\textsuperscript{209} Male to female transmission of HIV during sexual intercourse is more efficient than female to male transmission.\textsuperscript{210}

\textsuperscript{206} Health Implications, supra note 131 at 6-7.
\textsuperscript{207} Trafficking of Nepali Girls, supra note 2 at 65-66.
\textsuperscript{208} Ibid.
\textsuperscript{209} See M.F. Fathalla, "Women's Health: An overview" (1994) 46 Int'l J. of Gynecology and Obstetrics 105-118, 111 [hereinafter Women's Health].
\textsuperscript{210} It has also been reported that during vaginal or anal intercourse, girl/women have large mucosal surface exposed, that increase the maximum possibility of transmission if the male partner infected with HIV. Besides that semen contains a larger concentration of HIV virus than does vaginal fluid. See Women and AIDS, supra note 6 at 220.
Lack of health facility to provide timely treatment to STDs has led to a number of other health problems. Studies have proven that many STDs initially looking minor or vague for detection or treatment, and untreated can cause irreparable destruction to the reproductive and sexual health of the victim.\(^\text{211}\) STDs, such as chlamydia and gonorrhea, have high possibility to develop chronic problems such as chronic pain, pelvic inflammatory disease (PID), ectopic pregnancy, and infertility.\(^\text{212}\) It has been reported that, if timely not treated, 20-40% of infected female with chlamydia and 10-40% of female infected with gonorrhea develop PID.\(^\text{213}\) "PID causes infertility in 20% of the women affected, chronic pelvic pain in 18% and ectopic pregnancy in 9%."\(^\text{214}\) Ectopic pregnancy results from tubal damage because of PID and other STDs also contribute directly to other reproductive problems, and infertility rate is 50% after ectopic pregnancy.\(^\text{215}\)

PID causes extreme human suffering and has been found leading cause for ectopic pregnancy and infertility to many women in the world.\(^\text{216}\) There has not been any study conducted exclusively among the sex workers or trafficked victims in prostitution of the prevalence of PID, but finding in other group of similar age and sex shades some light on the problem. The study of PID conducted for 17 years in Sweden has found that the incidence of first episodes of PID was highest in the sexually active teen age group, thereafter decreasing


\(^\text{213}\) Ibid. at 111.

\(^\text{214}\) Ibid.

\(^\text{215}\) Ibid. at 110.

with the age.\textsuperscript{217} The risk of acquiring salpinigitis and pelvic inflection, through the \textit{chlamydia trachomatis} and \textit{Neisseria gonotthea} sexually transmitted viruses, in sexually active 15 year-old girls was calculated to be 1:8, and in girls aged 16 years 1:10.\textsuperscript{218} The incidence than rapidly declined, and in women aged 24 years, the risk was 1:80.\textsuperscript{219} According to IHO these are the same viruses commonly found among the brothels inmates in India,\textsuperscript{220} which indicates the high possibility of all these diseases rampant among trafficked victims in prostitution.

As consequences of high prevalence of STDs, infertility is a common among brothels inmates. It is said that the risk of infertility following a single episode of salpingitis increases five fold over the risk in women who have never had salpingitis.\textsuperscript{221} "Women with gonorrhea- or chlamydia- associated PID who delayed care for 3 or more days were 2.6 times as likely to develop impaired fertility as those who sought care promptly. Approximately 20 percent of those who delayed care suffered later infertility or tubal ectopic pregnancy, compared with 8.3 percent of those who sought care promptly."\textsuperscript{222} A comprehensive study of the etiology of infertility conducted by WHO in 1987 shows that up to 64% of female patients in Africa, and between 28-35% of patients in other parts of the world found to have infertility because of their prior sexually transmitted infection, PID, and pregnancy complications of an infectious nature.\textsuperscript{223}

\textsuperscript{218} Ibid. at 791.
\textsuperscript{220} Trafficking of Nepali Girls, supra note 2 at 66.
\textsuperscript{221} STDs and Infertility, supra note 211 at 1081.
\textsuperscript{222} PID and Infertility, supra note 216 at 1505
\textsuperscript{223} STDs Global Importance, supra note 212 at 112.
Another deadly disease attributed to STDs is cervical cancer, currently the most common cause of cancer related mortality among women in the developing world, and world-wide it is the second only to breast cancer.\textsuperscript{224} The specific type of STDs called sexually transmitted papillomaviruses (HPV) play a central role in the development of cervical cancer.\textsuperscript{225}

In addition to all these, hazardous use of contraception and unsafe abortion are widely practice in brothels.\textsuperscript{226} Contraceptive pills are rarely available and even if they are available, trafficked victims frequently miss the pill because of their nature of work and lack of proper knowledge for use.\textsuperscript{227} Condom option is not in their hands, as most of clients do not prefer to use condom. This has left trafficked girls to resort to the repeated abortions to terminate unwanted pregnancy.\textsuperscript{228} A study in 1995, at the Calcutta red light showed that sterilisation and repeated abortions are the only two most common methods of preventing pregnancies among sex-workers.\textsuperscript{229} Other commonly found diseases among them are diarrhoea, malaria, stomachache, skin infections, and wounds and cuts from violence.\textsuperscript{230}

3.2.2. Violation of mental health

The violent and hazardous sexual exploitation of trafficked girls trigger severe psychological disorder. The feeling of shame and guilt, provoked by social stigma, combined with sexual,

\textsuperscript{225} Ibid.
\textsuperscript{226} Guilty without Trial, supra note 31 at 78; Trafficking of Nepali Girls, supra note 2 at 67.
\textsuperscript{228} Guilty without Trial, supra note 31 at 75-76; Trafficking of Nepali Girls, supra note 2 at 66.
\textsuperscript{229} Guilty without Trail, Ibid. at 78.
\textsuperscript{230} Ibid. at 72-73.
physical and psychological abuse leads to severe psychological disorders.\textsuperscript{231} "The sense of dignity and self-esteem is threatened and the physical, psychological and sexual developments of these girls are damaged. The feeling of being unworthy and degraded is compounded when societal views on prostitution are internalized."\textsuperscript{232} All this happens without their mistake and to forget all the abuses, they get involved into smoking, drinking and drugs, which severely affect their overall health conditions.\textsuperscript{233}

The described reactions suggest that many victims who have returned from brothels suffer from Posttraumatic Stress Disorder (PTSD).\textsuperscript{234} PTSD is an acute response discovered in events of child sexual abuses.\textsuperscript{235}

The lifestyle in brothels also affects mental health of trafficked girls. The low self-esteem and worthlessness are sometime expressed in acts of self-mutilation such as scarring their own arms with knives, alcohol addiction and tolerance of violent relationships and violent behaviour.\textsuperscript{236} They get addicted to alcohol, as many clients demand that they drink together as part of a visit.\textsuperscript{237} One survey in 1993 found that in Bombay 69\% of clients took alcohol in the company of sex workers.\textsuperscript{238} As it is obvious that heavy dose of contaminated


\textsuperscript{232} Health Implication, supra note 131 at 1.


\textsuperscript{234} Health Implications, supra note 131 at 1.

\textsuperscript{235} It is defined as a psychological response to an event threatening death or injury that corresponds:

\begin{itemize}
  \item a) a sense of re-experiencing the trauma and the intrusion of memories or feelings;
  \item b) a pattern of avoidance, a numbing of responsiveness, or reduced involvement in the external world;
  \item c) a persistent state of physiological arousal, reflected by such problems as difficulty sleeping, startle response, and angry outbursts., See Health and Psychosocial, supra note 231 at 22,
\end{itemize}

\textsuperscript{236} Guilty without Trial, supra note 31 at 73.

\textsuperscript{237} Ibid.

\textsuperscript{238} Ibid.
and cheap alcohol can cause liver, kidney, or brain damage that can be permanent and life threatening for the victims.

Lately, there have been many studies carried out on the mental and psychological impact of HIV/AIDS in the personal health of the victim. The constant feeling of untimely death and social, occupational and sexual rejection create "psychogenic" mental disorders including acute stress reactions, adjustment disorders and anxiety disorders. Contracted persons are more prone to attempt to commit suicide and many with delusions turn to drug abuse, alcohol abuse, which leads to severe personality disorders.

These medical evidences are testament to prove the unprecedented physical and mental health violence faced by the trafficked victims when they are exposed to unprotected and traumatic forced sexual intercourse. The high probability of almost all trafficked girls to suffer from these diseases because of their impossibility to get protection or prompt care indicates the severe violation of human rights. Their bondage position for commercial sexual services make them completely dependent to their masters for their personal and economic needs. In a situation where two meals in a day are hard to get, expensive medical treatment is impossible to obtain. Thus, these diseases can permanently damage their ability to exercise all other human rights enjoyed by the other people.

3.3. Right to marry and found a family

Family is the principal foundation of a society. Individual's health, education, progress and prosperity largely depend on the kind of family he/she is born and brought up. In country like

239 See specially, Mario Maj, Fabrizio Starace & Norman Sartorius, Mental Disorders in HIV-1 infection and AIDS (Seattle, Toronto: Published on behalf of the World Health Organization by Hogrefe and Huber Publishers, 1993) [hereinafter Mental Disorders]; See generally, Michael B. King, AIDS, HIV and Mental Health (Cambridge University Press, 1993).
240 Mental disorders. Ibid. at 57.
Nepal and India where most of the people still live in joint family and highly regards family values, right to marry and found a family evokes emotional sentiment and inspires for many to work hard and bring prosperity for everyone in the family. Marriage is the first steps for the establishment of a family and it has been guaranteed as one of the fundamental human rights of every individual.

Article 16 of the UDHR has a provision that states, "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The various sub sections of Article 23 of ICCPR more elaborately state this provision. Art. 23 (1) states, "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state." Article 23 (2) has recognised "the right of men and women of marriageable age to marry and to found a family." Under Article 10 (1) of the ICESCR, States Parties have recognised their duty to provide widest possible protection and assistance to the family, which is the natural and fundamental group unit of society. However, this fundamental right protected for every one is not available to the trafficked victims because of the various adverse conditions forced upon their life.

Trafficking for prostitution at a very young age severally violates their sexual rights and denies them from having satisfying sexual pleasure and family life. Their body is used for commercial purpose to give sexual satisfaction to others. Hazardous nature of prostitution generally damages their sexual and reproductive capacity, which affects their ability to marry and found a family. Even if some trafficked girls are able to marry they will become victim of discriminatory nature of Nepalese law where it permits husband to have a second wife without giving divorce to the first wife if she is suffering from any of incurable STDs, however, the same right is not available to a wife in case her husband is in the same
situation.\textsuperscript{241} In addition, infertility for 10 years after marriage entitles husband to a second marriage without divorcing the first wife.\textsuperscript{242} As it is discussed earlier, trafficked victims chances of infection with STDs and developing infertility are high; these provisions will directly affect their marriage and family life.

Furthermore, as M.F. Fathalla states "[t]he psychological and social burden of infertility in most societies is much heavier on the women. A Women's status is often identified with her fertility, and failure to have children can be seen as a social disgrace or a cause for divorce. The suffering of the infertile women can be very real."\textsuperscript{243} This is true in the context of Nepalese society where infertile women are considered to be an unfortunate presence in the family. They are solely blamed and discriminated for not being able to bring new member in the family. Thus, infertility in trafficked girls, which arises because of forced prostitution, causes mental pain to them. Their right to have a family is permanently damaged due to the infertility.\textsuperscript{244} With the torturous background of prostitution, the infertility would end their little hope for reintegration into the family and society. Thus, their fundamental right to marry and found a family is violated because of the impairment of her reproductive capacity resulted from the unprotected and forced prostitution.

\textbf{4. Conclusion}

The above discussion has established that the human rights consequences of Nepalese girls trafficked into prostitution has been the widespread violation of human rights guaranteed for

\textsuperscript{241} Muluki Ain, supra note 57 at chapter on Bihabari(Chapter on Marriage) s. 9(1).
\textsuperscript{242} Ibid. at s. 9(3).
\textsuperscript{244} See generally Rebecca J. Cook, "Human rights and reproductive self-determination" (1995) 44 Am. U.L.Rev.975.
every human being. The main reason for these consequences has been the failure of the states parties’ to fulfil their commitments to promote and protect human rights in order to provide equal rights and justice\textsuperscript{245} to everyone without any distinction. The above discussion has also demonstrated that how rights and justice for all has remained illusive to Nepalese girls trafficked for prostitution. These victims are suffering from the violation of economic, social, and cultural rights as well as the civil and political rights, many of which are declared non-derogable by the international human rights law because of their sacrosanct position in human lives.

There are some other important rights, enjoyment of which is also crucial for the minimum human survival. Right to physical and mental health is one of these rights and its adequate availability determines the exercise of all other rights. Allowing perpetrators to force girls to work in prostitution, which involves unacceptably hazardous activities, always dangerous for the victims, violates the right to physical and mental health of trafficked girls. The rampant STDs, HIV/AIDS, and many other diseases reported in brothels in India represent life threatening for anyone physically participating in that business. In addition to this, they are also denied from the enjoyment of many other important rights essential for meaningful human life, such as right to non-discrimination; and right to marry and found a family. Furthermore, the health consequences of trafficking for prostitution not only damage the victim’s health and social well-being but also affect public health at large as they can easily spread many sexually transmitted diseases in the society.

\textsuperscript{245}Justice, as John Rawls calls, "is the first virtue of social institutions." He further says, "to respect persons is to recognise that they posses an inviolability founded on justice." See John Rawls, \textit{A Theory of Justice}, (Mass: Harvard University Press, 1971) 3.
Chapter Three: National Law Against Trafficking

1. Introduction

The widespread human rights consequences of trafficking into prostitution faced by the Nepalese girl victims has resulted from the long neglect of the states to prevent trafficking and protect victims of the same by effectively implementing the existing laws, and enacting new laws where existing laws are inadequate to address this problem. The indifference of the state authorities to address this problem with adequate legal mechanism has dehumanised and perpetuated this problem for a long time.

It can be argued that, had these girls been protected from illegal trafficking they would not have suffered from the violation of their rights guaranteed by national and international law. This is even so as it is the primary duty and responsibility of the national legal system to prevent the violation of the rights of its people and offer adequate remedies, in case violation occurs, in order to mitigate the suffering of the victims. National legal system must do so by effectively enacting and implementing law to this regard and provide justice by fulfilling the legitimate claims of the victims.

The present Nepalese and Indian law prohibits trafficking in human beings for any purpose. From the theoretical perspective, law against trafficking of both the countries follows abolitionist approach against trafficking for prostitution. According to this approach, commercialized vice in the business of prostitution is prohibited except for

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punishing those who privately engaged in buying and selling of the sexual services with their free choice. However, this approach believes that there cannot be a voluntary form of prostitution because it is inherently despicable for the women engaged in it. Therefore, it prescribes harsh punishment for pimps, traffickers, and brothels owners or any one who forced women/girls into prostitution.

Notwithstanding of some significant gaps in addressing various aspects of problems arising from the trafficking in girls into prostitution, the normative position regarding illegality of this practice under Nepalese and Indian law is clear and unambiguous. This chapter addresses those constitutional and statutory provisions along with some major judicial interpretation. As Nepal and India are governed by the democratic constitutions, which have jealously protected the independence of judiciary, the judicial attitude towards the protection of victims and eradication of this illegal trade needs to be examined in order to have a comprehensive understanding of national law on this problem.

2 Nepalese Laws

I have divided Nepalese law relating to trafficking in girls into five parts for the present study. The first part discusses the constitutional provision. In second and third part, specific legislation against trafficking in persons has been discussed. The fourth part highlights the other related law against this practice, and in the fifth part, Supreme Court's interpretation of

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247 See CSE in Asia, Ibid.
248 Ibid.
249 Such as health services, rehabilitation, compensation to the victims is entirely uncovered by the Nepalese laws. Whereas under the Indian laws, there is a provision for rehabilitation and essential services to the victims but widespread abuse of authorities and neglect of the state for the effective implementation of theses provision have made them as good as nothing. However, compensation to the victim is also not provided by the Indian law. See Infra, pp. 78-80, 101-105.
laws against trafficking has been analysed in order to understand its attitude towards this
problem. The last part briefly discusses the new draft bill on trafficking and prostitution
recently proposed by the government of Nepal.

2.1 Constitutional provision

Nepal has undergone a significant political and constitutional change in 1990 after a people's
movement against the then one party political system. The present Constitution of the
Kingdom of Nepal 1990 has acknowledged that movement as the cause for the constitutional
change[^252] and states in its preamble the reason for the promulgation of the Constitution as to
guarantee basic human rights to every citizen of Nepal. The objectives of the present
constitution declared in the preamble set the future course of the state, which is to "secure to
the Nepalese people social, political and economic justice long into the future."[^253]

Under the sub-title of the right against exploitation of the chapter on Fundamental
Rights, the Constitution declares, "[t]raffic in human beings, slavery or forced labour in any
form is prohibited. Any contravention to this provision shall be punishable by law."[^254] This
is a significant constitutional provision, which underscores the broad objectives of the
constitution makers, outlawing every form of enslavement and human exploitation. The
structure of this provision also signifies an important meaning as it has treated human
trafficking, slavery, and forced labour under the same category and prohibited them
altogether. This constitutional provision has captured the latest academic interpretation of

[^252]: See Constitution of Nepal, *ibid.* at preamble where it declares “recent public opinion expressed by the
Nepalese people through the people’s movement” cause this constitutional change.
[^254]: *Ibid.* at article. 20(1).
trafficking for prostitution as a contemporary form of slavery\textsuperscript{255} by equating human trafficking in any form with slavery.

However, the present Constitution does not guarantee right to health as the fundamental right to the people or provide a right to claim health services or impose duties on the state for the same and that has had severe consequences on the victims of trafficking, as it has been discussed before,\textsuperscript{256} the health consequences of Nepalese victims trafficked into prostitution has been devastating.\textsuperscript{257} However, there are some other important constitutional provisions under the Directive Principles and Policies of the State where health, education and social well being of the Nepalese people are addressed.

Even though, the Directive Principles and Policies are not enforceable by the Court of Law,\textsuperscript{258} according to the Art. 24(2) of the Constitution, these principles and policies "shall be fundamental to the activities and governance of the state and shall be implemented in stages through laws." Under Article 26(1) "state shall pursue a policy of raising the standard of living of the general public through the development of infrastructures such as education, health, housing and employment of the people of all regions." More specifically, under Article 26(7),"state shall pursue a policy of making the female population participate, to a greater extent, in the task of national development by making special provisions for their health, education and employment." These constitutional provisions, giving special attention to health, have been neglected by the state is evident from its poor handling of the public health services of the country.

\textsuperscript{255} See Contemporary form of slavery, supra note 142 at 488-489.
\textsuperscript{256} See Chapter Two, above, at 34-36, 58-65.
\textsuperscript{257} Ibid.
\textsuperscript{258} Constitution of Nepal, supra note 44 at article 24(1).
For example, out of 6% of GNP spent in health in 1997, 76% accounted for householders' spending, 14% development partners and INGOs, and just 10% government spending.\(^\text{259}\) Within the government spending, more than 40% continues to be allocated to the maintenance of big city hospital and curative health care available through these big hospitals.\(^\text{260}\) The large portion of the rest goes for administrative expenses and very limited is left for the hundreds of rural level health posts. The government's utter neglect is clearly reflected in case of its handling of HIV/AIDS epidemic. In November 2000, it has opened the first HIV/AIDS clinic in Kathmandu\(^\text{261}\) even though the National AIDS Centre was established in 1987 following the finding of the first HIV case in Nepal. The fact that the Government has allocated just US$ 20,000.00 for AIDS treatment and prevention for 2000/2001 fiscal year\(^\text{262}\) proves its callousness even though WHO predicts 100,000 HIV infections in Nepal by 2000.\(^\text{263}\)

2.2. *Muluki Ain* (Country Code) against trafficking

The prohibition declared by the constitution regarding trafficking in human beings has been enforced by two separate Anti-Trafficking laws in Nepal, having stringent punishment for traffickers and abettors to trafficking. The *Muluki Ain*, a codified country code of Nepal (First Act has a separate chapter namely *Jiu Masne Bachana Ko Mahal* (chapter on Sale of Human Beings) dealing with human trafficking, including trafficking and forced prostitution of girls/women since 1963. This chapter does not provide definition of human trafficking,

\(^{259}\) Human Development, *supra* note 50 at 69.

\(^{260}\) *Ibid*.

\(^{261}\) Special clinic for AIDS patients*, The Kathmandu Post (Nepal: December 1 2001) at 1.

\(^{262}\) *Ibid*.

however, declares it illegal and prescribes punishment up to 20 years imprisonment for the principal convict and half of that sentence for the abettor.\textsuperscript{264}

Section 1 of the said chapter states "no one shall take any person across the border under deception with the objective to sell". If the perpetrator is apprehended before the commission of the crime, the punishment prescribed is 10 years imprisonment, and after the commission of the crime, the punishment is 20 years imprisonment plus fine equivalent to the amount of the transaction between the trafficker and the buyer.\textsuperscript{265} If the buyer is found within the territory of Nepal, he/she is subjected to the same sentence as the seller.\textsuperscript{266}

Section 2 prohibits the enticement and separation of children under the age of 16 years, and any mentally disabled person from their family or legal guardians and prescribes punishment up to 3 years of imprisonment or CADS 5.00 fine for committing this offence. Section 3 of the same chapter imposes 3 to 10 years of imprisonment for keeping any one as a slave or bonded labour.

In Nepal, there was a sudden rise of trafficking in girls/women into brothels in India from mid 1980's as compared to the earlier period.\textsuperscript{267} The widely reported case concerning the rescued and repatriation of 13 years old Nepali girl Tulasa Thapa from the Bombay's brothel with multiple life threatening diseases shocked the mind of the conscious people and forced the government to enact more effective legislation to prevent the trafficking of girls/women into prostitution.\textsuperscript{268} This episode finally prompted the then Nepalese lawmakers to enact a new special legislation to address trafficking in human beings problem more

\textsuperscript{264} Muluki Ain, supra note 57 at chapter on Jiu Masne Bachana ss. 1,4 [translated by author].
\textsuperscript{265} Ibid. at ss. 1,5.
\textsuperscript{266} Ibid. at ss. 1.
\textsuperscript{267} See Reasons for the increase of such demand of Nepali girls in Indian sex market is discussed in Chapter Two, above, at 14-15, 23-28.
\textsuperscript{268} See Chapter Two, above, at 58 for detail discussion of this case.
effectively as then prevailing legislation suffered from many lacunas. Prominent lacuna as has been complained by the investigating authority is that, under this Act, it is very difficult to establish offence of selling and buying of human beings as that mostly takes place in foreign land, and the Act does not have any provision to address this difficulty.

2.3. Special Act against trafficking

The Special Act passed in 1986 has tried to fill the lacunas of the first Act and has given better legal protection to the prosecution case against traffickers and opportunity to the police to handle trafficking cases effectively. Even though it starts with narrow objectives, as stated in the preamble of the Special Act, it is more comprehensive and has tried to fill the loopholes of the first law, such as the definition of sale of persons and crucial question of extra-territorial implication of law.

Section 3 of this Act explicitly declares that no one shall sell human beings. Section 4 defines the following acts to be considered as a selling of human beings for the purpose of the Act:

i) sale of a person with any motive,

ii) the transport of any person abroad with intention to sell,

iii) the act of compelling any women to work as prostitute through allurement or enticement, deceit, threat, intimidation, pressure or otherwise,

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269 The preamble declares two specific objectives for the enactment of this Act. One is to protect the welfare of the general public and second to preserve public morality. It further says that in order to achieve those objectives it has become imperative to prevent trafficking in human beings. In other word, in order to protect public morality, it has become necessary to prevent sell of human beings. The protection of the right of the victims or welfare or rehabilitation of them is nowhere mentioned as a concern of this legislation.

270 Jiu Masne Bachana (Niyontran) Ain (Sale of Human Beings (control) Act), 1986 (Nepal)[hereinafter Special Act].

271 See on extra-territorial effects of Special Act, below, at 75.
iv) conspiracy for committing any of the acts mentioned above or abetting to do the same or encouraging to involve someone in such act or attempt to do the same.

Another important feature of this Act is that it has extra-territorial application. Under this provision, it considers any act declared by the Act as a punishable offence, even if committed by anyone living outside of the Nepalese territory, would have a same implication as an offence committed within the Nepalese territory. This was the provision much demanded by the law enforcement authorities to overcome the question of territorial jurisdiction as most of the crimes of trafficking, selling, and buying of human beings were executed in foreign land. With the incorporation of this provision, brothel owner or purchaser who may have committed the offence entirely living in foreign land can also be charged and punished accordingly. However, this provision has never been implemented effectively against many perpetrators living and working from India because of the reason that Nepal does not have an extradition treaty with India over this problem.

According to section 5(1), a case under this Act can be initiated by anyone who has the knowledge or who has suspected of the crime as specified by Act with registration of First Information Report (FIR) before the police. However, in situation of such registration of FIR, the suspected crime cannot be investigated immediately until it is brought before the District Court for the judicial order to proceed for further investigation. This provision has given extraordinary power to the district court to decide, while keeping in mind the preliminary evidence submitted with FIR, whether to allow police to start further investigation. The Act does not provide any remedy or room for appeal in case the court

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272 Special Act, supra note 270 at s. 2.
274 Special Act, supra note 270 at s. 5(1).
275 Ibid. s. 5(2).
276 Ibid. ss. 5(1) &5(2).
dismisses such FIR under the ground of inadequate preliminary evidence to initiate further investigation.

However, in situation where a victim submits the FIR, the court cannot dismiss the case and investigation must proceed. In such a situation, the police shall immediately take deposition of the victim in the presence of public prosecutor and take the victim to the nearest district court within 24 hours for attesting that deposition.\textsuperscript{277} The legal provision specifically states in such a case that, irrespective of anything stated anywhere in the law, it is the duty of the concerned judge of the district court to read the written deposition of the victim, re-examine it with the victim, and attest the deposition according to victim's version once such case is brought before the court.\textsuperscript{278}

Once the judge attests such statement of allegation, it becomes the most powerful evidence against the accused,\textsuperscript{279} and the burden of proof reverses\textsuperscript{280} towards the accused, which requires the accused to disprove the charges made by the victim if the accused is innocent. This provision has generated controversy not only within Nepal but also at international level. The Human Rights Watch/Asia has criticized it by pointing out that the presumption of innocence is a fundamental principle lied down in Article 14(2) of the ICCPR.\textsuperscript{281}

The same line of argument was raised before the Supreme Court of Nepal in \textit{Chandra Prasad Nepali v. Government of Nepal} as a violation of the right to remain silent of the accused, one of the fundamental rights guaranteed by the Constitution of Nepal.\textsuperscript{282} The

\textsuperscript{277} Ibid. at s. 6(1).
\textsuperscript{278} Ibid. at s. 6(2).
\textsuperscript{279} Ibid. at s. 7(1).
\textsuperscript{280} Ibid. at s. 7(2).
\textsuperscript{281} See Global Report on Women, \textit{supra} note 25 at 255.
\textsuperscript{282} (1990) Supreme Court, Nepal, writ no 1169[translated by author].
petitioner— an under-trial prisoner accused of committing offence under the Special Act— challenged the said provision as being inconsistent to the Art. 14(3) of the Constitution where it is said that, "no person accused of any offence shall be compelled to be a witness against himself." The full bench of the Supreme Court, consisting of five Justices, has, in its unanimous decision, disagreed with this argument and pronounced that it is not inconsistent with the constitution, as the said provision of the law does not compel accused to speak against his/her will, and courts would not convict any person only on the ground of accused's silence.283

Writing the judgement for the Court, Justice Laxman Prasad Aryal declared that it is entirely a matter of legislative policy upon whom a burden of proof is imposed and such burden may be imposed upon one party to another according to the seriousness of the issue concerned. He has also argued that the provision of this kind is not unconstitutional as Art. 11 (3) of the Constitution provides power to the legislatures to enact special provisions for the protection of the interests of women and children even if such provisions are against the general principles of equality and equal protection of law, and this legal provision can be protected under that constitutional provision.

Moreover, most of the victims of trafficking into prostitution from Nepal are illiterate and belong to the economically disadvantage class of the society.284 Their lack of knowledge about their rights, legal provisions, and economic resources to stand against the traffickers is very high. In such a situation, it is understandable the intention of the lawmakers to enact such a legal provision, which purports to give a less chance to the accused from absolving from the crime, and help the investigating authorities to reduce the trafficking cases.

283 Ibid. at 5.
284 See e.g. Girls Trafficking, supra note 2 at 37-41; Trafficking of Nepali Girls, supra note 2 at 9-14.
Another important feature of this Act has been the incorporation of a provision, which has made it very difficult for accused to obtain anticipatory bail.\textsuperscript{285} It is stated in section 10(1) of the Act that irrespective of anything written anywhere in the law, the court can keep an accused arrested under this Act in custody in course of trial.\textsuperscript{286} Tampering of the evidence by the accused released on bail in many cases must have prompted the legislatures to bring this important change in the law.

To the contrary from these relatively strong legal provisions, the punishments prescribed by this Act are flexible than that of the first Act. If a case is started under the first Act (which has stopped since Special Act came into effect even though the first act has not been repealed), Judges do not have any discretion with regard to the time period of the sentence to the convict. For instance, under the First Act, the principal convict shall be imprisoned for 20 years imprisonment along with fine, equal to the amount transacted between the seller and buyer of a trafficked victim.\textsuperscript{287} However, under the Special Act, judges enjoy considerable amount of discretion while deciding the period of imprisonment. For example, section 8 allows them to have a big margin of flexibility for awarding the sentences for the offences stated under section 4 of the Act, under which, the punishment for selling any human being ranges from 10 to 20 years of imprisonment; for the transport of any person abroad with intention to sell ranges from 5 to 10 years; for the act of compelling any women to work as prostitute through allurement or enticement, deceit, threat, intimidation, pressure or otherwise ranges from 10 to 15 years of imprisonment; and for the conspiracy for

\textsuperscript{285} Special Act, supra note 270 at s. 10(1).

\textsuperscript{286}\textit{Ibid.} However, the provision further states that if an accused finds this decision of the district court unjustifiable, he/she can complain before the Appellate Court and the decision given by later is final with regard to anticipatory bail. See \textit{ibid.} s. 10(2).

\textsuperscript{287} See \textit{Muluhi Ain}, supra note 264; See also \textit{Man Bd. Tamang v HMG} (1992) Supreme Court, Criminal Appeal no. 413,493.
committing any of the acts mentioned above or abetting to do the same or encouraging to involve someone in such act or attempt to do the same results into maximum of 5 years imprisonment.

Apart from some changes brought by the Special Act against trafficking into prostitution, there are many lacunas remain in anti-trafficking legislation in Nepal, and unless they are done away with, its effectiveness will remain in question.

a) The present law does not define the role and responsibilities of investigating authorities in cases of trafficking. Except for the victim's testimony, investigating authority normally does not produce evidence sufficient to convict the accused. The victim/complainant has to undergo persistent pressure and has to testify and repeat her whole ordeal before the court many times to convict the accused. Most of them are illiterate and ignorant about the law and court proceedings, and any small variation between the earlier and later statements gives enough room for judges to release the accused under insufficient evidence.

b) The present law does not provide witness protection. In many cases, where crime syndicates are involved, victims never file a case or appear before the court for corroboration or change their statement out of fear and intimidation. Moreover, due to ignorance, frustration, pressure, threats or any financial allurement by the accused, victims in many cases never appears before Court for reconfirmation of their earlier statement, which makes conviction very difficult to obtain.

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288 However, trafficking case is categorised under state case where government is the plaintiff and the accused is the defendant. This obviously has increased the responsibility of the police and public prosecutor. See *State Cases Act, 1992*, Nepal, Schedule 1 no 14 & 31.

289 See Guard Against, supra note 5 at 22-23.
c) Swift and prompt justice in cases like this is necessary to deter the likely future offender from attempting to commit the crime. The anti-trafficking Act should have provision for speedy trial. In present, the long delay in settling court cases has worsened the matter, and in some cases the legal process takes 3-5 years to complete at the district court, which not only frustrate witnesses’ patient but in many cases, crucial evidence may also be lost. 290

d) The most important shortcoming of the present anti-trafficking law is its lack of any provisions for the rehabilitation of the victim and protection of the rights of the victim, two important and essential requirements to re-establish them in the society. These shortcomings have affected lives of hundreds of victims returning from brothels, many of them having multiple life threatening diseases. The present anti-trafficking law has addressed problem of trafficking solely from the criminal law approach. Reversing burden of proof over the accused and harsh provision of punishment for the convict shows the priority of the law in that direction. However, even in that front, the success has been minimum and the number of trafficking victims has been increasing every year. 291

e) The complete neglect of the protection of victim’s health is a serious lacuna of the present law, which has contributed to the deterioration of the life of the victims. The increasing number of HIV/AIDS reported among the victims trafficked into prostitution and its long term severe effects on health and social condition of the victim has highlighted the immediate need to have appropriate legislation to address this problem. A trafficked victim

290 In his outspoken statement, the present Attorney General of Nepal Badri Bahadur Karki has said, "unfortunately, due to ignorance of the victims or pressures, threats or any financial allurement by the accused, most of the time, the victims never appear before the court for reconfirmation of their earlier statements. Consequently, the whole case falls to the ground." see ibid. at 20.
291 Until 1998, various reports have suggested the number of Nepalese girls trafficked into India ranging from 5000 to 7000 every year, but that has been increased ranging from 10,000 to 15,000 every year as suggested by the UN Special Rapporture, see supra note 6.
infected with HIV faces the untold stigma and discrimination in Nepalese society where any discussion over sex is still considered offensive. The Constitution has opened the possibility to enact law to protect the interest of the disadvantage class of the society.\footnote{292}{Under article 11(3) of the Constitution, the government can enact social legislation in order to protect women of all age suffering from the social, economical, and educational backwardness. This constitutional provision is even useful to enact comprehensive anti-discrimination law for the benefit of the trafficked victims.}

2.4. Other relevant legal provisions

In addition to the provisions of human trafficking and forced prostitution prescribed by the above mentioned Acts, the chapter of \textit{Jabarjasti Karaniko} (Rape), and \textit{Aasaya Karaniko} (Intention to Commit Adultery) of the \textit{Muluki Ain}\footnote{293}{Ibid. at 214, 215.} also address the issue of illegal sexual conduct. For example, pimping and soliciting for prostitution have been forbidden under Section 5 of the \textit{Aasaya Karaniko}. The said provision prescribes that in case where a person entices a woman with the intention of arranging sexual intercourse with himself or with any other person, or arrange contracts and affairs with prostitutes, he shall be punished with an imprisonment ranging a period from 6 months to two years, or fine ranging from Rs. 500 to Rs. 6000 (CADS 10 TO 120), or both. Under section 1 of the chapter on \textit{Jabarjasti Karaniko}, consent of the girl is not accepted as a defence in case of sexual intercourse with girl under the age of 16 years and intercourse with such minor girls is considered as a rape punishable under the chapter.\footnote{294}{See \textit{Muluki Ain, supra} note 57 at Chapter on Rape, section 1.}

After Nepal ratified the Convention on the Rights of Child (CRC)\footnote{295}{See CRC, \textit{supra} note 35.}, the government has enacted Children Act 1993 with some provisions directly conflicting with CRC\footnote{296}{Such as, it considers any person under the age of 16 years is child contrary to the 18 years suggested by the Article 1 of the CRC. In another outrageous provision, it does not consider offence of scolding and beating by father, mother, member of the family, and teacher, if it is proved that it was for the benefit of the child. A child may not be able to prove what was claimed as good for him/her claimed by these people. This directly violates child right to life, and right to equality and non-discrimination.}
whereas some progressive legal provisions in regard to child prostitution have been
incorporated into the Act. Section 16 of this Act prohibits anyone from using or forcing
children to work in immoral profession. However, this provision does not provide clear
definition of or areas of what constitute immoral profession, but it certainly includes child
prostitution or child sexual exploitation. Section 20(1) of the same Act allows anyone to
file petition or initiate a case in the local district court on behalf of a child victim of violation
of that prohibition. The district court is empowered to award appropriate compensation, if it
finds any violation of the prohibition made by the chapter II of the Act.

However, there is a difficulty for most of the Nepalese victims trafficked into
prostitution to get such compensation because of the definition of the term “child” given in
the Act, according to which anyone under the age of 16 years is a child. It has been
reported that many of the victims when they return home, after being thrown out from the
brothel due to their age or diseases, would have crossed the age of 16 years and would be
unable to claim compensation prescribed under this Act.

Even in cases where victims have not crossed the age limit, the most critical and
practical problem would be the costly legal battles, which would prevent many victims from
initiating civil proceeding against the perpetrators for the compensation. Contrary to the
criminal case under the anti-trafficking Act, case under the Children Act has to be started by
the victim or someone on behalf of victim, which requires individual spending. The crime
committed in India would pose further difficulty to prove the damage in Nepalese court,
when burden of proof lies with victim in order to receive compensation.

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297 Legislatures have not used the word prostitution or sexual exploitation, as it seems they are very much
uncomfortable to use that word or unable to accept the fact that there is prostitution or sexual exploitation of the
children exist in Nepal!
299 See report on 124 victims rescued and returned from the Bombay brothel, supra note 87-88.
2.5 Judicial interpretation

The Constitution of Kingdom of Nepal has protected the independence of the judiciary, and, especially, the Supreme Court of Nepal enjoys considerable power with regard to the protection of the rights of the people and providing remedies in case of violation of the same. Under Article 96 (2) of the Constitution, any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of hearing of a suit becomes the law of the land. The jurisdiction of the Supreme Court ranges from the appellate and writ jurisdiction to the judicial review, under which it can declare any law in question, be void if it is inconsistent with the Constitution.\textsuperscript{300}

Under the present scheme of the Constitution, nothing prevents judiciary to play an active and assertive role by addressing social problem through the liberal and dynamic interpretation of the Constitution and other ordinary laws of the land. Interestingly, it is the Constitution itself that desires judiciary to play such active role as Art. 84 of the Constitution states that, “powers relating to justice in the kingdom of Nepal shall be exercised by Courts and other judicial institutions in accordance with the provisions of this Constitution and the laws and the recognized principles of justice.” This is a unique and dynamic provision, which requires judiciary to dispense justice not only by looking at the provisions of the Constitution and law but also to the recognized principles of justice developed around the world. If understood correctly, this constitutional provision has vastly increased the power and responsibility of the judiciary, which can be effectively used for the benefit of oppressed and downtrodden classes of the society. Therefore, it is the judges who have to decide and take this constitutional mandate seriously.

\textsuperscript{300} Constitution of Nepal, \textit{supra} note 44 at article 88(1).
Furthermore, as seen in many democratic constitutional schemes followed in the common law tradition, Nepalese Constitution has bestowed more power to the Supreme Court, which as per Art. 88 (2) of the Constitution, “shall for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective…. have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute.” The plain language of this Constitutional provision provides the Supreme Court to award any remedy to the victims of violation of rights, even if the law does not provide remedy, or if Court finds that the provided remedy is inadequate or ineffective.

On the background of these constitutional provisions, some Supreme Court decisions related to the trafficking cases have been examined hereunder. It has been mentioned before that compared to the magnitude of the problem of trafficking into prostitution problem, very minimum number of cases have reached before the court. Here, 14 most important cases among the few cases reached before the Supreme Court between 1990-1997 have been selected and analysed in order to see the trends and attitudes of the judiciary regarding this problem.


302 Author has translated and analysed 14 cases reached before the Supreme Court as an appeal against the decision of the Appellate Courts. I have received photocopies of the decisions directly from the Supreme Court of Nepal, which I have cited according to the year and the case number as appear on the front page of the decision.
I. Exclusive reliance on victim statement before the court

The statutory provision by which burden of proof reverses to the accused once the victim’s charge is attested by the court, has become so popular for Nepalese judiciary that it has been the sole ground for the decision for all trafficking cases but one.\textsuperscript{303} Court seems to be satisfied with victim’s statement as the conclusive evidence for the conviction in every case, once the district court judge attests such statement according to the section 7 of the Special Act. The positive effect of this provision is that in genuine cases, it has diminished the ability of traffickers to escape from the punishment once victim is determined to take legal action against them. However, this provision can be grossly misused or become a hurdle to get justice for those victims who are unable to appear before the judge.

In \textit{Ramkrisna Tamang v. His Majesty’s Government of Nepal (HMG)}\textsuperscript{304}, where, appellant, a husband of 8 years was alleged by his wife for selling her in Bombay under deception after he took her to visit that place. The statement she had made before the police, after she returned from Bombay, was examined and attested by the district judge, which she further corroborated in course of hearing before the District Court. The appellant, then defendant, confessed the charge before the police, which he latter denied at the court in course of hearing. The accused claimed that the confession before the police was obtained from the police threat and intimidation.\textsuperscript{305} District court convicted the defendant on the ground that the accusation made by the victim had been corroborated by the victim. The Court argued that the defendant was not sufficiently able to refute the charges lodged against

\textsuperscript{303} In \textit{Indra Prasad Mainali}’s case Supreme Court reversed Appellate Court decision even when victim had directly alleged appellant as the trafficker. See \textit{Infra} note 309 for detail.

\textsuperscript{304} 2049 (1992) Supreme Court, Criminal Appeal No. 487.

\textsuperscript{305} This is one of the common features available in almost every trafficking case where accused confesses before the police and vehemently denies the same on the ground that it was the forced confession. Under the present undeveloped criminal justice system in Nepal, it is very difficult to decide who is right and who is wrong in such cases.
him. The decision of the district court was upheld by the Appellate court and reached before the Supreme Court as an appeal by the convicted husband. The Supreme Court agreed to the lower courts decision and argued that it was the burden of the appellant to prove that he did not commit the crime alleged by the victim as prescribed under section 7 (2) of the Special Act. It also argued that there was no reason for a wife to make such a serious charge against her own husband if that was not true.

Similarly, in *Krisna Bahadur B.K. v. HMG*, the victim charged the appellant/defendant for selling her in Bombay in the hands of two Nepali brothel owners. From lower courts to the Supreme Court, the Courts took up victim’s statement before the district court, which said that she was trafficked and sold in the brothel by the appellant, which remained sole and conclusive evidence for conviction.

Similarly in *Bharat Kumari Palika and others v. HMG*, the Supreme Court upheld the decision of lower courts and convicted two defendants for deceivingly trafficking two girls and selling them in Bombay as charged by one of the victims. Courts grounded their decision on the statement of one of the victims, who claimed to have successfully run away from the brothel after spending 12 days there. She also informed that her friend, the second victim, could not escape from the brothel, thus, still was there. The Supreme Court reiterated its earlier stand and declared that once the charge under the Special Act was made, it was the total responsibility of the appellate/defendant to convincingly refute it, if he were to claim innocence.

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306 See supra note 301.
307 See supra note 301.
As this provision has already drawn some controversy, relying solely on the statement of the alleged victim may be fatal in situation where it may be used to score personal vendetta or personal animosities. This was seen in *Indra Pd. Mainali* case. In this case, the alleged victim/complainant filed FIR charging appellant as principal accused along with three other people as co-accused for trafficking and selling her to an Indian man for 16,000 Indian currency (CADS 500) in Siliguri, an Indian town near eastern part of the Indo-Nepal border. She claimed that defendant/appellant took her to Siliguri in the pretext of visiting that city with the help from three co-accused and committed the offence. She corroborated her charge before the court, thus making her statement powerful evidence against the defendants.

However, from the deposition of the witnesses and the evidence collect from other sources showed that the reason behind the filing of this case was something different. The alleged victim and defendants were close relatives and the conflict between the families of both started when it was found that the victim and principal accused (Indra P. Mainali) had involved in a long sexual relationship, which resulted in pregnancy of the alleged victim. The family of the complainant took her to Siliguri, India in order to get abortion done, as that was illegal in Nepal and unavailable in the place where this incident had occurred. The news of abortion spread everywhere, even though they wanted to keep it secret. The incident of sexual relationship with relative and pregnancy is more than enough to create high stigma and shame in the Nepalese society. In addition to that, both abortion and sexual relationship with a close relative are punishable offences under the criminal law of Nepal. As Nepal follows the patriarchal social values, the heavy burden and stigma lie with women/girls more

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308 See for detail discussion on this point, above, at 76-77.
309 See *supra* note 301.
310 See Muluki Ain, *supra* note 57 at Chapter on Homicide, sections 28-32 & Chapter on Incest, section 2.
than men in such cases. Latter on it was found that in order to divert the attention from all these events, the alleged victim with advice from her family filed case under trafficking against the defendants.

District court absolved all defendants from the charges and observed that it was the family fight started from the illegitimate pregnancy, which prompted that case to come to that level. The court took strange line of arguments and argued that no independent evidence proved the allegation of the alleged victim/complainant. This line of argument goes against the precedent laid down by the Supreme Court in trafficking cases where, in fact, defendant has to prove that allegation is not true. The appellate court partially reversed the decision of the district court and convicted the principal accused on the ground that the principal accused had not successfully refuted the charge of alleged victim as required by Section 7 (2) of the Special Act. Challenging the appellate court decision, principal accused filed an appeal before the Supreme Court.

The Supreme Court reversed the decision of the appellate court and released the appellant on some reasonable grounds. The decision of the Supreme Court did not reveal whether district and appellate courts were aware of the facts it had given in the judgements. The starlet facts given by the district police stated in the Supreme Court decision showed that the exact days which was alleged to be the days when alleged victim was sold and remained in the hands of Indian man as claimed by her, she, in fact, was in police custody with her mother facing investigation in the abortion charges. The record also showed that the appellant as a teacher for many years had regular attendance in his school throughout the time when alleged crime was committed. The Supreme Court interpreted this evidence well
enough under section 7(2) of the Act to prove that the allegation was false and release the appellant.

Given the rampant corruption in the criminal justice system in Nepal (particularly in the police department), the evidence produced by the appellant in this case may have been fabricated and the allegation of the alleged victim may have been true. However, the evidence presented before the Supreme Court were adequate enough to prove the innocence of the appellant. In reality, if the complainant’s allegations were wrong, as analysed by the Supreme Court, this was a perfect example of possible misuse of the statutory provision, giving extraordinary prominence to victim’s statement unsupported by investigation.

Besides that, the hard and fast approach of the judiciary solely relying on victim’s statement has frustrated the very interest of thousands of Nepalese victims trafficked into prostitution. The experience shows that compared to the number of girls trafficked every year, very small number of victims is able to come forward and initiate charges against traffickers. When courts demand victim’s statement as the sole ground for the conviction,\(^{311}\) many family members and relatives of the victims (victims who are in brothels and unable to come before the court), are discouraged to file cases before the authorities even when they know their beloved ones are being trafficked into prostitution. If courts take progressive approach and encourage family members, relatives, or other people who know or have clue about the traffickers, to come forward under Section 5 (2) of the Special Act, the number of filling cases, trial, and conviction would be increased, which would immensely help to reduce the occurrence of this offence.

\(^{311}\) Exception was found in Taradevi Gharti and others v. HMG (1995) SCCA no 1470, see Infra note 314.
II Ignoring inadequate investigation of the cases

The second feature found in these cases is the visible disregard of the courts over the absence of proper investigation by the police. It is understandable that the thorough investigation of the offence alleged under the trafficking cases is difficult one as it requires co-operation between Indian and Nepalese authorities, and that can be possible only through the bi-lateral agreement between the two countries. However, even the absence of minimum investigation required in any criminal cases is the popular feature of these cases. As it has been discussed, in most of the cases, judges ground their decision on the basis of the statement made by the alleged victim before the district court judge corroborating the initial allegation made in the FIR.

Exceptionally, in Govinda Pd. Bhattari and Gopal Chwlagai v. HMG, judges of Supreme Court have made some observations regarding visible lapses of police investigation. In this case, a chronically ill victim alleged her husband and his friend for deceivingly taking her into India on the pretext to give her medical treatment. She alleged that after reaching New Delhi, they left her with an unknown woman in a house, promising that they will soon return with medicine. After sometime, suddenly an undiagnosed disease attacked her and she became unconscious. When she woke up, she was told that she had been sold in 17,000 Indian currencies and her husband and his friend would never return to take her back. As she claimed, luckily two Indian policemen arrived at that place and asked her to go out, which she happily did and returned to Nepal with the help from these policemen. She narrated this whole event and lodged the FIR against the traffickers and corroborated the same before the court.

312 See supra note 301.
Lower Courts convicted the traffickers, which was upheld by the Supreme Court. After writing the decision, Justice Hari Pd. Sharma made some observations and ordered that to be conveyed to the police headquarters, regarding the lapses of the investigations, which are simple but rarely found in the decisions given by the Nepalese judiciary. First, Justice Sharma observed that, normally when their Indian counterpart handed over girls to the Nepali police, they usually provide some document or receipt or hand over letter, which latter could be used as strong evidence. In this case, the police presented nothing of that sort of evidence, and, he observed that it was an improper investigation.

Second, Justice Sharma pointed out to the number of contradictory claim of the principal appellant-the husband of the victim- regarding his whereabouts when the victim claimed to have been trafficked into India. He observed that such frequent changes of his statements would have been easily examined had police conducted investigation into that matter at first when he claimed to be in the hospital taking care of his sick father. Later he changed his earlier statement and claimed to be in home mourning over the death of his father. The evidence presented by the police showed nothing about the reality of these statements. These observations of the court reveal the absence of a minimum investigation required in any of the criminal investigation.313

III Indifferent to finding whereabouts of the victim

One of the striking features of some decisions is the complete silence of the court regarding the whereabouts of the victims even when cases concerning them have been decided and

313 Under the Art 96(2) of the Constitution, the principles laid down by the Supreme Court in course of hearing of a case have power of law. The above observations of the Court and its decision to send those to the police commissioner's office have significant normative value. However, in practice, none of these orders have seen to be implemented.
traffickers have been sentenced to imprisonment. In Taradevi Gharti, the father of 13 years old girl lodged FIR before the police alleging three persons, including the appellant for trafficking and selling his daughter in Bombay. Even in the absence of the victim all three accused were convicted (the series of evidence well established the charge, which has happened in rare cases) which was subsequently upheld by the Supreme Court. However, conspicuously, the victim girl child was still in the brothel (still may have been) irrespective of the fact that her traffickers had been thrown into the prison. The judges did not even make small observation on this rather painful situation and ask government for initiating action to bring the victim home. Court’s observation or order in this regard might have put pressure on the government of Nepal to initiate dialogue with government of India and bring those victims in Nepal, as there whereabouts in India could be known from the convict’s initial statement before the police.

In another case one of the victims lodged FIR accusing three persons of trafficking and selling her and her friend in Bombay in the pretext that they would find better job for them in that city. She repeatedly mentioned that her friend was still languishing in brothel because she was unable to escape, the courts did not pay any attention and make reference about the victim languishing in the brothel.

IV Minimum sentencing pattern

The issue of awarding sentences to the convict is another interesting aspect of judicial decisions where judges have always favoured minimum sentence irrespective of the severity of the crime or the age of the victim. This has become possible for the judges after the enactment of the Special Act, under which judges enjoy considerable discretion while

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314 See supra note 301.
315 See Man Bahadur Tamang and Others v HMG, supra note 301.
deciding sentences, which is not available under the Country Code (First Act).\textsuperscript{316} As it has been discussed before, there are some shortcomings in the First Act,\textsuperscript{317} and, therefore, after the enactment of the Special Act in 1986, this has been the practice to register trafficking cases under the later Act instead of earlier one.

The Special Act provides 10 to 20 years imprisonment for the convict for selling anyone abroad. But none of convicted person tried under this Act has received sentence to the maximum level even though severity of the crime can be seen from the face of the case. This observation is not only based on the finding of this research but from other who has suggested the same.\textsuperscript{318} For example, in a case where a husband was found guilty for selling his severely sick wife into brothel after taking her to New Delhi in the pretext to provide her medical services, the Supreme Court upheld the minimum sentence of 10 years awarded by the lower court whereas it could have easily increased that sentence to 20 years imprisonment.\textsuperscript{319} In Taradevi’s case, the traffickers of 13 years girl child also received minimum sentence. These are few of the many examples of insensitivity of the judges where they have shown their undeserved sympathy towards culprits instead of showing the same for the victims. The most unacceptable part of these sentencing patterns is that the judges have never given justification for why they choose to award a particular sentence and not the other one in a given case. The trends of such sentencing patterns shows that, if law had given judges a free hand to award sentence without fixing the minimum level, they would have given even lesser sentence and made the crime of trafficking the least punishable offence under the criminal law.

\textsuperscript{316} See for discussion on this point, above, at 78.
\textsuperscript{317} See for discussion on this point, above, at 74-75.
\textsuperscript{318} See Gender and Judges, supra note 59 at 84-88.
\textsuperscript{319} See Govinda Pd. Bhattari case, supra note 301.
The argument intended to make here is not that the maximum sentence or harsh punishment would drastically reduce the number of trafficking incidents. However, overall efficiency in investigation of the crime and thoughtful exercise of discretion power to award sentences would certainly discourage potential traffickers. If traffickers of girl children and of other severe cases receive maximum imprisonment with heavy fine for this crime, it can be argued that less people would risk their life for few hundred dollars. This observation brings the final point, which is to suggest that judiciary in Nepal does not seem more responsible than investigating authorities for the failure of the existing anti-trafficking law.

V Silence over the victims’ consequences

As it has been discussed before, the present anti-trafficking law in Nepal does not have any provisions to protect victims’ individual rights and provide health and rehabilitation services. More disturbingly, none of the decisions of the Supreme Court have observed these fundamental lacunae in the law and suggested the need for the protection of the victim. Such initiative would have been possible from the court, had judges accepted and analysed the horrific consequences of trafficking in girls into prostitution. The complete silence and disregard by the highest judiciary over the consequences of the victims in their judgements has perpetuated the covering up of the widespread violence suffered by the victims, without getting even a minimum redressal to overcome from their dreadful condition.

The Supreme Court can make difference in the lives of the victims of trafficking into prostitution, if it decides to exercise its power and responsibility under the Constitution.\(^{320}\) Trafficking and selling of girls into prostitution directly violates ‘right against exploitation’, a fundamental rights guaranteed by the constitution, under which traffic in human beings, slavery, serfdom or forced labour in any form is prohibited. The Supreme Court under its

\(^{320}\) 56. See power of the Supreme Court of Nepal, \textit{supra} note page 16-17.
extraordinary jurisdiction can appropriately remedy this violation by issuing necessary and appropriate order for the enforcement of the fundamental rights or any other legal right for which no other remedy has been provided. The available legal provisions, which only provide punishment for traffickers cannot be regarded as an appropriate and sufficient or adequate remedy in these cases when crippled victims, physically and mentally from the excessive sexual exploitation, do not receive any acknowledgement of their situation and compensation for the violence they have suffered.

The role of Supreme Court envisaged by the Constitution is of the protector of the rights and not of mute spectators. The Constitution in its preamble declares guaranteeing basic human rights to every citizen of Nepal as its one of the objectives. This objective to guarantee human rights to every citizen is incorporated in part III of the Constitution as the name of fundamental rights and the responsibility is imposed on the Supreme Court to protect them in case of their violation. The Supreme Court, as the final interpreter and protector of the constitution, should have released itself from its narrow and compartmental approach while dealing with one of the most inhuman forms of human exploitation and violation of rights, and offer appropriate help to the victims and also order other branch of governments to undertake effective measures to address this problem.

The lack of judicial craftsmanship found in these decisions shows the inability of the judges of the Supreme Court to apprehend and understand the progressive and human rights approach of the Constitution of Nepal. Their denial, even to discuss the suffering and whereabouts of the victims, highlights their utter insensitivity.
2.6 Recent developments

Recently, the Ministry of Women, Children, and Social Welfare (MOWCSW) has proposed a new draft bill, currently under consideration of the Parliament, which purports to replace existing anti-trafficking laws scattered under different statutes and bring them under the one consolidated law. However, if this Bill becomes law under its present form, it will bring a radical change in the present anti-trafficking law and victimise victims of trafficking and prostitution more instead of protecting them from violence and intimidation.

Interestingly, it has tried to define some terms related to the problem such as brothel, prostitution, victim, sexual misconduct, and rehabilitation centre, which play crucial role in criminal investigation. The most interesting term is the offensive sexual activities. It has been defined as unacceptable or immoral sexual contact or any act that arouse sexual feeling or sexual misconduct or sexual exploitation.

Some of these are highly controversial and sensitive issues related to the private lives of individuals, which have been loosely used in this Bill. These terms need to be defined independently instead of putting them together as the definition of immoral sexual activities. Voluntary prostitution is an independent and separate topic, which should not be confused with trafficking into prostitution. The former could be a right of a matured individual whereas later one is a forced prostitution. Furthermore, trafficking into prostitution is the

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322 See ibid. Sections 4 (2)(A)(E), 11(B)(E); see also Dr. Jyoti Sanghera & Ratna Kapur, Trafficking in Nepal: policy analysis, an assessment of laws and policies for the prevention and control of trafficking, The Telegraph (Kathmandu: 24 January 2001)[hereinafter Trafficking in Nepal]. In this article the authors have claimed that, this bill would “effectively criminalize prostitution for the first time in Nepal, whether or not it results from trafficking. This would result in denial of redress to victims of trafficking for the purpose of prostitution because, in such cases, the “victim” risks impugning herself of committing a crime in the course of filing a complaint against a trafficker.”
323 See New Draft Bill, supra note 321. at 3 (E).
illegal trafficking and sexual exploitation of the victim and nothing else should be mixed with this topic if this has to be effectively addressed and eradicated.

The Bill recognises, for the first time, the existence of prostitution and brothels within the territory of Nepal and sweepingly proposes to criminalize them. Rarely seen in other democratic countries, it punishes voluntary sex workers, even engaged in their consensual activities in private. Under section 11 (5) of the Bill, anyone who engaged in sexual misconduct will get 1 to 3 months imprisonment and fine of 50,000 Nepali Rupees (CAD$ 1,000). As the Bill proposes to give extraordinary power to the police for searching house, vehicles, or any place and arrest anyone believed or reported to have committed the offence defined in the Bill without a warrant, this power could be grossly misused to harass or victimize women/girls more as experiences of other countries have shown in under similar legal provision. As in India, soliciting prostitution in public place has been criminalized, but what this Bill has proposed goes beyond and purports to be discriminatory against women/girls. It also refuses to address the real causes of the growth of prostitution and trafficking into prostitution in Nepal and consequences of that on the victims.

Section 4 has defined five different categories of prohibited acts and considers them as selling or buying of person for the purpose of this Bill. They are, buying and selling of a person for any purpose; involving in sex work or forced by someone for the same; forcing children to involve with criminal sexual conduct by any means; attempting any act with objective to put children and unconscious person in prostitution; and act of voluntary sex work.

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324 See Ibid. ss. at 3(B), 3(C).
325 Bill does not specify what comes under the term of sexual misconduct.
This Bill seems to have been proposed to control free sexual activities of women/girls and harshly criminalize prostitution rather than to address trafficking for prostitution. In fact, in relation to trafficking, except for proposing to increase the minimum imprisonment from 10 to 15 years and increase fine up to CAD$ 2000 to 4000 for the buyer and seller of trafficked victims,\textsuperscript{327} it does not have any new provisions which are not found in the existing anti-trafficking laws. Disturbingly, it has proposed to remove forced prostitution of others from the list of serious criminal offences, against the provision of the present Special Act, and provided lenient punishment for that and for child prostitution. Under the present law, anyone who forced someone to engage in prostitution can get imprisonment of 10 to 20 years with fine. However, if this Bill becomes a law, the same person will get 5 to 10 years imprisonment.\textsuperscript{328} Even more surprisingly, any one convicted for having immoral sexual conduct with children, as defined above, will get less punishment, which is up to 3 years of imprisonment and maximum fine of up to CAD $ 2000.\textsuperscript{329}

The Bill has a provision for the establishment of rehabilitation centres for the victims rescued from the brothels and homeless women. It has not addressed the real causes of trafficking and prostitution and proposed any solution except for advocating restriction on the sexual freedom of women/girls. Even before this Bill has been taken up for discussion in the parliament, it has been severely criticized for its outdated moralistic and conservative approach towards prostitution, sex, and sexuality of women.\textsuperscript{330}

\textsuperscript{327} See New Draft Bill, \textit{supra} note 321 at s. 11(A).
\textsuperscript{328} \textit{Ibid.} at s. 11(B).
\textsuperscript{329} \textit{Ibid.} at s. 11(D).
\textsuperscript{330} See Trafficking in Nepal, \textit{supra} note 322.
3. Indian Laws

3.1. Law against trafficking

The study of the effectiveness of the Indian law regarding the trafficking in girls into prostitution is crucial in this thesis, because almost all of the Nepalese girls victims of trafficking are taken into the brothels in India for sexual exploitation. They are sold in India where they are inflicted with various forms of torture, inhuman and degrading treatment and forced to work in condition of slavery.

Indian Constitution, being a democratic one, has guaranteed many of the recognized human rights norms under its constitutional provisions as fundamental rights of the people. Among them, such as right to life and personal liberty, right to equality, right to freedom, and right to constitutional remedies are prominently figured in the judicial decisions and academic discourse on the Indian Constitution. Although, right against exploitation has not received similar attention, it is guaranteed as one of the fundamental

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331 See Red Light Traffic, supra note 4; Girls trafficking, supra note 2; Trafficking of Nepali Girls supra note 2.
332 For the detail discussion on this point Chapter Two, above, at 32-47.
333 Constitution of India, supra note 25 at Part III fundamental rights.
334 Ibid. article 21.
335 Ibid. articles 14,15.
336 Ibid. article 19.
337 Ibid. 32. article 226 of the Constitution also provides separate power to the High Courts of India to issue to any person or authority, within its territorial jurisdiction, orders or writs for the enforcement of any of the rights conferred by the Part III of the Constitution and for any other purpose. See Ibid. article 226.
339 H.M. Seervai, a well Known constitutional expert on Indian Constitution has spared one paragraph to explain the problem of trafficking in women under article 23(1), which guarantees right against exploitation, whereas article 19 (right to freedom) received 242 pages: see Constitutional law of India, ibid at 1244; Prof. Upendra
rights of any person (including non-citizen) living in India.\textsuperscript{340} Art. 23 (1) declare that, "traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." In addition to this, Art. 39, as a directive principles of the state declared by the Constitution, obligates state to ensure that the health and strength of workers, men, women and children are not abused and that children and youth are prohibited against the exploitation.

Since prostitution and human trafficking is the subject of criminal law, they come under the concurrent list of the constitutional scheme.\textsuperscript{341} The federal law on the issue of trafficking was the Suppression of Immoral Traffic in Women and Girls Act of 1956(SITA) that was amended and renamed as the Immoral Traffic in Persons (Prevention) Act (ITPA) in 1986. Neither the SITA nor IPTA prohibit prostitution, but target commercialized vice and forbid soliciting publicly.\textsuperscript{342}

Followings were the main features of SITA;

i) Prostitution was defined as the act of a female who offered her body for promiscuous sexual intercourse for hire. It penalized a woman engaged in prostitution in or near public places, or seducing or soliciting for the purposes of prostitution.\textsuperscript{343} The sentencing procedures under this law discriminated against women than men for the same offence.

\textsuperscript{340} Constitution of India, supra note 251 article 23.
\textsuperscript{341} See seventh schedule of the constitution, under which both central and state government have jurisdiction over criminal law. However, centre law overrides state's law in case of inconsistency. \textit{Ibid.} art. 246.
\textsuperscript{342} See Trafficking of Nepali Girls, \textit{supra} note 2 at 73.
\textsuperscript{343} Suppression of Immoral Traffic in Women and Girls Act, 1956(India) s.7(1), 8(b)[hereinafter SITA].
woman arrested under this Act for soliciting could face imprisonment up to one year, whereas for the same, a pimp may be imprisoned up to three months.344

ii) The biggest drawbacks of SITA were that, first it addressed only the street prostitution and prostitution behind closed door was left alone, without prescribing any norms for the protection of the rights of the inmates, a condition that actually promoted the establishment of thousands of exploitative brothels in India;345 and second, very minimum punishments were prescribed for the pimps, traffickers, and brothel owners who earn and exploit other women/girls for their profit. Since the closed-door prostitution was allowed without responsibility, thousands of innocent girls were brought to work under the garb of their consent.346

SITA was amended in some respects with an important exception for voluntary prostitution. ITPA has made very important distinctions between "major", "minor", and "child". The Act defines anyone who is under 16 years as a child, anyone between 16 to 18 years as a minor, and anyone older than 18 years is major.347 ITPA comprises with detail provisions regarding trafficking and prostitution and has described following acts as having constituted a punishable crime:

i) Keeping a brothel or allowing premises to be used as a brothel,348

ii) Living on the earning of prostitution.349

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344 Ibid. at s.10(1), 10(2).
346 SITA, supra 343 at s. 10(1).
347 Ibid. at s. 4(1), 4(2).
348 Immoral Trafficking (Prevention) Act 1986 [hereinafter IPTA], s. 3. Any person who keeps or manages, or acts or assists in the keeping or management of a brothel shall be punishable on first conviction with rigorous imprisonment from one to three years, and for second and subsequent conviction from two to five years with minimum fine of CADS 45, see IPTA, s. 3 (1).
iii) Procuring, inducing or taking (person) for the sake of prostitution,\textsuperscript{350} 

iv) Detaining a person in premises where prostitution is carried on,\textsuperscript{351} 

v) Prostitution in or on the vicinity of public place,\textsuperscript{352} 

vi) Seducing or soliciting for the purpose of prostitution \textsuperscript{and},\textsuperscript{353} 

vii) Seduction of a person in custody\textsuperscript{354} 

Any person convicted of any of these offences shall be punishable with imprisonment and fine. The provisions of this Act have shown serious concern against the trafficking and prostitution of the children, minor, and those who has not voluntarily but with someone’s encouragement or force, involved into prostitution, and prescribed severe punishment against those who profited from sexual exploitation of them. It has prescribed harsh punishment for a convict committing the above-mentioned offences against children and minors. The Act provides rigorous imprisonment from 7 years to life for the said offences against a child\textsuperscript{355}, and for same against a minor may result into 7 years to 14 years imprisonment.\textsuperscript{356} In case of person committing child/minor prostitution in public place, the imprisonment shall not be less than 7 years to life.\textsuperscript{357} 

Any person who keeps or manages, or acts or assists in the keeping or management of a brothel shall be punishable on first conviction with rigorous imprisonment from one to

\textsuperscript{340} Ibid. at s. 4. Person over 18 years knowingly lives, wholly or in part, on the earning of prostitution of any other person shall be punishable with imprisonment up to 2 years, or fine extend to CADS25, or both. But, if such earnings relate to the prostitution of a child or a minor, imprisonment shall go from 7 years to 10 years. \textsuperscript{350} Ibid. at s. 5. 
\textsuperscript{351} Ibid. at s. 6. 
\textsuperscript{352} Ibid. at s. 7. 
\textsuperscript{353} Ibid. at s. 8. 
\textsuperscript{354} Ibid. at s. 9. 
\textsuperscript{355} Ibid. at s. 5(1)(d)(i). 
\textsuperscript{356} Ibid. at s. 5(1)(d)(ii). 
\textsuperscript{357} Ibid. s. 7 (1-A).
three years, and for second and subsequent conviction from two to five years with fine going up to CADS 45.\footnote{\textit{ibid.} at s. 3 (1).}

It has defined brothel "includes any place, room (conveyance) or place or any portion of any house, room, conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes".\footnote{\textit{ibid.} at s. 2(1).} This definition also accepts the possibility that two or more sex workers can establish a brothel for their mutual gain. The traffickers, brothel owners, pimps, and police have been grossly misusing this provision in order to maintain brothels for their benefit by employing various forms of intimidating practice against the victims for obtaining their consent.\footnote{See also Chapter Two, above, at 45-46; Trafficking of Nepali Girls, \textit{supra} note 2 at 1,2,40,144-145.} As many girls, especially Nepalese, are unfamiliar with the new people, place, and language, they are physically assaulted and forced to agree with the brothel owners for their physical survival.

Section 5 of the Act specifically deals with trafficking of girls/women. There are four circumstances outlined in section 5 (1), which constitutes "procuring, inducing or taking (person) for the sake of prostitution."\footnote{\textit{Procures or attempts to procure a person, whether with or without his/her consent, for the purpose of prostitution; or induces a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmates of, or frequent, a brothel; or takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution; or causes or induces person to carry on prostitution,"} In case of a person over 18 years knowingly lives, wholly or in part, on the earning of prostitution of any other person he/she shall be punishable with imprisonment up to 2 years, or fine up to CADS25, or both. But, if such earnings relate to the prostitution of a child or a minor, imprisonment shall go from 7 years to 10 years.\footnote{\textit{ibid.} at s. 4(1).}
Any person convicted on any of the offences under section 5 (trafficking and procuring) shall get imprisonment from 3 years to 7 years,\textsuperscript{363} and, if any one commits the same offences against the will of any person, the imprisonment of 7 years shall extend to 14 years.\textsuperscript{364} The important point on this provision is that it considers consent of the victim immaterial in these cases because, according to this provision, they are lured or deceived or coerced into prostitution. Here, the legislators have shown their desire to stick to the overall objective of this legislation, which is to prohibit all other forms of trafficking and prostitution except by allowing indoor prostitution with free consent of the party involved. However, in practice, the refusal of the authorities to determine the actual consent of the girls/women involved in prostitution has widely violated this provision and produced horrible abuse and exploitation within brothels’ wall.

The other categories of offences, carrying a strong punishment, are detaining any person in any brothel, or in or upon any areas with interest that such person may have sexual intercourse with a person other than such person’s spouse.\textsuperscript{365} Here also the consent of the victim cannot be a defence and in case of conviction the punishment shall not be less than 7 years to life imprisonment.\textsuperscript{366}

Interestingly, there are some similarities between the anti-trafficking laws of Nepal and India, particularly in the selection of offences, such as, trafficking and forced prostitution of others, where laws of the both countries prescribe stringent punishment. Besides this, Indian anti-trafficking law also has provision to reverse burden of proof on the accused,\textsuperscript{367} as found under the Nepalese law. However, there is an important difference between them over

\textsuperscript{363} Ibid. at s. 5(1)(d).

\textsuperscript{364} Ibid.

\textsuperscript{365} Ibid. at s. 6 (1)(a,b).

\textsuperscript{366} Ibid.

\textsuperscript{367} Ibid. at ss. 3(3), 4(2).
the selection of the offences. Under the IPTA, reversing the burden of proof is provided in cases where charges are made against someone for keeping a brothel or allowing premises to be used as a brothel, and living on the earnings of prostitution. However, conspicuously, in case of trafficking, which are described as procuring, inducing or taking person for the sake of prostitution; and in case of detaining a person in premises where prostitution is carried on, burden of proof remains with prosecution. This is very unconvincing priorities of the law because the later categories of offences are more severe than the former, and if legislators desire to protect prosecution case from the defendant's undue manipulation by reversing the burden of proof on accused, they should have received first priority for such legislative protection.

There are some other offences where sex workers (prostitutes, as named by the Act) are punished in case of public prostitution or soliciting or seducing general public for the prostitution. The Act has prohibited prostitution within a distance of two hundred meters of any public place of religious worship, educational institution, hostel, hospital, nursing home or such other places as notified by the commissioner of police or magistrate. Defying this restriction can result into maximum of three months of imprisonment. The elaborate description is given in the provision as to how prostitution could be spread by the sex workers and long procedural details are laid down to address such problem of street prostitution.

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368 Ibid. at ss. 6 & 7.
369 Ibid. at s. 7(1).
370 Ibid. at s. 7(1)(b).
371 For example one the provisions states, "whoever,....by words, gestures willful exposure of her person (which by sitting by a window or on the balcony of a building or house or any other way), or otherwise tempts or endeavours to tempt, or attract or endeavours to attract the attention of, any person for the purpose of prostitution." See ibid. 8 (a).
372 Ibid. at s. 8(a)(b).
One of the provisions of the law states that both men and women can cause public prostitution and offence of seducing and soliciting for the purpose of prostitution, but surprisingly, the punishments for the same are higher for women as compared to that for men. For these offences, women can get 6 month to one-year imprisonment whereas men can get 7 days to 3 months imprisonment. This provision constitutes discrimination against women and directly violates right to equality and non-discrimination, one of the fundamental rights guaranteed by the Indian Constitution.

3.2 Other laws prohibiting trafficking

Besides this law, there are some other relevant Indian laws applicable to the issue of girls trafficking for forced prostitution. Indian Penal Code (IPC) explicitly forbids the purchase and sale of human beings, forced labour and all forms of bonded labour. It has stated that anyone who buys or sells or obtains possession of anyone under the age of 18 years for the purpose of prostitution or illicit intercourse or unlawful or immoral purpose, or knowing that such use at any age is likely, is subject to up to 10 years of imprisonment. "Whoever imports into India from any country any girl under the age of 21 years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine." This provision identically represents the offence of trafficking in Nepalese girls in brothels in India and can be directly applied to punish the offenders of this provision.

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373 Ibid. at s. 7(1)A.
374 Ibid. at s. 8(b).
375 Ibid. at s. 366B.
376 Constitution of India, supra note 250 at article 14.
377 Indian Penal Code, 1850 (India) s. 376.
378 Ibid. at s. 373.
The provision of Rape under the IPC is also applicable to the crime committed against the brothel inmates. IPC defines rape as the act of sexual intercourse with a woman when the act is against her will; without her consent; or with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or injury; or with her consent when she is incapable of understanding the consequence of her consent; or with or without her consent when she is under sixteen years of age.379 Under IPC, the minimum term of imprisonment for rape is 7 years.380 These laws are also directly applicable against brothel owners, brothel staffs, and customers, when they involve in sexual intercourse with children and minors with or without their consent, or with those women who are kept in brothel under force and threat.

By looking at these legislative provisions against trafficking and forced prostitution, one can believe that there should not have been a considerable problem of trafficking in prostitution in India. However, the actual facts of trafficking in girls into prostitution in India provide a perfect example of big-gap between law in the book and law in practice. As it has been reported, the legal provisions against of trafficking and forced prostitution of children, minors and others have never been seriously applied against the perpetrators.381

There are hundreds of Nepalese victims rescued or escaped from the brothels in India, who are able to provide the details of their life in brothels and atrocities committed against them by the people (they are able to identify), many of them are currently living in India.

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379 Ibid. at s. 375.
380 Ibid. at s. 376(1)(2).
381 Jean D'Cunha in her study ‘Prostitution in a patriarchal society: a critical review of SITA Act’, XXII (45) Economic Weekly (India: November 7 1987) p. 1919-19225 has found that in Bombay in the years 1980-1986 while 44,663 women were arrested for indecent behaviour only 1,116 pimps were arrested during the same period. Despite there being clear instances of the so-called rescue officers demanding and accepting bribes, no one has ever been prosecuted.” See S. Muralidhar, “The case of the Agra protective home”, in Amita Dhanda & Archana Parashar eds., Engendering Law (Lacknow, India: Eastern Book Company, 1999) 310,291[hereinafter Protective Home].
Interestingly, even there were instances when the courts had given order to rescue victims from the brothels and as a result of that many victims have been rescued. However, except for giving such order, courts did not pursue those cases of violation of prohibition of trafficking into prostitution and order to investigate to find out who had brought these innocent victims into brothels. The fact that the rescued operation carried out by the police itself is enough evidence to prove the existence of illegal brothel, which is the clear violation of IPTA.

However, instead of applying legal provisions against the violators of the Act, the strong punishment prescribed against the perpetrators has become the bonanza of corruption for the police. This analysis supports a report, which reveals the fact that nowhere in Bombay has heavy police presence than in the red light areas (brothel streets) but, contrary to the expectation of police presence, illegal trafficking in girls into prostitution and their exploitation continues unabatedly. Their presence should have stopped many criminal activities undergoing in that areas, if their presence were not just meant to collect their share from the brothel owners.

3.3 Rehabilitation, including health services

There are detailed provisions for the rehabilitation of the victims rescued or escaped from the brothels or for those who have left prostitution voluntarily and have sought for shelter. State governments are bound under the law to establish and properly maintain such protective homes or rehabilitation centre, which also includes the provisions of health services to the victim. However, there are no such homes in many states. Some

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382 See supra note 191 at 50-51.
383 See Trafficking of Nepali Girls, supra note 2 at 44-47.
384 See IPTA, supra note 348 at section 21.
385 Ibid.
established protected homes, such as homes in Liluah and in Agra, lack basic accommodation facilities and have been functioning like prisons. It is reported that many inmates in these homes sleep under beds and floors because of lack of space and furniture. Nepali girls rescued from Bombay brothels have reported that the conditions in the protected homes are worst than that of the brothel.

After the AIDS epidemic reported in brothels in early 1990, the All-India Institute of Hygiene and Public Health, a Central Government institution, has been implementing a HIV/STDs Intervention Programme focusing on HIV/STDs awareness and prevention among sex workers in many cities' red light areas. A group of sex-workers in each area is trained to become peer educators who distribute condoms and teach other sex workers about HIV infection. In Bombay, some free clinics are available for sex workers. However, the voluntary sex workers who have limited freedom of movement to seek care enjoy these limited services. Many of them have their family, husband and children living with them. They have their own organisations and resort frequently for demonstrations to claim rights and civic facilities.

However, trafficked girls from Nepal face difficult situation in India because of the severe restriction imposed on them, and the barrier created by the unfamiliar language and place. Therefore, these limited health services may not provide any help to them. The other
biggest hurdle is that they are forced to work as sex commodities and unable to negotiate safe
sex or request customer to use condom even if condoms are made available to them.\textsuperscript{395}

IPTA also provides states to have separate police forces to deal with problems of
trafficking and prostitution.\textsuperscript{396} In case of suspect of the offences prescribed under this Act,
the police can carry out search and investigation without a warrant.\textsuperscript{397} In order to effectively
address the problem of trafficking into prostitution, IPTA has also given permission to the
state governments to constitute special courts for the purpose of providing speedy trial of
offences under IPTA\textsuperscript{398}, so that the victims can get prompt justice and perpetrators can be
punished for their heinous crime. However, until today, none of these provisions have been
effectively implemented.

3.4 Judicial interpretation

The widely reported buzzing sex trade and sexual slavery of small girls in Indian sex markets
not only have challenged the sanctity of the Indian Constitution and legislation but also the
capacity and sensitivity of the Indian judiciary, which has been highly regarded for its
activism. It is a real but sad fact that the extensive legal provisions against trafficking and
prostitution have rarely been implemented in India, and, as a result of that, there are very few
judicial decisions available under this issue.

Notwithstanding of its reputation as campaigner for social justice and innovators of
public interest litigation in Indian judiciary, even the Supreme Court of India has time and

\textsuperscript{395} Trafficking of Nepali Girls, \textit{supra} note 2 at 66-67.
\textsuperscript{396} See IPTA, \textit{supra} note 348 at s. 13.
\textsuperscript{397} Ibid. at s. 15.
\textsuperscript{398} Ibid. at s. 22-A.
again damaged its reputation by showing its apathy towards the problem of trafficking and prostitution.\textsuperscript{399}

In \textit{Visal Jeet v. Union of India},\textsuperscript{400} the petitioner, an Advocate filled an important writ petition before the Supreme Court, “requesting for issuance of certain directions, directing the Central Bureau of Investigation to institute an enquiry against those police officers under whose jurisdiction Red Light areas are flourishing and to take necessary action against such erring police officers and law breakers.” This was the best opportunity for the Supreme Court to look into the whole gamete of the complete failure of the anti-trafficking law in India and brought the culprits, including corrupt police officers into the book. Instead of addressing the principal demand of the petitioner, it went on to discuss the moral harm of the prostitution in the society and refuse to issue directions by observing that, “this malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.”

It described, “Prostitution always remains as a running sore in the body of civilisation and destroys all moral values.” It put aside many legal questions rose before it and did not find the violation of legal rights of individual victims and argued instead that every forms of prostitution as moral problem and not the legal one.\textsuperscript{401} The judges in this case were more concerned of the destruction of human civilisation because of the prostitution as if civil

\textsuperscript{399} In India, the problem of trafficking and prostitution are mixed together as both are handled by the same Act and it is very difficult to distinguished between who is trafficked victim and who is not. Furthermore, until the whole business of commercial sex work is addressed from the human rights perspective, it is also impossible who is voluntarily involved in this profession. Once girls/women in that profession are allowed to make their decisions, without anybody’s threat and intimidation, real victims of trafficking and voluntarily involved can be identified, which will make possible for victims’ to come out from that life and initiate legal action against perpetrators. Now the whole issues evoked emotion for some at the same time high stigmatization for others. This situation must end before any law to be effectively implemented.

\textsuperscript{400} AIR 1990 SC 1412.

\textsuperscript{401} In another more recent case, Supreme Court addressed women/girls in prostitution as “fallen women” many a times. From the reading of the whole of the 32 pages judgement, one can see that their understanding of this problem remain with full of prejudice against sex worker or victims of prostitution due to their work. See \textit{Gaurav Jain v Union of India} (1997) 8 SCC 114[hereinafter Gaurav Jain].
society had played no role of maintaining prostitution and blame should squarely have to be imposed over the victims.

Throughout this judgement, their contradictions have been manifested many times as they were struggling to maintain their humanity and cover their apathy towards this problem. For that matter they did not hesitate to observe that, “It is highly deplorable and heartrending to note that many poverty stricken children and girls in the prime of youth are taken to flesh market and forcibly pushed into the flesh trade”, but termed that act as “is being carried on in utter violation of all canons of morality, decency and dignity of humankind.”

Their reluctance to identify the nature of this problem is clearly manifested in the above statement. In the same statement, the judges find that victims of flesh trade are forcibly taken into the sex market for trading, which is, if taken simply, nothing but the selling and buying of the victim, but declare, on the other hand, that is not the violation of law but morality, decency and dignity of humankind. This underlines the height of misrepresentation of the facts and inconsistency. When the judges of the Supreme Court themselves violate constitutional and legal provisions by giving absolutely wrong interpretation of the facts directly related to law, then the victims or anyone on behalf of them can complain that injustice has been done against the victims of trafficking into prostitution. Instead of interpreting the business of trafficking and forced prostitution as a moral issue, the Court should have just followed the available laws and declared it was the violation of Article 23 of the Constitution and Sections 3,4,5,6,7 of IPTA and Sections 377, 376, 355 of the IPC.

The request of the petitioner in this case was clear and important and if Court had exercised it’s power and responsibility for the cause of justice for thousands of victims languishing in the brothels, it should have accepted petitioner’s request and ordered for CBI
inquiry, which would have brought the police complacency out and begun the end of impunity. Instead, Court found the issue was not worthy for CBI inquiry with unacceptable reason. It observed that, “in our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI throughout the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner.”

Furthermore, the petitioner had demanded the inquiry of the police involvement and involvement of law-breakers (pimps, traffickers, brothel owners). However, the court did not even mention actual role have been and should have been played by the police and gave wrong interpretation to the petition by analysing the petition as if it sought prosecution of victims of prostitution. This is clearly seen from its arguments. After refusing to have CBI inquiry, the Court states that, “this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout.”

The petitioner nowhere had sought punishment for victims but for those public servants, such as police, and other who were benefiting from this malignity. The judgement seems to have been written according to the whim and fancy of the judges as it contradicts in several places. Judges have accepted the violation of law but have refused to provide legal protection. The statement quoted above also accepts that many of “victims in prostitution are unwilling participants and involuntary victims.” When this has been the fact, it proves the procuring, inducing or taking women/girls for the sake of prostitution. Unwillingness and involuntariness are good enough to establish coercion and exploitation of others into
prostitution, a crime statutorily punishable for rigorous imprisonment from 7 years to life. In this case, the expected course of the Court was to follow this and other clear legal provisions against trafficking and prostitution by refraining from giving misleading interpretation of the petition, and passed the judgement to investigate against those who were responsible for keeping "unwilling and involuntary victims" in the prostitution, as it was demanded in the petition.

The refusal of the Supreme Court to accept violence suffered by the brothels inmates as worth to be investigated is clearly established in this case. Thus it highlights the deep sense of insensitivity and indifference of the judges towards the victims of one of the most apprehensive forms of contemporary slavery in India. Their attitude towards addressing the problem of trafficking and prostitution has defeated the existing statutory legal provisions, which may have sprouted from their individual feeling or judgement (deep sense of sexual morality) over the practice of prostitution. However, it is absolutely wrong from their part to bypass or disobey laws of the land for the shake of their individual sense of sexual morality.

At the end of this case, the Supreme Court ludicrously ordered every state government to constitute an Advisory Committee to give suggestions for the measures to be taken in eradicating the problems of prostitution. Instead of feeling the urgency of the matter and applying available laws in the hand, Court took such a veered way and helped to shrug

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402 See also In State of UP v Kaushaliya, 1964 (4) SCR 1002, when section 20 of SITA that provided extreme power to the magistrate to place restrictions on the movement and residence of sex workers or even order her deportation was challenged as unconstitutional, the five judges of Supreme Court dismissed that petition and made very harassing observation about them by calling them "dangerous to public health and morality."
off state governments from taking immediate responsibility for the prevention of sexual slavery in India.403

The Supreme Court's inconsistency and insensitivity can also be found in one of the earlier social interest litigation cases,404 started from the letter written by Upendra Baxi and Lotika Sarkar, both the then professors at Delhi University, to the then one of the Justice of Supreme Court of India Justice P.N.Bhagwati, enclosing a letter published in Indian Express, revealing a gusty and inhuman picture of Agra Protective Home (Home) established under SITA, earlier version of IPTA. The Court converted the letter into Writ petition and ordered the Superintendent of the Home to furnish the explanation of the appalling facts presented through the writ petition. The home supposed to be corrective and protective for those rescued or returned from the prostitution had been a hell house for the inmates, as the information given in that letter.405

The letter described that, "the average strength of the Home varies between 100-125. The building, a rented one, has two underground cellars about twelve feet by twelve feet. The rooms lack ventilation and drainage facilities. There is only one latrine with a flush. There is no bathroom and the kitchen is without wire gauze. The girls live like animals."406 The letter

403 The decision in Visal Jeet and other cases related to women/girls in prostitution is quite insensitive in contrast to landmark decision in Vishaka case (Vishaka v State of Rajasthan, (1997) 6 SCC AT 248-254) where the Supreme Court of India not only addressed the widespread concern of workplace sexual harassment when there was no specific law to prevent incidences of this nature, but also virtually legislated in the form of guideline to fill the vacuum left by the legislatures. In the Visal Jeet Court even refused to effectively apply the existing laws to prevent one of the most inhuman forms of slavery of our time, whereas in Vishaka the Supreme Court took aggressive steps to formulate law by citing international human rights law, recommendations from the treaty monitoring bodies, especially of the CEDAW, and resolutions of the Beijing Conference (1995). Such a dramatically opposite course of the court to address social crime suggest heavy influence of the personal attitude and belief of the judges to specify the priority and importance of the matter more than the impartial commitment of the court to prevent violence against all vulnerable classes of the society.


405 Letter of Dr. R.S. Sodi, "Home for the girls or Jail?" Indian Express (New Delhi: April 6 1981).

406 Ibid.
also disclosed that many of them were kept illegally. Many of them were chronically, physically and mentally, ill for many years but they were never given medical services. 407

From 1981 to 1997, the Supreme Court monitored this case and found many outrageous discrepancies in the functioning of the protective home but it never took any concrete decision to punish the culprit. In other words, apart from ordering to furnish reports 408 and giving tall orders, it did not give specific order to the state government to take action against those who have grossly abused their administrative power and kept the home in such a condition. Unnecessarily, thousands of copies of reports were sent to the Supreme Court, which have been buried under the dust of the Supreme Court record and victims were continually kept under inhuman condition and the actual conditions of the protective home have never improved. 409

If the orders of the court had not been taken up by the authorities seriously, it should have taken action against them for contempt of court or hold officially responsible for failing to obey the law, as under Article 141 of the Constitution, the order of the Supreme Court is law of the land. Instead of employing its constitutional authority to implement the law, suddenly in 1997, Supreme Court decided to transfer this case to National Human Rights Commission (NHRC) for the future monitoring and closed this case from the Supreme Court.

407 The panel of the doctors in their report to the Court pointed out that out of fifty inmates examined, twenty-one were suffering from extra-pulmonary tuberculosis, eleven were suffering from secondary syphilis, twenty from bacterial vaginitis, one from vaginal venereal warts, one from chancre, two from herpes genitalis, one from scabies and four from suspected syphilis. Many of them were below eighteen years.” As regards to the mental conditions of these inmates, “ten were found to be suffering from severe mental retardation, two from profound mental retardation, four from mild retardation, two from inadequate personality, three from mild anxiety, eight from moderate mental retardation, and four from borderline mental retardation.” See Protective Home, supra note 311 at 297.

408 The Supreme Court, itself, agreed on this point as it has observed in its 22 September 1997 decision that, “the facts beyond controversy indicate a total apathy on behalf of the State Government and the concerned authorities towards the continuing serious problems in the Agra Protective Home. Repeated directions of this court have also not received the consideration necessary from the concerned authorities. This situation is continuing ever since the commencement of these proceedings in the year 1981.” See Protective Home, supra note 311 at 308.

409 Ibid. at 295-310.
list. NHRC, a statutory body having only a recommendatory power cannot be compared with the supreme judiciary's authority and nothing much can be expected from the NHRC more than what was seen from the Supreme Court.⁴¹⁰

After the rapid growth of HIV/AIDS epidemic in India, girls/women working in prostitution has become scapegoats of state and society's failure to prevent this deadly disease. In 1996, a panic Bombay High Court issued a Suo Moto writ petition⁴¹¹ to rescue brothels inmates, triggered by an article in the India Express, which stated that there were 70,000 prostitutes in Bombay out of which 65% were HIV positive.⁴¹² Pursuant to a Court order, police raids were carried out in some brothels and 473 girls/women were rescued.⁴¹³ None of the brothel owners were arrested for their criminal offence of keeping these victims in prostitution. Without having drawn rehabilitation plan in advance, these victims were truck loaded and cramped in some institutions established for the destitute and orphans. These institutions neither prepared nor equipped to handle such a large number of people and expressed their disbelief and anger towards Court's arbitrariness. In addition to the inadequacy of food and shelter, compulsory HIV tests were carried out on them. According to the Court order, they were initially kept separately from other people living in those institutions. Due to the lack of any strategy for proper rehabilitation, 35 of them broke the window of the rescue home and returned to brothels. Remaining girls were either willingly or forcefully returned to their villages.⁴¹⁴

⁴¹⁰ See ibid at 310-311.
⁴¹¹ See People at Large, supra note 191.
⁴¹² Indian Express (India, Bombay: February 5 1996).
⁴¹³ 90% of these victims were children when they were trafficked into brothels, and among them 218 were Nepalese girls trafficked in Bombay, which is more than 4000 k.m. from their home. The Times of India (India, Bombay: March 11 1996); also see online: http://www.prerana.org/fag7.html at 5.
⁴¹⁴ Among 218 rescued Nepali girls, 124 were brought back to Nepal through NGOs initiatives and whereabouts of the remaining 94 of them is still unknown.
From all these accounts, it can be rightly argued that the Indian Judiciary has not seriously addressed the questions of constitutional and legal rights of victim trafficked into prostitution even it had some crucial opportunities to do so. It has largely ignored the crimes committed against the victims, and, more so remain spectators over governments emphasis to punish victims or sex workers for their work, without investigating whether they have been forced to undertake that profession. The deep prejudice and discriminatory attitude of the judges (even though they strongly denied that and wrote profoundly humanistic obiter in their judgement\textsuperscript{415}) against victims of prostitution\textsuperscript{416} must have prompted them to play indifferent role, which is one of the principal reasons for neglecting the rights of these victims for so long.\textsuperscript{417}

4. Conclusion

The above discussion has underlined the inadequacy of the Nepalese laws to address the various consequences of the trafficking in girls into prostitution. Its total neglect to address the violation of human rights of the victims and lacking any measures to provide remedies, including rehabilitation and necessary health services have increased the suffering of the victims. The inability of present anti-trafficking law to protect victims, who are also the principal witness in case a criminal investigation against perpetrators is initiated, and other witnesses from the intimidation and inadequate mechanism to conduct criminal investigation

\textsuperscript{415} See Gaurav Jain, supra note 401.

\textsuperscript{416} See e.g. State of UP v Kaushaliya (1964) 4 SCR 1002. In this case 5 judges bench of the Supreme Court upheld the constitutionality of section 20 of the SITA, which had given excessive power to the magistrate to arrest and punish sex workers without any warrant.

\textsuperscript{417} Prof. Upendra Baxi, an eminent jurist and scholar comes heavily against Indian judiciary for failing to address this problem by calling “Indian judicial creativity the lie of the land.” See Upendra Baxi, “From human rights to the right to be a woman”, in Amita Dhanda & Archana Parashar eds., Engendering Law (Lacknow, India: Eastern Book Company, 1999) 281, 275.
in trafficking cases need to be done away with effective law to protect witnesses as well as to conduct through and complete investigation.

In comparison to Nepalese law, India does have better legal provisions, which also includes proper rehabilitation of victims; however, in terms of implementation, India's record is worst than that of Nepal. There are many examples where courts in Nepal have decided cases relating to trafficking and many perpetrators have been imprisoned, which is, however, not known in case of India. Such a pervasive neglect of the state to enforce existing laws has worsened this problem. In addition to this, Indian anti-trafficking law has not addressed the protection of the human rights of victim and that must be given urgent attention by the authorities.

Finally, the narrow and compartmental approach of the judiciary are common feature in both the countries, which must be changed in order to have an aggressive legal engagement to eradicate the problem of trafficking in girls into prostitution, and to mitigate the suffering of the victims.
Chapter Four: International Law Against Trafficking

1 Introduction

The violation of individual’s human rights is one of the core concerns of the present day international law. The States Parties have made this dramatic change possible with their acceptance of individual as a subject of international law against the earlier concept of international law, under which states were the exclusive subjects. Loudly, in the modern time, the Charter of the United Nations declares such an acceptance in 1945. The UN is also the first international organization established by the countries of the world with one of its purposes to promote and protect human rights and fundamental freedoms of all people. Thus, the sovereign states of the world have begun to declare through the Charter of the UN that the issue of protection and promotion of human rights is an international concern, until then an exclusive subject of their domestic jurisdiction.

This process of international concern for human rights of individuals, which began from the Charter of UN has been followed by number of binding international agreements as well as non-binding declarations or resolutions adopted by the states through the United Nations and other international forums in the different areas of human rights. However, as one scholar has said, “the international law of human rights does not replace national institutions” but “parallels and supplements national law, superseding and supplying the

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419 See Introduction, supra note 103 at 7.
deficiencies of national constitutions and laws, and indeed depends on national institutions for the actual implementation of human rights norms.

As it has been discussed in the second and third chapters that the trafficking in Nepalese girls into prostitution widely violates the human rights of the victims, such as, but not limited to, their inherent right to life; right against torture or cruel, inhuman or degrading treatment; right against slavery and servitude; right to recognition as person before the law, which are also the non-derogable rights of every human beings in any circumstances. Such a violation is a direct result of the deficiencies and ineffectiveness of national laws to prevent trafficking and protect the rights of the victims.

Various International laws have specifically prohibited trafficking in girls into prostitution (this can be called as the right against trafficking into prostitution), have provisions for the protection of the victims, and guarantee remedies in case of the violation of this prohibition, which have been agreed and accepted by Nepal and India and pledged to give effect at the national level. In this chapter, I am arguing that international human rights law strictly prohibits trafficking in girls into prostitution and obliges States Parties to protect human rights of the victims and provide adequate remedies, including health services and compensation to them. For the same, I am arguing how both countries have duties to fulfil under the international law according to their commitment, which if not followed would incur the state responsibilities under the international law. If, as my thesis argues, international law against trafficking in girls into prostitution is followed by Nepal and India by effectively implementing at national level, the extent of this problem and the suffering of victims would be drastically reduced.

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420 Ibid.  
421 Supporting and elaboration of this thesis is the main concern of this chapter.
Besides introduction, I have divided this chapter into five parts. In the first part, I have briefly discussed the theory of state responsibility under the international law where the focus is given to the state responsibility to be incurred against the states parties from the international human rights treaty obligations. The following three parts are also closely related to the first part where the discussions are focused around the duties of the States Parties (Nepal and India) to prevent and punish perpetrators, protect the human rights of the victims, and provide remedies to the victims of trafficking into prostitution under the international human rights agreements. Finally, the discussion of the last part focuses on some important recent developments taking place at the global and regional level to prevent trafficking in persons, particularly against women and children.

2. Responsibility of the state under the international human rights law

On acceptance of the international human rights instruments, States Parties promise before the international community to give effect to the provisions of these instruments in domestic jurisdiction. Obligations arising from the international treaties are the binding obligations created by the agreement between the States Parties to the instrument.\(^{422}\) For example, Article 2 of the ICCPR creates obligations upon the States Parties with regard to the domestic application of all rights declared in the Covenant. The obligations ranges from the obligation to respect and to ensure these rights; the prohibition of discrimination; the obligation to take

legislative and other measures of implementation; and the right to an effective remedy, including judicial remedy, for violations of the Covenant.\textsuperscript{423}

As Louis Henkin argues, "international human rights obligations are met when, and only when, national laws and institutions meet the minimum international standards and give effect to the minimum human rights."\textsuperscript{424} The doctrine of state responsibility comes into play in a situation where a state does not meet these minimum standards for the effective implementation of human rights, or acts or omits to act against the norms of the binding international law.\textsuperscript{425}

The obligations of the state under the international law can also be traced from the customary international law.\textsuperscript{426} However, a state cannot be held accountable or responsible under a treaty law unless it has ratified that treaty without any reservation to the contested provision. Nevertheless, every state is obliged to honour the norms of customary international law because they are the pre-emptory norms (\textit{jus cogens}) of the international law, which should not be abrogated or violated under any circumstances.\textsuperscript{427} In the area of human rights, rights such as inherent right to life; right against torture or cruel, inhuman or degrading treatment or punishment; and right against slavery or servitude are regarded as \textit{jus cogens}\textsuperscript{428} and any state can be held responsible in case of breach of these norms within its jurisdiction.\textsuperscript{429}

\textsuperscript{423} See e.g. CCPR Commentary, \textit{supra} note 115 at 27-28.
\textsuperscript{422} See Introduction, \textit{supra} note 103 at 14.
\textsuperscript{425} See generally Violence Against Women, \textit{supra} note 13 at Para. 50, 51, 52, 53; State Responsibility, \textit{supra} note 418 at 142, 143, 147; State Responsibility and Individual, \textit{supra} note 422 at 231; Responsibility of States, \textit{supra} note 422 at 362, 362-372.
\textsuperscript{426} See State Responsibility, \textit{supra} note 418 at 142-146; International law, \textit{supra} note 418 at 683-686; Cases and material on International law, \textit{supra} note 418 at 697-699.
\textsuperscript{427} See CCPR Commentary, \textit{supra} note 115 at 105; Slavery, \textit{supra} note 136.
\textsuperscript{428} See e.g. Jochen Abr. Frowein, "Jus Cogens" (1984) 7 Encyclopedia of Public International law 327-330; ICCPR Commentary, \textit{ibid}.
\textsuperscript{429} See ICCPR, \textit{supra} note 34 at article 2 & 3.
Thus, when a state signs and ratifies a particular treaty, and later violates the provision of that treaty, its act creates responsibility for which, it can be held answerable before the international body, or in some case before the domestic court, if under the municipal legal provision, that treaty has legal sanctity as municipal law. For example, in Nepal, under Section 9 of the Treaties Act 1990, any international treaty acceded to or ratified by Nepal has overriding power, in case it conflicts with any domestic law, except constitution. Thus, every international agreements accepted by Nepal by way of ratification or accession are the part of Nepalese domestic law, and any individual in Nepal can hold the government accountable if it violates the rights provided under those international instruments.

India and Nepal are parties to many human rights treaties, including Trafficking Convention, CRC, ICCPR, and the Women's Convention where trafficking in girls/women into prostitution or for slavery like practices is strictly prohibited. However, as has been discussed before, Human Rights Watch/Asia and many other NGOs have directly charged that police from both the countries are actively involved in transportation of victims to the brothels, and protection of traffickers. Such an allegation with factual proof can hold both states responsible for violating the international law by not protecting the human rights of the trafficked victims and punishing perpetrators as well as those state officials complicit with the crime. The act of the agents of the state has been considered as the act of the state, unless state acts to punish those acting against the wish of the state.

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430 See generally Trafficking in Women, supra note 10 at 345-346.
431 Discussion of these Conventions is found at infra at 125-135.
432 See Trafficking of Nepali Girls, supra note 2 at 44-55; detail discussion of this topic is found at page 27-28, above.
433 See generally Giuseppe Sperduti, "Responsibility of States for Activities of Private Law Persons" (1987) 10 Encyclopædia of Public International Law 373, 373-375; State Responsibility, supra note 418 at 142-143.
2.1. Preventing trafficking and punishing traffickers

There are many international agreements preventing trafficking in girls/women into prostitution. The first such international convention on trafficking was the International Convention for the Suppression of White Slave Traffic 1910. This was followed by the International Convention for the Suppression of the Traffic in Women and Children 1921, and the International Convention on the Suppression of the Traffic in Women of Full Age 1933. However, all these international laws had limited target and purposes (that is also reflected from the title of these Conventions) inadequate to address the prevalent problem of trafficking into prostitution. The UN studied this situation and the General Assembly of the UN adopted the Trafficking Convention on 21 March 1950. This Convention has been regarded as the first consolidated anti-trafficking into prostitution Convention of the world.434

The Trafficking Convention435 declares in its preamble that the "prostitution and the accompanying evil of traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family, and the community." The purpose of this Convention is to punish any person who engages in the trafficking and procurement or any other activities related to the prostitution, irrespective of the victim's age or consent.436 One scholar has rightly commented on this Convention by observing that the considering the time of the commencement of the Convention (1950), the most remarkable achievement is the acceptance by the world

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434 See Redirecting the Debate, supra note 10 at 75.
435 Trafficking Convention, supra note 12
436 Ibid. at art. 1(1).
community, for the first time, trafficking into prostitution as an international matter, contrary to its being under domestic jurisdiction.  

The other activities prohibited under the Convention are renting the house for prostitution, keeping, managing or financing brothel, and exploiting the victims of prostitution. Beside these, the state parties are required to repeal or abolish any existing law and regulation designed for the registration or supervision or notification of people engaged in prostitution. It further requires states parties to undertake publicity campaign around the border cities of the danger of trafficking for making aware the likely victims or other people of the danger of trafficking for prostitution. This is an important provision of the Trafficking Convention, which remains only on paper and has not been implemented to prevent trafficking of Nepalese girls into prostitution in India. If effectively implemented by them, it would largely help the likely victims to realize or understand whether they are likely to be trafficked into prostitution and make them aware about the danger it could pose in their life. It would also educate the general public, which would help them to participate in a campaign to apprehend perpetrators, thus reducing the number of victims of trafficking into prostitution.

\[437\] However, the Trafficking Convention has been criticized for its narrow definition of trafficking. The criticism centres around the fact that there are many other features of trafficking in addition to forced prostitution, which it has not covered. But the criticism seems to have gone little too far so far as the purpose of the convention is concerned. The name and the purposes outlined in Art. 1 of the Convention has clearly set its area. It is designed to prevent trafficking for the forced prostitution and punishes all those involved in this offence. Though trafficking in persons has many different forms, trafficking for forced prostitution remains widespread, severely destroying life of many innocent victims. It is interesting to note that even the Convention enacted in 1950 has not been fully implemented according to the letter and spirit of the Convention yet. The present Convention can be an effective tool, if an optional protocol is added to the Convention for establishing a treaty monitoring body and other provisions similar to that of ICCPR. If states parties, such as Nepal and India could be examined before a committee over their handling of problem and the preventive and rehabilitative measures they have taken, the present miserable situation would certainly have changed. See Redirecting the Debate, supra note 10 at 75; Violence Against Women, supra note 13 at Para 22; Trafficking in Women, supra note 10 at 356-357.  

\[438\] See Trafficking Convention, supra note 12 at article 2.  

\[439\] Ibid. at article 6.  

\[440\] Ibid. at article 17.
Article 8 of the Trafficking Convention makes the offences referred in the Convention extraditable and both Nepal and India have agreed to punish or extradite offenders, exchange information, and help each other to prevent the offences from taking place. Even though many perpetrators (according to victims’ statement, many of the present madams and babus [brothels owner] in Bombay and Calcutta are Nepali men and women of Nepalese trafficked victims into prostitution are living in India, both the countries have conspicuously refused to implement this clause of the Trafficking Convention, thus have violated their own commitment. If they effectively implement this clause and perpetrators are extradited and held accountable for the inhuman criminal act with stringent punishment as prescribed under the Nepalese law (as Nepalese anti-trafficking law also has extraterritorial effect) it would have strong deterrent effect over the future happening of this offence. However, until today, both the governments have refused to implement this provision, which they are obliged according to their commitment. More strangely, the Government of Nepal has not tried to make use of this provision and bring this issue with government of India, even when there is sufficient evidence to identify many of the brothel owners as Nepali nationals.

The other important international agreements requiring States Parties to prevent trafficking in girls into prostitution are CRC, ICCPR and Women’s Convention. CRC has addressed various aspects of sexual exploitation of girl child and requires States Parties to prevent them. It contains several specific provisions targeted to eradicate trafficking in girl children for prostitution and other abuses related to them. Under Article 34 of CRC, states parties "undertake to protect the child from all forms of sexual exploitation and sexual...

\footnote{This undoubtedly proves that the aim of this Convention is to abolish any or every forms of trafficking related to the prostitution.} \footnote{Ibid. at 24, 59-61; See, Rucika Gupta, "Children for Sell", The Asia Week (March 9 1996) 38-43.}
abuse." In order to achieve this, they "shall in particular take all appropriate national, bilateral, and multi-lateral measures to prevent:

i) the inducement or coercion of a child to engage in any unlawful sexual activity;

ii) the exploitative use of children in prostitution or other unlawful sexual practices;

iii) the exploitative use of children in pornographic performance and materials."

Under Article 35 of CRC, states parties "shall take all appropriate measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

At present, these Articles contain the most comprehensive international legal provisions committed by the states parties to prevent every form of child prostitution, sale or traffic of children, child pornography, child sexual exploitation, or other unlawful sexual practices.443 The use of strong and mandatory words, such as "shall take all appropriate measures", in these Articles underscore the States obligations to prevent child trafficking into prostitution and all other sexual exploitation and punish perpetrators of such acts. These provisions also underline the concrete demand for the substantive action from the States Parties to eliminate all sexual abuses against children.

However, these crucial provisions of the international human rights agreement prohibiting trafficking in girls into prostitution have been completely ineffective due to the omission of states parties to implement them. Empirical evidence supporting this statement can hold both the states responsible for failing to fulfill the obligations they have

443 The enforcement mechanism of CRC is better than that of the Trafficking Convention. It has treaty-monitoring committee, which receives reports from the states parties, the first report within two years of entry into force of the CRC for that state and every five years thereafter. The non-availability of the complaint procedure under CRC and under the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography,443 is the major hurdle for its full effectiveness. However, reporting mechanism at least has brought the domestic implementation of CRC before the international body, which embarrasses the state that do not comply with the provisions of the Convention, and compels it to make some progress in accordance with the CRC before it faces the committee next time. This Optional Protocol is adopted by the General Assembly on 25 May 2000. See online: UNICEF http://www.unicef.org/crc/oppro.htm.
undertaken under CRC. As mentioned before, under Article 34 of CRC, both the countries have undertaken to protect children from all forms of sexual exploitation and sexual abuse, and under Article 35, they are committed under the Convention to take all national and bilateral measures to prevent inducement, or coercion of a child to engage in any unlawful sexual activity, and exploitative use of children in prostitution. As discussed earlier, they have failed on all these accounts. Girl children, some as young as 10 to 14 years, have been trafficked from Nepal into brothels in Bombay. Nepal has repeatedly violated CRC by not taking sufficient measures to stop girl children from being trafficked into prostitution in India, whereas India has done the same by not preventing thousands of brothels from sexually exploiting these victims and punishing the perpetrators of this offence.

Furthermore, even though the problem of Nepalese girls trafficking into prostitution in brothels in India has been reported for many years, the government of Nepal has not taken any specific socio-legal measures to address this problem. In Nepal, the neglect in effectively undertaking measures to make birth registration compulsory has provided the room for traffickers and brothel-owners to dispute and compromise the age of the victims. Even if a case is started against those perpetrators, the dispute over the age of a victim protects them from child trafficking and prostitution, and makes them able to get away with minimum punishment. Nepal has not taken this responsibility seriously for too long and its omission violates Article 7 of the CRC.

444 See generally State Responsibility, supra note 418 at 147-148.
445 See Chapter Two and Three, above.
446 See Trafficking of Nepali Girls, supra note 2 at 13.
447 See ibid. at 1,2,13,14,23-17.
448 See ibid. 44-45.
The Committee on Rights of Child has made some serious observations when Nepal presented its first report before the Committee in 1996.\footnote{CRC "Concluding Observation on Nepal", Committee on the Rights of Child CRC/C/15/ADD.57 (Twelfth Session 1996).} It has observed very closely the government report and expressed its dissatisfaction over many issues on which the CRC requires the government of Nepal, as a party to the Convention, to take effective measures in order to prevent trafficking in girl children. The Committee expressed its concern "at the insufficient attention paid to systematic and comprehensive data collection, identification of appropriate indicators in relation to children victims of sale, trafficking and prostitution..."\footnote{Ibid. at Para. 14.}

ICCPR prohibits all forms of slavery, servitude and forced labour.\footnote{ICCPR, supra note 34 at arts. 8(2), 8(3)(a).} It declares, "no one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited."\footnote{Ibid. at art.8(1).}

The HRC, in its Concluding Comments on Macau in 1997,\footnote{See CRC "Concluding Comments on Macau," U.N. Doc. CCPR/C/Add. 77 (1997).} declared trafficking into prostitution as an egregious form of violation of this provision. The Committee expressed its concern over the reported large number of women trafficked into Macau from the different countries for the purpose of prostitution and inaction of authorities to prevent this from happening and punish every perpetrator involved. The Committee concluded that these inactions on the part of government of Macau violate Article 8 of the ICCPR. This observation of the HRC can be drawn into the context of Nepalese girls trafficked into brothels in India and inaction of governments of Nepal and India to prevent this from happening.

The Committee recommended the government of Macau to “initiate or strengthen programmes aimed at providing assistance to women in difficult circumstances, particularly..."
those coming from the other countries who are brought into Macau for the purpose of prostitution. Strong measures should be taken to prevent this form of trafficking and to impose sanctions on those who exploit women in this way.” Similarly, in Concluding Comments on Brazil over the duty under Article 8, the Committee found it imperative that “persons who are responsible for, or who directly profit from, forced labour, child labour and child prostitution, be severely punished under the law.” These recommendations of the Committee in the form of interpretation of Article 8 of Covenant are particularly obligatory for India as it is the principal receiving country of Nepalese victims trafficked into prostitution and it has the duty to prevent the inflow of ever increasing number of these victims brought into its territory for the purpose of prostitution, by effectively punishing traffickers, pimps, brothel owners and others who are benefiting from this human trade. It must also fulfill its duty by providing necessary assistance to the innocent Nepalese victims in difficult circumstances in an unknown land.

ICCPR also protects individual from the arbitrary arrest and guarantees the right to liberty and security of person. The provision under Article 2 is the most significant provision of the ICCPR. As it has been discussed before, Article 2 does not limit its targets to an active State’s involvement to prevent the violation of rights but it holds them responsible for not fulfilling their obligation, if they don’t exercise due diligence to protect the rights guaranteed by the Covenant. In the present case, if States Parties fail to exercise their due diligence to end trafficking in girls into prostitution, a contemporary form of slavery or violation of Article 8 as interpreted by the HRC Committee, they can be held liable under the

455 Ibid. at art.9(1).
ICCPR. For example, it can be argued that the lack of implementation of the existing laws relating to trafficking discussed in the Chapter Three can satisfy the lack of due diligence of the States Parties to prevent trafficking in girls into prostitution and States can be held responsible for such failure.

The neglect by the mainstream international human rights bodies to address specific concerns of women/girls has led to the demand of the separate human rights instrument for effective handling of the women’s concern globally. The growing demand was materialized in 1979 and new Convention was promulgated to eliminate all and every forms of violence, discrimination, exploitation, and subordination of women of all age. It has a specific provision dealing with trafficking of women and girls including the exploitation of prostitution of women. Art. 6 of the Convention contains the commitment of the States Parties on this regard and says that they "shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." This provision not only requires States Parties to prevent trafficking in women into prostitution, which certainly includes girl children, but also to take all measures to suppress all forms of this practice. By ratifying to the Women’s Convention, Nepal and India have committed themselves to take all legal and other measures to prevent all forms of trafficking in women/girls into prostitution and punish perpetrators of this offence.457

457 However, there are some scholars who have criticized the Women’s Convention for having less strong provision against the crime of trafficking in women/girls into prostitution. They claim that the only provision, Article 6, addressing this violence against women/girls has given a considerable area of manoeuvring to the states parties to neglect this provision because of the use of unspecific word like "appropriate" in the text. What constitutes appropriate measure is very much time and country specific and highly contestable, allowing states to get away with nothing or limited act. Trafficking in women/girls for prostitution is the serious and flagrant violation of human rights of the victims. Women's Convention should have addressed this issue with detail and specific provisions to create an international momentum to eradicate such a blatant violation of the basic human rights of thousands of women and girls in the world, but it has failed to do so. See generally Susan Teanne Toepfer, Bryan Stuart Wells, "The World wide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding in Women"(1994) 2 Michigan Journal of Gender and Law 83, 101; But see Trafficking
However, despite the various commitments, trafficking in Nepalese girls into prostitution in India continues and that has triggered the violation of many human rights of the victims as has been discussed in Chapter Two of this thesis. Duty to punish the perpetrators of any crime is imperative to prevent the continuation of that crime in future. However, in this case, India has totally failed to punish perpetrators and prevent thousands of illegal and inhuman brothels running in its territory, where Nepalese girl children are forced to live as prostitutes for many years, thus, has severely violated the provisions of international human rights laws. It is reported that only in Bombay, there are more than 50,000 brothels, where apart from 567, none have ever been searched by the police.\footnote{458} Hundreds of Nepali victims have returned to Nepal after their childhood and best days of their lives being robbed in brothels in India, revealing their true stories of the atrocities and violence endured by them, are enough evidence to hold the Indian Government responsible\footnote{459} for allowing their human rights to be violated, by not stopping those illegal brothels. It is because of the clear complicity of the state agents with traffickers and brothels owners that these illegal centres for sexual slavery are continuing. It is the duty of the state to implement the law of the land, and follow the international law to which it has committed to give

\footnote{458}{See generally Violence Against Women, supra note 13 at Para. 50; State Responsibility, supra note 418 at 147-152.}
effects. The Government of India has completely failed to oblige by law, thus, is responsible for the violation of human rights of thousands of victims.

Furthermore, Nepal and India share open border and people from both sides enjoy some privileges in each other country under the Peace and Friendship Treaty of 1950. Nepalese citizens do not require visa to enter and stay in India. The situation here is completely different than that of the Burmese trafficked victims in Thailand or Thai victims in Japan, where they can be charged for violating the host country's immigration law and face deportation. Contrary to these situations, Nepalese victims of trafficking have a right to remain in India as long as they want and can provide the first hand information and evidences against those who have tortured and violated their rights, if Government of India decides to address the problem of trafficking in Nepalese girl children into prostitution in India seriously. However, specific crimes committed against them have never been investigated as required under the Indian domestic laws, and the international laws accepted by India.

When the Indian states (Federal and States Governments) make little or no effort to stop slavery like practices, such as forced confinement, rape, physical assault, forced labour, selling and buying little girls in open markets for sexual slavery, it tacitly condones these violence. This complicity transforms, even if the whole conduct is private act, into a constructive act of the state. However, in the cases of Nepalese girls trafficked into the sexual slavery in brothels in India, there is a compelling evidence of the direct police

\footnote{Nepal India Treaty, ibid. note 78 at art. 7.}
\footnote{See Global Reports on Women, ibid. note 25 at 218-220; Owed Justice, ibid. note 25 at 117-140.}
\footnote{Under the Article 7 of the 1950 treaty, no Nepali can be deported from India for lack of visa, see Nepal India treaty, ibid. note 78.}
\footnote{See Trafficking of Nepali Girls, ibid. note 2 at 78-79.}
\footnote{The discussion of the Conventions ratified by India is found at ibid. note 12, 34, 35.}
\footnote{See generally State Responsibility, ibid. note 418 at 142-144; Trafficking in Women, ibid. note 10 at 345.}
involvement enough to hold states responsible. State cannot ignore its responsibility by claiming that violence was not committed in police custody. Its persistent denial of active role to discharge duty imposed by international law and its own domestic law proves its complicity. The lack of due diligence, and wilful and gross negligence to implement the law, and allowing widespread violation of the norms under the customary and treaty international law, such as, right to life, liberty and security of a person; right against torture, inhuman and degrading treatment; right against slavery and servitude establish strong evidence of state responsibility. Therefore, both Nepal and India must avoid this situation by giving effects to the international law at domestic level and prevent trafficking in Nepalese girls into prostitution in India.

2.2 Protecting human rights of the victims

The successful discharge of the duty to prevent violation of human rights by the State is one of the essential ingredients of the successful fulfillment of the duty to protect human rights. Duty to protect human rights of every individual, living within a State’s territory, has been recognized by almost all international human rights agreements. States have agreed to provide such a protection through national, regional, and international co-operation. Accordingly, being a party to various international human rights agreements, and resolutions or declarations, Nepal and India have committed to protect the human rights of every individual, through every possible means, which includes the Nepalese victims trafficked into prostitution in India.

The impressive growth of international human rights law in last fifty years has extensively developed norms of formal protection of the rights of girls/women under

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See Trafficking of Nepali Girls, supra note 2 at 44-46.
mainstream as well as specific human rights regimes.467 Such an obligation of States Parties to protect rights of individuals, in general to everyone, is unambiguously laid down by Article 2 of the ICCPR. The principal feature of the obligation of States Parties is declared under the Article 2 (1) of the ICCPR, under which "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Accordingly, after ratifying this Covenant, Nepal and India have assumed obligation to 'respect' and to 'ensure' the incorporated rights in the Covenant to all individuals within their territory and subject to their jurisdiction without any discrimination of any kind.468 The obligations specified by Article 2(1) indicate negative as well as positive duties of the States Parties. The duty to respect underlines the negative character of the obligation in regard to the Covenant's civil and political rights, whereas duty to ensure them oblige States Parties to take positive steps to give effect to the rights.469 For example, right against slavery and servitude is one of the non-derogable rights guaranteed by the ICCPR and, therefore, both countries are under the obligation to respect and ensure this right of everyone within their territory and subject to their jurisdiction, which for the present context would be to prevent Nepalese girls from being trafficked into prostitution, a recognized contemporary form of

469 See extensive discussion on the obligations under Article 2 of the ICCPR, CCPR Commentary, supra note 115 at 27-47.
slavery, and protect those victim already trafficked into prostitution from being compelled to live under the slavery like conditions. As has been discussed before, the lack of protection of right against slavery and servitude of the Nepalese victims trafficked into prostitution has widely escalated the violation of many other human rights, many of which are also non-derogable.470

The obligations under Article 2(1) are wider as the Article requires the State Party to respect and ensure rights not only of those who are within its territory but also of those who are subject to its jurisdiction. For example, in the present case, duty to respect and ensure the rights of Nepalese victims living in India may not be the obligation of Nepal but solely of India, as they are not considered living within the territory of Nepal. The obligation of India to respect and ensure the rights of these victims is complete and paramount as they are illegally kept in its territory and inflicted the massive violation of human rights. However, Article 2(1) has also imposed obligation to Nepal as these victims are subject to its jurisdiction because of their being the citizens of Nepal.471 Therefore, the protection of their rights guaranteed by the ICCPR is the simultaneous obligation of India as well as of Nepal.

One scholar argues that the significant aspect of the provision under Article 2 of ICCPR is that it does not limit its targets to active state involvement but it holds them responsible for violating their obligation if they don't exercise due diligence to protect the rights guaranteed by the Covenant.472 In other words, if Nepal and India continuously fail to exercise their due diligence to end trafficking in girls into prostitution and protect their rights to be free from slavery and servitude, they can be held liable under the ICCPR.

\[^{470}\text{For more discussion on this point see Chapter Two of this thesis, above.}\]
\[^{471}\text{See generally Obligations under ICCPR, supra note 468 at 73-75.}\]
\[^{472}\text{Ibid. at art. 2; See specially Stephanie Farrior, "The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential (1997)10 Harvard Human Rights Journal 213, 225-226.}\]
Besides ICCPR, the rights of the girl child is more firmly guaranteed under the CRC, which has explicitly forbidden every form of child sexual abuses, including prostitution, sexual exploitation, and child pornography. The CRC is very important to the present paper, since the target victims of trafficking addressed in this paper are mostly under the age of 18 years.\textsuperscript{473} The adoption and acceptance of CRC marks the important event in the history of the international human rights law, because within ten years of its promulgation 191 countries in the world, except U.S.A. and Somalia, have ratified it.\textsuperscript{474} Such enthusiasm has never been seen in case of other conventions. The universal acceptance of CRC sends a strong message of the world community to protect children from any harm and promote their best interest. The obligations to protect the rights of the children accepted by the States Parties are firm and specific. Similar to ICCPR, under Article 2(1) of the CRC, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." Under Article 2(2), they "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination."

Besides the protection of right against trafficking in children into prostitution, with acceptance of CRC, States Parties have undertaken to ensure many other rights of girl child, such as inherent right to life; right to non-discrimination on the ground of sex, disability and other status; right against torture or other cruel, inhuman or degrading treatment; right to

\textsuperscript{473} CRC, \textit{supra} note 35 at art. 1. It reads, "A child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier."

\textsuperscript{474} See online: UNICEF \url{http://www.unicef.org/crc/convention.htm}.
enjoyment of the highest attainable standard of health; right to private and family life; and right to education.

All provisions in CRC are very important commitments of the states parties for giving every child fullest opportunities to live a healthy, purposeful and happy life. There are many other Articles under CRC creating obligations for the states parties to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse; to protect children from economic exploitation and from performing any work that is likely to be hazardous or interfere with child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development; and to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

However, many of the obligations of CRC have not been respected and the Governments of Nepal and India have not ensured the rights guaranteed under it to their girl children. The unfortunate outcome of which has been the massive increase of the trafficking problem and exploitation associated with it. For example, Nepal has violated many provisions of CRC by deliberately neglecting the socio-economic and legal rights of girl children, detrimental to their subordinated position which has contributed a lot to the ever increasing problem of trafficking in Nepalese girls into prostitution. They are neglected in education, which is a violation of Articles 28 and 29 of the CRC. Inequality in their development at rural level, where most of trafficked victims come from, has violated Article

475 CRC, supra note 35 at art. 19.
476 Ibid. art. 32.
477 Ibid. art. 39.
4 of CRC. Poverty leading in discrimination in food and health has violated girl children's inherent right to life guaranteed under Article 6(1) of the CRC, and, therefore, Nepal is obliged to ensure to the maximum extent, the survival and development of the girl child. Girls do not enjoy right to inheritance of property at par with boys under the present domestic law, violating Article 2(1) and 2(2) of CRC. Thus, the neglect and, consequently denial of Nepal to abide by its commitment under CRC creates responsibility under the international law.

On the other hand, India has deliberately violated right to equality and non-discrimination of Nepalese victims trafficked into many brothels in its territory by denying them protection as they are entitled to get under the CRC and other international human rights law. For example, as it has been discussed before, when a large number of Nepalese girls were rescued from the brothels, their cases were handled under the Indian Juvenile Justice Act, 1996, and considered as if they were voluntarily involved in prostitution. There was no investigation conducted to find how such a large number of Nepalese girls, 3000 k.m. away from there home to a foreign land, reached to the brothels and what kinds of crimes were committed against them. For five months, these victims were kept in remand at a government home, in conditions, many complained worst than in that of brothels. They were cramped in one big hall, food was never enough and no health services were provided to them, which violates their inherent right to life explicitly protected by the CRC and ICCPR. Some died due to HIV/AIDS and other unknown diseases, and some fled or returned.

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476 This legal discrimination also specifically violates Articles 2(f), 13(a) of the Women's Convention.
477 More discussion is found, above, at 51-52.
478 Agro forestry Basic Health and Cooperative (ABC)/Nepal, Nepal Farkiayaka Cheliharu Bare Bivinna Pakchhayako Dristikona Abaum Gairsarkari Sasthaharuko Prayash (Report on girls who have returned to their home, different views and NGOs efforts for the same) (Kathmandu: ABC/Nepal, 1999) 5-10
479 Matti Farkiayaka, supra note 7 at 21-30.
480 Ibid; Chalibati, supra note 2 at 7.
into the brothels because of no alternatives. All these constitute a violation of legal provisions under the CRC and many other human rights agreements, which are not adequately protected by the States as required by these international laws.

The rights available under CRC are specifically protected for the children under the age of 18 years according to the age limit of the child stated in Article 1 of the CRC. The available data on the Nepalese girls trafficked into prostitution has shown most of these girls were under the age of 18 years at the time of trafficking. However, by the time they were rescued or escaped or thrown out from the brothels, many of them may have crossed that age and no more remained eligible to demand protection under the CRC. In such a situation, apart from the ICCPR, they are protected under the Women’s Convention. In fact, rights guaranteed under the Women’s Convention are for all female population irrespective of their age, as this Convention does not exclude girl children or adolescent girl from its protection.

The Women’s Convention has prohibited any and every forms of discrimination against women. Article 1 of the Convention defines ‘discrimination against women’ “shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms…” The widespread occurrence of the violence against women reported all over the world has been interpreted by CEDAW as gender-discrimination and, thus, satisfies the characteristics of discrimination outlined in Article 1 of the Convention. CEDAW, under General Recommendation 19, states, “the definition of discrimination includes gender-based violence that is directed against a woman because she is a woman or

483 Health Implications, supra note 131 at 11 of 12.
484 For this point, discussion is found, above, at 126-129.
that affects women disproportionately. It includes acts that inflict physical, mental or sexual
harm or suffering, threats of such acts, coercion and other deprivations of liberty.\textsuperscript{485}

This interpretation of the definition of Article 1 of the Convention perfectly embodies
the characters of violence suffered by the Nepalese victims trafficked into prostitution in
India, such as severe infliction of physical, mental or sexual harm or suffering, coercion and
other deprivations of liberty. Furthermore, the practice of trafficking into prostitution from
Nepal to India is typically a gender-based violence because there has not been any reported
incident of man being trafficked for this purpose and all individuals trafficked into
prostitution have been exclusively women/girls. This gender-based violence, which is also
known for slavery like practices, has nullified and impaired the enjoyment by the victims of
human rights and fundamental freedom under general international law or under human
rights conventions, which, according to CEDAW, is discrimination within the meaning of
Article 1 of the Convention.\textsuperscript{486}

Through Article 2 of the Women’s Convention, States Parties condemn
discrimination in all its forms and agree to pursue by all appropriate means and without delay
a policy of eliminating discrimination against women perpetuated by any person,
organization or enterprise.\textsuperscript{487} Under Article 6 of the Women’s Convention, States Parties are
required to take all appropriate measures to suppress all forms of traffic in women and
exploitation of prostitution of women.\textsuperscript{488} While interpreting Article 6 of the Women’s
Convention, CEDAW has noted that poverty, unemployment, wars, and armed conflicts have
led to increased opportunities for trafficking in women. It has stated that these practices are

\textsuperscript{485} CEDAW Committee, General Recommendation No 19 U.N. Doc. A/47/38
\textsuperscript{486} See \textit{Ibid.} Para 7.
\textsuperscript{487} \textit{Ibid.} Para 7.
\textsuperscript{488} \textit{Ibid.} 2(e).
\textsuperscript{489} \textit{Ibid.} at Para 13.
incompatible with the equal enjoyment of rights by women and with the respect for their rights and dignity.\textsuperscript{489}

Beside these binding obligations of the States Parties through the international treaty laws, in recent times violence against girls/women has also received important attention at international level through various international conferences, declarations and resolutions where States Participants have reaffirmed their commitments and pledged to eliminate every forms of violence against women. The long failure of the international community to adequately address the concerns of girls/women was the central point at the 1993 World Conference on Human Rights in Vienna. This was, for the first time, acknowledged by the international community that, even though human rights for all and right to equality and non-discrimination on any grounds has been the core concept of international human rights law, international law and mechanisms established to promote and protect human rights had not adequately cared for the concerns of half of the world’s population, the women. Therefore, the Conference declared that the human rights of women to be “an inalienable, integral and indivisible part of human rights.”\textsuperscript{490} It also directly addressed the issue of violence against women and referred specifically to sexual harassment, exploitation, and trafficking.\textsuperscript{491}

The unambiguous and bold declaration of Vienna in 1993 that human rights of women to be an inalienable, integral and indivisible part of human rights has been further consolidated by the subsequent international conferences where States Parties have committed themselves to protect the human rights of women/girls, giving particular attention to the vulnerable sections of the society. The Conference on Population and Development at

\textsuperscript{489} Ibid.
\textsuperscript{491} See \textit{ibid}, at Part I Para. 18 & Part II Para 38.
Cairo in 1994 has emphasized on gender equality and the human rights of women and made specific references to the need to prevent all international trafficking, especially for the purpose of prostitution.\footnote{See Report of the International Conference on Population and Development, U.N. Doc. A/Conf. 171/13, (1994) at Para 10.16.} The participants in Cairo (including Nepal and India) accepted the need for legal regulation in both sending and receiving countries to prevent human rights abuses and exploitation of the victims. Very importantly, the Programme of Action from that Conference emphasizes the need for governments to support education program to counter trafficking, sexual abuse, exploitation, and violence, to develop procedures that will encourage victims to report violations, and to ensure that adequate protective laws are enacted and enforced.\footnote{\textit{Ibid.} at Para. 7-39.}

The following year, at the World Summit for Social Development, States, including Nepal and India, further committed themselves to intensifying and coordinating international support for the protection of all women and children “especially against exploitation, trafficking and harmful practice”\footnote{Report of the World Summit on Social Development, U.N. Doc. A/Conf. 166/9 (1995) at Para. Y of Commitment 6 of the Declaration on the Summit).} and through the Programme of Action attached to this Declaration, States have agreed to strengthen international co-operation to combat “trafficking in women, adolescents, children…. and other activities contrary to human rights and human dignity.”\footnote{\textit{Ibid.} at International Programme of Action Para. 17(b).}

In the same year, States have again reaffirmed their commitment to protect human rights of women/girls at the Fourth World Conference of Women held in Beijing. Through the Beijing Platform of Action, declared at the end of the Conference, States have accepted the task to address trafficking and prostitution, with particular reference to the violence
inherent in these practices, and set out a comprehensive list of actions to be taken by them to
dress the root causes of these violations and help victims.\textsuperscript{496} Such actions to be taken by
the governments include "strengthening existing legislation with a view to providing better
protection of the rights of women and girls and to punishing the perpetrators, through both
criminal and civil measures."\textsuperscript{497} The growing concern for the inhuman nature of trafficking
into prostitution has also been recognized by the Beijing Conference, which reflects from its
report where it, for the first time at the international level, calls for the ratification of the
Slavery Convention by the States in the context of this practice.\textsuperscript{498}

Significantly, these recent developments, along with the binding legal obligations, at
the international level directly contradict the earlier notions that exploitation of prostitution
takes place in the private domain and thereby outside the preview of international law. As
one scholar has rightly said, these developments are "indicative of a gradual blurring between
the public and private spheres and a consequential shift in traditional rules of responsibility,
to the effect that states may be held responsible for private acts if they fail to act with due
diligence to prevent violations of rights or to investigate and punish acts of violence."\textsuperscript{499} In
the line of all these commitments, Nepal and India have obligations to amend their existing
legislation in order to incorporate human rights concerns of victims trafficked into
prostitution and implement them effectively.

Summing up all these developments, it can be said that from the first World
Conference on Women held in Mexico City in 1975 to the UN Forth World Conference on
Women in Beijing in 1995, women's right issue has moved from neglect to the bold assertion

\textsuperscript{496} Report of the Fourth World Conference on Women, Action for equality, development and peace, Beijing
\textsuperscript{497} Ibid. at Para 122.
\textsuperscript{498} Ibid. at Para 130 (a).
\textsuperscript{499} See Contemporary Slavery, \textit{supra} note 142 at 505.
that "women's rights are human rights."\textsuperscript{500} The spectacular participation and commitment shown by the governments of the world in these conferences mark the significant change in their attitude towards women's issue. The near universal ratification of CRC where rights of the girl children have been strongly guaranteed is a significant development to universalize their rights. However, the commitments shown by the states parties for the promotion and protection of human rights of the women/girls have remained on paper, which is frequently revealed by the Special Rapporteur on Violence Against Women, Its Causes and Consequences appointed by the UN in 1994 handed with significant authority to investigate the violence against women globally and make a comprehensive report to the Secretary General.\textsuperscript{501} Trafficking in girls into prostitution is one of the worst forms of violence and has been extensively covered by the Special Rapporteur, which reveals the widespread violation of human rights of thousands of innocent victims trapped into prostitution and blame for lack of States’ due diligence to prevent trafficking and protect the rights of the victims.

\textbf{2.2.1 Protecting rights of trafficked victims affected with HIV/AIDS}

The rapid increase of HIV/AIDS among victims trafficked into prostitution has become another serious issue of international human rights law as the combination of HIV/AIDS and prostitution, both constituting high stigma in many parts of the world, has been a source of persistent discrimination and vulnerabilities, violating right to non-discrimination on any ground, a core international human rights norm.


CEDAW has reminded States Parties their commitment and rightly noted that not providing the right to the highest standard of attainable physical and mental health in such a situation is discrimination within the meaning of Article 1 of the Women's Convention. Violence perpetuated against trafficked girls and denial of necessary health services also constitutes the violation of right to non-discrimination because that increases physical, mental or sexual harm or suffering they have undergone. Furthermore, the UN has noted the danger of HIV/AIDS and its widespread effect over the life and rights of the victims and has formulated a guideline to help states to deal with HIV patients according to the human rights standards.

The twelve points guidelines stress that the protection of human rights is essential to safeguard human dignity in the context of HIV/AIDS and to ensure an effective rights based response to this problem. An effective response requires the implementation of all human rights, civil and political, economic, social and cultural rights, in accordance with existing international human rights standards. These guidelines further call states to review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS. These are particularly important for the States to be followed for the

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503 For the effective enjoyment of rights enumerated from the Women's Convention or for the promotion and protection of women's human rights, including the human rights of victims trafficked into prostitution, a recent adoption of the Optional Protocol to Women' Convention would be a significant tool. Once Nepal and India become party to the Optional Protocol, the trafficking victims or group of victims or someone on their behalf can lodge complaint before the CEDAW Committee for the redress of the violation of rights provided under the Women's Convention once they have exhausted the available local remedies accordingly. Adopted by the General Assembly Resolution A/54/4 on 6 October 1999 and entry into force 22 December 2000, See http://www.law-lib.utoronto.ca/diana/compilation/comp.htm.
505 See ibid. at Conclusions Para. 10(a).
506 See ibid. at Para. 10(d).
protection of the rights of the victim, as they are the easy targets of infection because of their forceful commercial use for sexual purposes.

Unless various human rights principles principally guaranteed by CRC, ICCPR, the Women’s Convention, and ICESCR, such as the right to non-discrimination, equal protection, and equality before the law; the right to life; the right to highest attainable standard of physical and mental health; the right to liberty and security of person; the right to freedom of movement; the right to privacy; the right to marry and found a family; the right to access to education; and the right to be free from torture and cruel, inhuman or degrading treatment or punishment are applied and brought to protect the trafficking girls victim of HIV/AIDS, they will not seek HIV related counselling, testing, treatment and support, if all this mean facing discrimination, lack of confidentiality and other negative consequences. 507

UN guidelines have underlined the vulnerability of women and girls with HIV/AIDS and stressed that “with regard to prevention of infection, the rights of women and girls to the highest attainable standard of physical and mental health, to education, to freedom of expression, to freely receive and impart information should be applied to include equal access to HIV related information, education, means of prevention and health services.” 508

However, the situation is complicated in case of trafficked girls for prostitution, because even if information and services are available, they are unable to implement them or negotiate safer sex or avoid HIV related consequences unless the brothel owner and customers co-operate with them. Therefore, effective measures are required from the state to protect them from the diseases and mitigate the physical and mental violation. This is only possible if these victims are able to enjoy freedom and reproductive and sexual rights, which include the

507 See Ibid. at Introduction C.
508 See Ibid. at C(2).
rights of trafficked girls to have control over their body and to decide freely, free from coercion, discrimination and violence, on matter related to their sexuality. When strong measures are taken to eliminate the sexual violence and coercion, it not only protects trafficked girls from human rights violence but also protect them from HIV infection. In other words, protection of the human rights of the victims would play a great role in preventing them from HIV/AIDS or in case they are affected would help them in seeking the related counselling. Ensuring this and all other rights to the Nepalese victims trafficked into prostitution is primarily the responsibility of the Government of India as long as they remain in India, whereas Nepal has continuous duty to provide and protect every rights to these victims as they are the citizens of Nepal.

2.3 Providing remedies, including compensation, health services, and rehabilitation

The human rights emerged from the international agreements are primarily commitments of the States Parties for the claims of individuals against authorities of the State itself—“either to remain free from interference by them, or to require them to act in some specific fashion.” These commitments, which have been voluntarily accepted by the States Parties, not only demands a corresponding legislation at the domestic level to protect the human rights of individuals from violations but also the legislation for the effective remedies, which necessarily includes adequate compensation, essential health services, and proper rehabilitation of the victims, in cases where the guaranteed rights are violated, either by the governmental officials or private individuals. Such a demand of the remedies from the domestic law underscores the progressive feature of the present day international law where

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510 Ibid.
adoption of human rights norms are concurrently required for their implementation at the municipal level for them to be effectively enjoyed by the people.\textsuperscript{511}

It is a genuine and legitimate claim that the enormous violation of human rights suffered by the victims trafficked into prostitution must be remedied, for justice to prevail and be equally distributed among the citizens of the society. Furthermore, rights without remedies are as good as nothing. As one scholar says "rights without remedies are ineffectual. Even the symbolic value of rights could disappear once it became obvious that rights could be violated with impunity."\textsuperscript{512} Appropriate remedies also can have a strong deterrent effect on those who commit violations as well as provide justice to the victims.\textsuperscript{513} Therefore, some human right agreements content explicit provisions obliging States Parties to ensure effective remedies to those individuals suffered from the violation of human rights guaranteed under the respective agreement.\textsuperscript{514} For example, under Article 2 (3) (a) of ICCPR each State Party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

The fact that by reason of inherent limitation of international law, the effective remedy for the violation of human rights can only be provided under the national legal system. International human rights law cannot impose binding obligation or issue a dilatory order to a State Party to provide remedies to the victim of violation of human rights. It can only request or recommend or remind a State of its responsibility or hold responsible for

\textsuperscript{512} See Remedies in Human Rights Law, \textit{supra} note 418 at 45.
\textsuperscript{513} \textit{Ibid}. 14-15.
\textsuperscript{514} See ICCPR, \textit{supra} note 34 at Article 2(3).
failing to fulfill its obligation, but the actual work to provide remedy has to come from a
court or tribunal. For this matter, international law can provide guidelines or
prescribe rules under the Covenant or Conventions agreed by the States Parties and monitor
the implementation.\textsuperscript{515} This mechanism developed by the States Parties further increases their
responsibilities to provide adequate remedies at the national level, as the same is not possible
from the international level.

However, as it has been repeatedly mentioned before, the National laws of both the
countries have not addressed the serious concern, which is the legitimate claim of remedies,
of the Nepalese victims trafficked into prostitution in India. Neither Nepalese nor India anti-
trafficking and other national legislations have provided any provisions for victims to claim
compensation against perpetrators who have, on the other hand, hugely benefited from the
sexual exploitation of these victims in brothels. In case of rehabilitation and health services
to the victims, Indian Federal law has some provisions, however, they have not been properly
implemented, and widely misused and made ineffective which do not provide any help to the
victims,\textsuperscript{516} whereas Nepal does not have any specific legal provisions concerning these
issues.\textsuperscript{517} Human rights of these victims so widely violated cannot be protected unless they
are strongly supported by the effective remedial provisions and mechanism to implement
those provisions. Therefore, effective remedies are the most essential part of the commitment
to protect human rights and provide redressal in case of violation of those rights.

“The duty to provide appropriate remedies may be discharged through exercise of the
State’s executive, judicial, or legislative functions, or by the overall system of

\textsuperscript{515} See e.g. Remedies in international human rights, \textit{supra} note 418 at 9-11.
\textsuperscript{516} See Chapter Three, \textit{supra} at pp 107-109.
\textsuperscript{517} See Chapter Three, \textit{supra} at pp 79-80.
Violation of human rights differs from the private actions in tort or contractual liability. Even though, it is obvious that these violations are committed by the individuals and not by some abstract organs or parts of the governments, it is the State and not the individual or individuals who actually cause harm, is generally held responsible. On the other hand, under the today's working international legal procedure, no rule exists, which allows international civil action against an individual human rights violator in order to provide remedies to the victims. Therefore, instead of leaving the victim without a remedy, the state is held responsible, which is a just and rational outcome under the international human rights law.

In future this situation could be different once the Rome Statute of the International Criminal Court comes into force with ratification from the both the governments. Under Article 75 (1), the Court can establish “principles” on its own for “reparations to or in respect of, victims, including restitution, compensation and rehabilitation” of crimes within the jurisdiction of the Court. Very importantly, the Statute has listed enslavement, including trafficking in persons, in particular women and children and sexual slavery, enforced prostitution under the categories of crime against humanity. Even further, Court may issue an order “against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” or may order reparations be made to the victims of crime from an International Trust Fund established under Article

518 State responsibility, supra note 418 at 169.
519 See e.g. Remedies in human rights, supra note 418 at 2.
520 Ibid.
521 Rome Statute of the International Criminal Court, 1999, Article 7(1) (c) (g ), (2) (c )[hereinafter Rome Statue].
522 Ibid. Article 75 (2).
79 of the Statute. However, even after this Statute comes into effect, there are considerable hurdles, which need to be satisfied before the Court entertains any application.

As it has been mentioned before, State can fulfill its duty to provide remedies for the human rights violations through exercise of the State's executive, judicial, or legislative functions. Besides providing compensation or any other forms of monetary damages, the principal goal of any human rights remedies ought to be rectification and restitution. The top priority of any remedies ought to be to restore the rights of the victim, which was taken away and bring the victim into the *ex ante* position. At the same time, such remedies also need to address the larger general concern of the public, which is to have deterrence effects so that violation would not be repeated in future. In the present problem, deterrence of trafficking in Nepalese girls into prostitution should be the primary concern of the overall remedial measures, however, multitude of harms already inflicted on the victims cannot be rectified or resituated. Therefore, to have deterrent effects as well as to do justice to the victims of trafficking into prostitution cases, remedies should include an award of damages and compensation to the victims.

Damages of these kinds would include punitive or exemplary damages and non-monetary remedies. In trafficking into prostitution, which is a case of intentional or grossly negligent infliction of personal injury against the innocent victims as well as criminal acts, Nepal and India can enact legislation and adjudicate the offenders holding them liable for payment of a private penalty in the form of punitive and exemplary damages in an amount thought to be reasonable by the court according to the nature of the case. Subsequently, such

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524 See *Ibid.* Articles 17, 18, 19, and 20 for detail procedure for admissibility of a case before the court.
525 See generally Remedies in human rights, *supra* note 418 at 54.
a penalty can be provided to the victim as part of compensation. 527 For example, Section 60 of the Swiss Penal Code authorises the judge to rule that a fine be paid directly to the victim, wholly or in part. 528 This kind of legal arrangement is very useful and provides direct help to the victims in cases of trafficking in girls into prostitution. This is because, even if civil remedies were made available, fighting court case for the compensation for these innocent and poor victims would be another huge hurdle and would not work to deter traffickers either.

Non-monetary remedies are basically awarded by the State, as in human rights cases, it is the responsibility of the State to protect the rights and provide help to the victims of violation of human rights. 529 Basically, the non-monetary remedies include the acts of rehabilitation of the victims, punishment to the perpetrators, and restitution of rights and property. 530 Rehabilitation is a wider term, which necessarily includes adequate emergency and long-term health services, education, and all other possible help to the victims for proper social adjustment. As it has already been examined in second chapter the clinical, epidemiological, and societal effects of trafficking in girls into prostitution are enormous; particularly HIV/AIDS and STDs have devastated the life of Nepalese victims trafficked into prostitution. Therefore, States Parties have obligations to provide proper rehabilitation to the victim trafficked into prostitution. This obligation is committed by the States Parties under the various international agreements.

From its preamble, the Trafficking Convention starts with strong statement against trafficking in person for the purpose of prostitution and says that the practice is incompatible

527 See generally ibid.
528 See ibid. at 76.
529 Ibid. 77-79.
530 Ibid.
with the dignity and worth of the human person.\textsuperscript{531} Trafficking in persons endangers the welfare of the individual, family and the community. \textsuperscript{532} Thus, it has underlined the endangering characteristics of trafficking in person for prostitution to the welfare, which can be social, health, and moral, to the victim and her family and the community. Therefore, this Convention denies consent to be trafficked for prostitution as an excuse and forbids all forms of prostitution.

Article 16 of the Trafficking Convention has provision regarding educational, health, social, economic and other related services to be provided for the prevention as well as rehabilitation of the victims of prostitution. Since this Convention exclusively deals with trafficking for prostitution, the clear provision concerning education, health, social, economic and other related services to prevent trafficking for prostitution obliges states parties to provide these services to the likely victims of trafficking. Furthermore, in cases where prevention has failed, rehabilitation of the victims in a manner that they are socially adjusted is stressed upon. According to this provision, states parties have agreed to take measures through public and private health services for the rehabilitation and social adjustment of the victims. The rehabilitation and social adjustment include all necessary physical, mental and psychological treatments of victims, and enactment of necessary law and policies in order to take adequate measures to re-integrate victims into the society where they can again resume their normal life.

The important feature of this provision is its integrated handling of health with education, economic, and other social services. This approach comes close to the definition of health given by the WHO where health is defined as physical, mental and social well

\textsuperscript{531} Trafficking Convention, supra note 12.
\textsuperscript{532} Ibid.
being. Art. 16 of the Trafficking Convention obliges States Parties, such as Nepal and India, to bring the victims of trafficking into prostitution at par with other individuals in the society.

The proper rehabilitation and social adjustment are two very important tasks by which victims are brought back into the family and society where they belong. Their smooth acceptance into the community, and proper training through educational institution would give a new hope for a renewed life. This process of rehabilitation and social adjustment of trafficked victims with HIV/AIDS and other chronic diseases is more difficult in a country like Nepal, where social stigmatization and discrimination against them is prevalent. Therefore, it requires strong state intervention. Right to access to health and other social services is most important for their immediate survival. In order to comply with this provision, the States needs to enact specific law, protecting confidentiality and right to privacy of the victims. Furthermore, it has to work on various measures to educate the society that these girls are victims of violations of human rights and need extra care and protection in health, education and other social services for their proper adjustment in the society.

As a party to this Convention, Nepal is obliged to take measures, through law and policies, for the rehabilitation and social adjustment of trafficked victims, that it has failed to do for a long time. The anti-trafficking law in Nepal must be amended in order to include provisions for the rehabilitation of victims along with the present provisions, which declare trafficking for prostitution illegal and provide stringent punishment for the convict. The

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533 Cf. Women’s Health, supra note 209 at 106.
present law, which does not speak how the victims would get their health services, economic subsistence, education, skill training etc violates Article 16 of the Trafficking Convention. According to Article 16 of Trafficking Convention, Nepal has agreed to take measures to provide educational, health, social, economic and other related services to the trafficked victims for integrating them in the society. It has completely failed to do so, and thus its omission has violated the international law. As a party to the Convention, India is also obliged to do the same. Importantly, it has not provided the necessary health services to the victims of trafficking, even though thousands of Nepali girls face wide range of health problems in the brothels in its territory.

The complete neglect of the government of Nepal to have specific policies to combat sale of girl children and rehabilitation plan for girl children trafficked into prostitution has come under the scrutiny of the CRC Committee and the Committee has expressed its deep concern for not having the same.\(^{535}\) As under Article 24 of the CRC, "states parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." It further imposes responsibility on the States Parties and declares that they "shall strive to ensure that no child is deprived of his or her right of access to such health care services."

The explicit provision contained in this Article has guaranteed every child the enjoyment of the highest attainable standard of health, and the states parties have recognized that as the right of every child. This imposes the strongest obligation on the states to provide facilities for the treatments of illness and rehabilitation of health so that the child can enjoy his/her right to health. Under this provision, states parties have to strive for ensuring that every child gets access to health care services and is never denied these services.

\(^{535}\) *Ibid.* at Para. 22.
It is obvious that among the children, victim girls trafficked into prostitution are the most unfortunate victims of violence who are deprived to have natural growth of their body, mind, and soul. They are forced to undergo horrible torture, which can permanently impair the enjoyment of their life. As it has been discussed earlier, their young age makes them more vulnerable to be infected by many STDs and HIV/AIDS. Their physical exploitation and hazardous working conditions also expose to many other infectious diseases such as tuberculosis, diarrhoea, and meningitis. Prompt and adequate medical treatments with proper social adjustment and rehabilitation measures may bring back their life to normal. As the parties to the CRC, Nepal and India have committed for the implementation of this provision and to provide all necessary medical and rehabilitation services. Even though, the Government of India is aware of a large number of trafficked victims working forcibly in brothels in India, it has taken no step to stop this illegal practice from continuing and to improve the health and hygienic standards of these victims.

Recently General Assembly of the United Nations has adopted two separate Optional Protocols to the Convention on the Rights of the Child, one on the involvement of children in armed conflict and the other on the sale of children, child prostitution and child pornography. The Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography adopted on 25 of May 2000 has addressed the issue of physical and psychological problem of child prostitution, and under Art. 9(3) of the Protocol, "states parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery." This provision is further.

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added by Article 10 of the Protocol, according to which "states parties shall promote international co-operation to assist child victims in their physical and psychological recovery, social reintegration and repatriation."\(^{538}\)

The strong words used in these provisions of the Optional Protocol aims to redress the physical and psychological harm suffered by the child victims trafficked for prostitution, and pornography. States parties would be under obligations to have international co-operation to make every efforts for full clinical and social recovery of the victims. Their social reintegration is the most important task where educational, health, social and economic problems of the victims must be adequately addressed.

The Women's Convention has categorically prohibited all and every forms of discrimination against women in any field. The Committee on the Elimination of Discrimination Against Women (CEDAW) in particular is very active in defining and expanding the meaning and scope of the provisions of Women's Convention. Women's health is addressed by Article 12 of the Convention according to which "states shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

More importantly, CEDAW has underlined the danger of AIDS epidemic and its effects on the rights and needs of women and girl children in general, and their subordinate

\(^{538}\) The biggest lacunae in the CRC's Optional Protocol is that it does not incorporate a complaint procedure in the Convention for the individual victims/or on their behalf to be able to make complaint before the treaty monitoring body. Under the Article 14(1) of the Optional protocol, it will come into effects once ratified by ten states parties to CRC. Up to now, 69 countries have signed and Bangladesh is the only country that has ratified the Optional Protocol. Nepal has signed the Protocol but has not ratified as yet, and India has not even signed the said Protocol. See online: http://www.unhchr.ch/html/menu3/b/treaty18.asp.htm. Accessed on January 7, 2001.
position in the societies, which makes them more vulnerable to HIV infection\textsuperscript{539} and, therefore, it has asked states parties to intensify efforts on dissemination of information to increase public awareness of the risk of HIV/AIDS among women and children and formulate programmes to combat AIDS.\textsuperscript{540}

Trafficked victims have hardly any access to the health services. Though the Government of India has recognized the threat of HIV/AIDS and has done some work in preventive measures, such as condom distribution and HIV prevention counselling, on a very limited scale, their limited services are out of the reach of Nepalese victims because of the language barriers and unfamiliarity of the place. Their right to freedom of movement is forcefully obstructed by the brothel-owners, and for counselling and health they have to go out from the brothels. Thus, preventive measures cannot be successful in an environment of slavery like conditions of coercion and violent practices. After-care is even more expensive, and when they become chronically ill and unable to earn money for the brothel owner because of the STDs or HIV/AIDS or other diseases, they are thrown out from the brothels.\textsuperscript{541} Neither India nor Nepal has implemented Art. 12 as they have promised to ensure health services to these trafficked girls who are thousands in number.

CEDAW's significant contribution to health can be seen in its General Recommendation 24.\textsuperscript{542} CEDAW's status as treaty monitoring body selected by the states parties to the Convention gives its General Recommendations a strong legal standing as they are the broader definitions of the provisions of the Convention coming from a legal authority.


\textsuperscript{540} Ibid.

\textsuperscript{541} See Trafficking of Nepali Girls, \textit{supra} note 2 at 65.

General Recommendation 24 has addressed the health need and rights of women belonging to vulnerable and disadvantaged groups, such as girl child and women in prostitution, and, thus has underlined the reason to give special attention to their health. Through this recommendation, CEDAW has noted that the full realization of their health can be achieved only when states parties fulfill their obligations to respect, protect and promote their fundamental human right to nutritional well-being throughout their life span. The reproductive capacity of any girl in future would be severely compromised if this right were not protected.

Very importantly, General Recommendation 24 has addressed the problems of STDs and HIV/AIDS in women and given detailed guidelines to the states parties how that should be taken care of. It says "the issue of HIV/AIDS and other STDs are central to the rights of women and adolescent girls to sexual health. Adolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other STDs. Women in prostitution are also particularly vulnerable to these diseases. States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, even if they are not legally residents in the country. In particular, states parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained

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543 See Ibid. Para. 6.
544 See Ibid. at Para.7.
personnel in specially designed programmes that respect their rights to privacy and confidentiality.\(^5\)

It has specifically recommended to the states parties to compulsorily "implement a comprehensive national strategy to promote women's health throughout their life span. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services."\(^6\)

States parties should also, in particular, "ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health, and, in particular, allocate resources for programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS."\(^7\)

These are the very important and specific guidelines needed for a long time for the adequate advancement of the overall health conditions of women of all ages. Nepal and India, being parties to the Women's Convention, are obliged to follow these guidelines and enact legislation to provide health services to these victims of prostitution who are vulnerable individuals in the society. These recommendations made by the CEDAW put legal obligations on the states parties because these are explanations of the original provisions of the Convention. Further, health of women of all age is agreed upon by Nepal and India at Cairo as well as Beijing Conferences. CEDAW has interpreted the provisions of the

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\(^5\) Ibid. at Para. 18.
\(^6\) Ibid. at Para. 29.
\(^7\) Ibid. at Para. 31(b).
Women's Convention in the light of the final declaration of Cairo and Beijing conferences, where states, including Nepal and India, have pledged to implement policies and programmes set out by those conferences. These guidelines must be implemented and followed by the states parties while presenting their report, and if not, they would be held responsible for failing to implement them.

3. Recent developments

Combating trafficking in persons, particularly of women/children, has recently received a significant attention at the international level. The adaptation of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol) by the General Assembly of the United Nations on 15 of November 2000 and inclusion of trafficking in persons and enforced prostitution into the categories of "crime against humanity" by the Rome Statue of International Criminal Code are evidence of such an attention.

Even though the Trafficking Protocol has not come into effect and Nepal and India have not signed and ratified it, its relevance to this thesis is very important because it has progressively addressed many of crucial areas of trafficking in women/children into prostitution. The long delayed and much criticized failure of the international law to define trafficking in persons comprehensively, with human rights perspective, is particularly addressed by the Trafficking Protocol. The definition given by this Protocol, for the first time at international level, treats trafficking in persons to slavery or practices similar to

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548 See ibid. at Para. 3.
549 See Rome Statue, supra note 52 at articles 7 (1) (c) (g) & 7 (2) (c).
550 See Protocol to Prevent Trafficking, supra note 15.
slavery and servitude.\textsuperscript{551} It has widened the scope and meaning of the exploitation in relation to trafficking in persons by including not only the exploitation of the prostitution of others but also all other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs,\textsuperscript{552} and, therefore, if there is exploitation, the Protocol refuses to accept consent of the victim excusable ground for defence.\textsuperscript{553}

More importantly, for the protection of the children, the Protocol considers any act of recruitment, transportation, transfer, harbouring or receipt of a child under the age of 18 an offence of “trafficking in persons.” The definition of child given by this Protocol is specific, which “shall mean any person under eighteen years of age.” This definition does not allow national law to have below than 18 years of age for a person to be a child as that has been allowed by the CRC.

What is significant about this Protocol is the manner in which it has attempted to address the international problem of trafficking in persons not only from the criminal law approach but also from the human rights approach. This is clearly reflected from the preamble of the Protocol where it states “effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers, including by protecting their internationally recognised human rights.”\textsuperscript{554} These objectives stated in the preamble are reiterated at the purposes of the Protocol, which are to prevent and combat trafficking in persons, paying particular attention

\textsuperscript{551} Ibid. at article 3 (a).
\textsuperscript{552} Ibid.
\textsuperscript{553} Ibid. at article 3 (b).
\textsuperscript{554} See preamble \textit{ibid.}
to women and children; protect and assist the victims of such with full respect for their human rights. The Protocol aims to meet these objectives with co-operation among States Parties to the Protocol.

The Protocol separately addresses human rights and other concerns of the victims. For example, after ratifying this Protocol, States Parties are obligated to protect the privacy, confidentiality, and identity of the victims through legal provision; provide all information and assistant regarding legal actions, which have been taken on their behalf. States Parties would also commit to implement measures to provide physical, psychological, and social recovery of victims, and to provide appropriate housing, counselling, and information regarding their legal rights in their mother language, medical, psychological and material assistance, employment, education and training opportunities. Another significant provision of the Protocol requires the States Parties to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damages they have suffered.

Thus, by laying down these and other provisions, this Protocol has tried to address the growing concerns of the international crime of trafficking in persons, particularly against women/children by giving importance to the human rights violations of the victims and their appropriate protection. The significant provisions in this Protocol, however, would have been more effective, had it provided provision for the individual complaint procedure to be used by victim or on behalf of the victim. The other concern is the scope of application given under Article 4 of the Protocol, which limits its application against those offences involving an ‘organised criminal group’ with transnational nature. Subject to transnational nature would not create a big barrier for the usefulness of this Protocol as cross border trafficking is
one of the largest international crimes in the world. However, limiting the scope of such an important Protocol just to fight against "organized criminal group" would leave thousands of victims, mostly in developing countries, who are trafficked by the individual or individuals without being a part of any criminal group. For example, as discussed in third chapter, most of the Nepalese girls trafficked in India are the victims of their husband or the near relatives. Under this Protocol, these victims may not qualify to receive protection.555

The grave concern of trafficking in women/girl children within South Asian Region has lately prompted the seven countries, including India and Nepal, of this region to initiate a dialogue to convene a regional Convention to address this problem collectively. In May 1997, from the Ninth summit of South Asian Association for Regional Co-operation (SAARC), the head of the States or Governments of SAARC countries directed the Technical Committee on Women and Development of SAARC to prepare a draft Convention on trafficking.556 With consultation with member States, the Committee has submitted a draft Convention under the title of "SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution."557

Draft Convention accepts the increasing exploitation by traffickers of women and children from SAARC countries and their increasing use of these countries as sending, receiving and transit points.558 It recalls all relevant international legal instruments relating to prevention of trafficking in women/children, particularly Trafficking Convention, the Women's Convention, ICCPR, and CRC and pledge to give due regard to the implementation of recommendations of various international bodies and conferences,

555 See ibid. at article 4.
556 See online: http://www.saarc-sec.org.
558 Ibid. at Preamble.
including the Beijing Conference.\textsuperscript{559} It also contains the definitions of child,\textsuperscript{560} prostitution,\textsuperscript{561} trafficking,\textsuperscript{562} and traffickers.\textsuperscript{563} As stated in the draft Convention, the main purpose of this Convention will be "to promote co-operation amongst the Member States so that they may effectively deal with the various aspects of prevention and suppression of trafficking in women and children; the repatriation and rehabilitation of victims of trafficking."\textsuperscript{564}

Even before this draft Convention is being signed and ratified by the Member States of SAARC, it has been rightly criticized for its neglect to address the human rights concern of victims trafficked into prostitution.\textsuperscript{565} Even though the preamble of the Draft Convention recalls international human rights conventions and commits to give due regards to the implementation of the recommendations of various international bodies and international conferences, its purposes and other provisions directly contradict that and have attempted to address this problem only from the criminal law approach. As it has been studied before, ICCPR, CRC, and Women’s Convention have obliged States Parties to protect and promote human rights of all without any distinction and have particularly guaranteed right against trafficking into prostitution and protection of all other human rights as equally available to others. Their treaty monitoring bodies have reminded States Parties to prevent trafficking in

\begin{itemize}
\item 559 \textit{Ibid.}
\item 560 "Child means a person who has not attained the age of 18 years." \textit{Ibid.} at Article 1(1).
\item 561 "Prostitution means the sexual exploitation or abuse of persons for commercial purposes." \textit{Ibid.} at Article 1(2).
\item 562 "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 subjected to trafficking." \textit{Ibid.} at Article 1(3).
\item 563 "Traffickers mean persons, agencies or institutions engaged in any form of trafficking." \textit{Ibid.} at Article 1(4).
\item 564 \textit{Ibid.} at Article 11.
\item 565 See generally Memorandum to the honourable members of the Standing Committee of the 10\textsuperscript{th} SAARC Summit, \textit{Re/productions: Issue #2} See online: http://www.hsph.harvard.edu/healthnet/Sasia/repro2/SAARC.HTM; South Asia: women’s groups slam proposed laws on prostitution, \textit{World News} online: http://www.oneworld.org/ips2/feb99/07_24_007.html [hereinafter Criticizing draft SAARC Convention].
\end{itemize}
women/girls because it violates fundamental human rights of the victims and asked them to address this problem from not only from the criminal law approach but also from the human rights perspective.\textsuperscript{566} These and many other important international binding obligations have been ignored by this draft Convention as its provisions only emphasize on prevention of trafficking and repatriation of the victims of trafficking. UN Special Rapporteur on violence against women has criticized the draft and rightly observed that it has been prepared as a law and order document for criminal law purposes.\textsuperscript{567}

The most serious objection of the draft is Article 9, under which the rehabilitation of the victims is solely imposed on the home state of the victims and victims are not allowed to remain in the country where they have been criminally exploited.\textsuperscript{568} This provision has tried to absolve the responsibilities of the receiving country, which is totally unjust, unfair and not known in any other international agreements. If this becomes the part of the final Convention, the Government of India will have no responsibility to provide rehabilitative services to the Nepalese victims trafficked into prostitution in brothels in India. In any criminal offence, which is of such a serious nature like selling and buying of human beings, the rights of the victim to receive hearing and right to pursue case and get justice is a fundamental human right.

Beside this, the draft Convention does not consider any remedy to the victims rescued or escaped from the prostitution after suffering untold physical and mental atrocities in the prostitution. The draft can also be criticized for its narrow understanding of trafficking

\textsuperscript{566} See, above, at 135-149.
\textsuperscript{567} See Criticizing draft SAARC Convention, supra note 565.
\textsuperscript{568} UN Special Rapporteur, Radhika Coomaraswamy has commented on the provision (Article 9(1)) for repatriation of victims saying, "why can’t they be given the choice of deciding-whether to go back or stay since social customs are such that once you become a sex worker you are ostracized and may not be taken back into your community.” See Criticizing SAARC Convention, supra note 565 at 2.
linking it only with prostitution. All other aspects of trafficking, such as forced marriage or all other forms of forced labour should have been covered by any trafficking Conventions. Like these lacunas and concern for human rights of victims, which are invisible in the draft Convention, must be included before the Convention is adopted by the Member States, if this Convention is seriously thought by the SAARC member States to prevent trafficking and protect the rights of the victims.

4. Conclusion

The above discussion has left no room for Governments of Nepal and India to shy away from the responsibilities to prevent trafficking in Nepalese girls into prostitution in brothels in India and protect their human rights under various binding international human rights agreements. As discussed before, this problem is no more just a problem of criminal law but it is also one of the well-recognized contemporary forms of slavery, which is one of most severe violation of human rights, and duty to prevent slavery and to provide necessary remedies must be, honestly, discharged by the States Parties in order to address this problem effectively.

The major concern of this problem most urgently be addressed by the States is treating victims of trafficking in prostitution with equality, respect and dignity so that their concerns receives just and adequate attention as guaranteed under the international human rights law to every human being. The other most pressing concerns are preventing cross-border trafficking of Nepalese girls in India through swift and severe punishment of the traffickers, brothel owners and abettors to trafficking in both countries along with an immediate agreement on extradition of any of these offenders of one national living in other
country; establishing various legal provisions and mechanism to promote human rights of the victims, such as supporting in education, confidence building measures, and helping to achieve economic independence, providing essential health services, and encouraging victims to report violations of their rights and to ensure that when they do so an adequate protection is provided to them.

Finally, the crux of the success of all these concerns or of the international human rights treaties, which are the outcome of the States’ voluntary agreements, rest on the fulfilment of the States Parties’ commitments before the international community, and, if they fulfil their commitments as outlined earlier in this paper, by giving effect to the provisions of international human rights treaties at the national level, the problem of trafficking and the violation of human rights would be reduced and victims’ suffering would also be mitigated.
Conclusion

The finding and analysis of the data, reports, and various studies presented in this thesis reveals unacceptable level of highly neglected socio-legal issues attached with the problem of trafficking in Nepalese girls into prostitution, which justifies the central argument of the thesis that to address this problem effectively, such a neglect of the States, including judiciary, in refusing to adequately implement even the existing national laws must be dealt with, and the victims ought to be regarded as equal human beings as others endowed with rights.

Socio-economic deprivation, ignorance, illiteracy, legal and judicial discrimination are the principal underline causes of the continuing problem of trafficking of Nepalese girls into prostitution. Perpetrators have exploited these causes to meet the ever-growing demands of young Nepalese girls in India’s sex markets because of their fair skin, different look, their innocence, and being largely immune from HIV/AIDS, as they are mostly trafficked from the remote villages of Nepal. Furthermore, this problem has been worsened because of the States complicity with the perpetrators and lack of political commitment to address it with urgency.

The ongoing effects of this colossal commercial sexual exploitation of Nepalese victims trafficked into prostitution in India, which can be termed as one of the most inhuman forms of contemporary slavery, are widespread diseases, including various kinds of STDs and HIV/AIDS, severe physical, mental and psychological violence, which have been severely violating many of the human rights of the victim, such as right to life; right against slavery and servitude; right against torture or cruel, inhuman or degrading treatment; right to recognition as a person before the law; right to non-discrimination; right to highest standard
of physical and mental health; and right to marry and found a family, many of which are non-derogable under any circumstances and guaranteed to every human being by the international human rights laws.

It is the duty of every State to prevent the violation of these basic human rights of any individual living in its territory and, therefore, the immediate reason behind the widespread exploitation of the victims trafficked into prostitution and violation of their human rights is the inadequacy and ineffectiveness of national laws of India and Nepal to prevent that from happening and their disregard of international human rights laws. It is the responsibility of Nepal and India to prevent trafficking in girls/women into prostitution as it is widely prohibited by international human rights laws, prominent among them are ICCPR, CRC, the Women’s Convention, and Trafficking Convention and they all have been ratified by both the States.

Since these international laws are ratified by the States Parties, they are under obligations to implement them in national level. It is the principle of international law that there is a binding responsibility of the States Parties to give effect to any international treaty once they voluntarily accept it. However, Nepal and India have failed to implement international human rights laws against trafficking in girls into prostitution and refused to protect even the most fundamental human rights of the victims, such as right to life; right against slavery and servitude; right against torture, cruel or inhuman and degrading treatment; and right to recognition as a person before the law all of which are non-derogable. This situation or their refusals to implement their own commitment to eradicate one of the most inhuman forms of contemporary slavery of our time have created the responsibility of these States for which they can be held answerable before the international community.
Therefore, in order to comply with their responsibility, both the countries must address the shortcomings and ineffectiveness of the national laws against trafficking into prostitution in order to remedy the present situation as according to the international human rights laws. The unjust lacunae, which is the complete disregard of the present anti-trafficking legislations of Nepal and India to address specific concerns of violation of human rights of the victims, must be given urgent attention by States and victim centred anti-trafficking law needs to be enacted for giving adequate protection to the human rights of the victim instead of present inadequate anti-trafficking law, which is largely based on criminal law approach to the problem of trafficking in persons into prostitution.

Apart from establishing effective criminal law mechanism to prevent human rights violation, which include prevention of trafficking in girls into prostitution, human rights approach to anti-trafficking law should also include various legal provisions to establish legal mechanism to promote human rights of the victims, such as supporting in education, confidence building measures, and helping to achieve economic independence, providing essential health services, easy and prompt method of providing compensation to the victim, and encouraging victims to report violations of their rights and to ensure that when they do so an adequate protection is provided to them.

The judiciary of both the countries can play important role in preventing trafficking in girls into prostitution and protecting the rights of the victims. The democratic Constitutions of both the countries have envisaged an independent and powerful judiciary to protect rights of the people and provide special protection to those belonging to the downtrodden and weaker sections of the society. The Supreme Courts of both States not only have power of judicial review but also to accept any petition by victims or on their behalf or initiate *suo*
*motto* proceeding on its own if they find any action or event violating the fundamental rights guaranteed by the Constitutions and take appropriate actions against perpetrators, ask government to take specific action to stop the violation, and provide remedies such as compensation to victims. Especially, the Supreme Court of India is known all over the world for its activist role in social interest litigation. However, unfortunately, even though it has knowledge of thousands of innocent girls/women who have been forced to live a life of sexual slave in many parts of India, it has refused to take any strong steps to investigate offences of trafficking into prostitution in order to punish perpetrators and provide any protection to the victims. Such insensitivity and indifference of the judiciary in cases of trafficking in girls/women must be changed and they must take this issue seriously for effective implementation of national or international laws in this regard.

The other critical concern of Nepalese girls trafficking in Brothels in India is preventing cross-border trafficking of Nepalese girls through swift and severe punishment of the traffickers, brothel owners and abettors to trafficking in both countries along with an immediate agreement on extradition of any of these offenders of one country living in other country. If such agreement is enter into and implemented properly, it will not only discourage potential offenders but also start the concrete step to put an end to the immunity enjoyed by hundreds of perpetrators living in either of countries and continuously engaged in this inhuman trade.

In addition to the severe violation of human rights of victims, trafficking in girls into prostitution also has the potentiality to bring worst public health disaster in both countries (particularly in Nepal), where economic recourses are limited to cope with any such calamity. For example, STDs and HIV/AIDS have been costing billions of dollars of public
and private money every year all over the world. In many developing countries, HIV/AIDS is reversing years of achievements in improving the quality of life. It reduces life expectancy and compels to make choices between health and many other investments vital for overall developments of a country, such as education, power generation, and infrastructure for rural development etc. It is estimated that "if AIDS affects 5 percent of the population, total national spending on health will increase by 40 percent."569

The devastating example can be found in Sub-Saharan Africa, the most severely affected by HIV/AIDS. It is said that sex workers and their clients along the trade routes were the initial victims of HIV infection. Then, the male partner, in a second wave, spread the infection to their wife and sex partners in rural areas, and in third wave to their children. "Today, of the 34.3 million adults living with HIV/AIDS around the world, 24.5 millions live in Sub-Saharan Africa."570 This example can possibly be repeated in India if government of India does not take appropriate actions to address sexually transmitted HIV, and one of the easiest way of spreading that through prostitution. It is reported that only in Bombay more than 50,000 brothels exist, where unprotected and exploitative forms of commercial sex is rampant, and thousands of men from all sorts of life visit there everyday, leaving with or transmitting HIV or other diseases.

This disaster is also continually falling on Nepal as every year thousands of Nepali workers cross border to work or visit in big Indian cities like Bombay, Calcutta and New Delhi, leaving their family and children behind in Nepal. It has been reported by many of the trafficked victims that many of these Nepalese men regularly visit the brothels and can take

570 Ibid.
the diseases back home.\textsuperscript{571} In other situation, many of the trafficked girls, infected with viral diseases, once released or escaped from the brothels returned to their villages, not fully knowing the nature and consequences of various diseases, including HIV/AIDS frequently marry and may pass the diseases to their husband and children.\textsuperscript{572}

Finally, the problem of trafficking in Nepalese girls into prostitution is a problem perpetuated and worsened by the utter neglect and discriminatory attitude of the States towards the victims and the work they are compelled to undertake. Once the States (Nepal and India) adequately provide and protect the victims’ human rights without discrimination as according to the Constitutions and international human rights law, the magnitude of the problem will steadily be reduced and the suffering of the victims surely be mitigated.

\textsuperscript{571} Maiti Farkiayak, \textit{supra} note 7 at 23; AIDS in Nepal, \textit{supra} note 198 at 47.
\textsuperscript{572} Health Implications, \textit{supra} note 131 at 3.