Prosecuting Orphanage Trafficking in Nepal
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Abstract

Various studies have been published on the occurrence of orphanage trafficking in Nepal. These studies have focused on how orphanage trafficking occurs but have not investigated how orphanage trafficking is responded to from a legal perspective. This article analyses the legal framework for prosecuting orphanage trafficking in Nepal. It considers the available legislative frameworks for pursuing prosecution and makes recommendations for Nepal to reform their anti-trafficking law to include orphanage trafficking and to align with international law.

Introduction

The recruitment and/or transfer of children into orphanages in Nepal has been well documented dating from the first non-government report in 2005 (Dhungana, Basnet, Rai and Pradhan, 2005) to the first inclusion of the link between orphanage volunteering and the recruitment of children into orphanages highlighted in the United States Department of State Trafficking in Persons Report 2017. Orphanage trafficking is the recruitment or transfer of children into orphanages for a purpose of exploitation and profit (van Doore, 2022). There are cases documented in Nepal where children are recruited or transferred from their families into orphanages to attract donations from volunteers, foreign donors, and tourists, making them ‘paper orphans’ (van Doore, 2016).

This article builds upon previous studies on orphanage trafficking published in this journal on the intersections of orphanage trafficking and voluntourism in Nepal (Punaks and Feit, 2014), the regulation of orphanage trafficking (van Doore, 2020), and emergency management and orphanage trafficking (Punaks and Lama, 2021). It is based on research undertaken as part of a funded grant in 2021 which focused on establishing the legal framework for orphanage trafficking in Nepal (van Doore & Nhep, 2021b).
Whilst cases have been prosecuted for orphanage trafficking in Nepal, there has been no systematic approach and prosecutions remain low. In part, this is a familiar issue also seen at the global level where trafficking prosecutions have remained ‘stubbornly low’ (Gallagher, 2016) but is also reflective of a prosecutorial focus on the exploitative element as a singular offence, rather than the more complex human trafficking or transportation offences.

We begin by outlining the increasing recognition of orphanage trafficking in Nepal. We then examine the legal framework for orphanage trafficking in Nepal. Finally, we conclude with a particular focus on recommendations for reform to enable the prosecution of orphanage trafficking in Nepal and to meet the obligations of ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (‘Trafficking Protocol’).

Current recognition of orphanage trafficking in Nepal

In 2005, the report on a Fact-finding Mission on Displacement of Children from Humla 29 December 2004–1 January 2005 by UNICEF and the Forum for Women, Law and Development investigated the systemic movement of over 300 children from Humla, a region in far western Nepal, to India and Kathmandu that had been prevalent from 1996 to 2004. It detailed that parents were paying people taking the children under false pretences to obtain an education, that government officials had prepared false death certificates of alive parents, and that the names of some of the children had been changed with pseudonyms used with approval of the local administration (Dhungana, Basnet, Rai and Pradhan, 2005).

In 2008, a report published by UNICEF and Terre des Hommes outlined that by then over 1000 children had been taken from Humla with only 400 able to be traced (UNICEF and Terre des Hommes, 2008). It also outlined how parents had been convinced that their children would obtain an excellent education and paid the agents between NPR 10,000 and NPR 20,000 believing they were going to school and would return home on holidays. The report detailed that the children were taken to unregistered and illegal orphanages and kept in poor conditions (UNICEF and Terre des Hommes, 2008).

In 2009, a Study of Children’s Homes in Nepal found that 11% of orphanages were utilising brokers to recruit children into orphanages (CPCS International Belgium and Central Child Welfare Board Nepal, 2009). The Programme Cooperation Agreement 2011–2012 (‘the Agreement’) made by Terre des
Hommes and UNICEF, outlined how families seeking a better education for their children were deceived by a ‘network of traffickers who strategically convinced parents to turn over relatively large sums of money or exchange of precious goods or land in return for taking their children to Kathmandu or India’ (Save the Children, 2011).

By 2011, the issue had gained international attention. The Nepal narrative in the United States Department of State’s Trafficking in Persons Report 2011 stated that ‘there were reports of traffickers in the remote Karnali region who deceive families into sending their children to urban areas with false promises of schooling’ (Office to Combat Trafficking in Persons, 2011). Shortly after in 2012, the United Nations Committee on the Rights of the Child outlined that families were ‘reportedly relinquishing their children as a consequence of soliciting, coercion or inducement’ and that there were ‘cases of children being abused by foreign paedophiles who run so-called orphanages and street shelters’ (United Nations Committee on the Rights of the Child, 2012).

A Nepali government report in 2014 outlined that people paying to volunteer or sending funding after visiting an orphanage had led orphanages to regard volunteers and visitors as sources of income (National Human Rights Commission Office of the Special Rapporteur on Trafficking in Women and Children, 2014). Against this backdrop, the media continued to publish stories regarding ‘fake orphanages that exploit children and feel bleeding-heart donors’ (Rai, 2014). Despite increasing international attention, the 2015 earthquakes in Nepal saw media reports of recruiters removing children from their families to place them in orphanages (Rai, 2015). The Government of Nepal instigated both an intercountry adoption moratorium and a ban on new orphanages being registered to attempt to address the issue. Despite this, the number of children institutionalised increased from 2015 to 2016 (Nepal Central Child Welfare Board, 2016) and the 2016 Concluding Observations on Nepal by the Committee on the Rights of the Child noted that children were being placed in residential care unnecessarily due to an ‘absence of an assessment system based on necessity and appropriateness’ exacerbated by a lack of government enforcement or oversight of private institutions (Committee on the Rights of the Child, 2016). The Nepal Trafficking in Person National Report 2015/16 published by the National Human Rights Commission in 2017 detailed that the Central Child Welfare Board had conducted a study of 49 randomly selected orphanages in Kathmandu Valley and found that most institutions were funded by foreign grants or aid, and nearly one-third were operated by faith-based organizations (National Human Rights Commission, 2017).
In 2016, Gale and Khatiwada found that ‘very few children in residential facilities are orphans, or those that have been subject to abuse and exploitation’ (Gale and Khatiwada, 2016). They detailed that the major reason for children being placed in an orphanage was a parental desire for education:

One major concern is the manner in which families, especially from remote rural areas, are being persuaded to relinquish their children, often with a request for a financial donation. The children are then removed far away from their communities often to Kathmandu and other large urban areas where the promises made to parents are not necessarily fulfilled, documents are being falsified and, some children are being subjected to exploitation and abuse (Gale and Khatiwada, 2016).

Following extensive advocacy by non-government organisations for over a decade, in 2017 the Nepal narrative in the United States Trafficking in Persons Report included the first reference to the link between volunteering and visiting in orphanages and human trafficking (Office to Combat Trafficking in Persons, 2017). This explicit acknowledgement of a link between the recruitment of children into orphanages and orphanage tourism, where people visit or volunteer in orphanages (Canossa & van Doore, 2022), was the first official acknowledgement that orphanage trafficking was a form of trafficking. This same reference has been included in the Nepal narrative in each United States Trafficking in Persons Report between 2017 and 2022, with a Special Interest section on ‘Child Institutionalisation and Trafficking’ included in the Trafficking in Persons Report 2018. The Trafficking in Persons Report 2022 Nepal narrative still reported that orphanages bring children from rural parts of Nepal with a promise of providing better educational opportunities outlining that children who still have one or both parents are registered as orphans to attract international donations from the sponsors, donors, and volunteers (Office to Combat Trafficking in Persons, 2022). Child traffickers continue to capitalise on the goodwill of tourists and volunteers to fund large amounts of money to assist what they believe to be orphaned children.

**Legal framework for prosecuting orphanage trafficking in Nepal**

The *Constitution of Nepal* provides a framework for taking legal action against human trafficking in Nepal. The most applicable laws to orphanage trafficking that will be analysed here are the *Human Trafficking and Transportation Act 2007* and the *Act Relating to Children 2018*. Neither the *Human Trafficking and Transportation Act* nor the *Act Relating to Children* explicitly define orphanage trafficking as an offence, however they do criminalise its components, such as separating children
from their family, transporting them from their place of origin, bringing them into orphanages and exploiting them for profit, and falsifying their identity.

The *Human Trafficking and Transportation Act 2007* (HTTA) defines ‘human trafficking’ and ‘transportation’ as two separate offences and criminalises them. Section 4(1) of the HTTA defines four types of acts as ‘human trafficking’:

(1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:
(a) To sell or purchase a person for any purpose,
(b) To use someone into prostitution, with or without any benefit,
(c) To extract human organ except otherwise determined by law,
(d) To go for in prostitution.

The offence of human transportation is most closely aligned with trafficking under the Trafficking Protocol and is defined in section 4(2) of the HTTA as:

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:
(a) taking a person out of the country for the purpose of buying and selling
(b) taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

The main difference between the trafficking and transportation offences is that the transportation offences include the movement of the victim, whether over state borders or domestically. The first step in applying the HTTA to the context of orphanage trafficking is to determine the age of children under the Act. Section 2 (d) defines a ‘child’ as ‘a person who has not reached the age of eighteen years’. The second step is to ascertain whether the typical components of orphanage trafficking – that is, the recruitment or transfer of a child to a residential care centre for the purpose of exploitation – are covered under the HTTA as a form of trafficking or transportation.
To meet the definition of human trafficking under the HTTA, the elements involved in orphanage trafficking would need to include either the sale or purchase of a person for any purpose; the ‘use’ of someone in prostitution with or without any benefit; the extraction of human organs (except where allowed by law); or to ‘go in for prostitution’, all of which fall under Section 4(1) of the HTTA. The most likely application would be Section 4(1)(a), the sale or purchase of a person; however, this would only include where money has been exchanged for the child being transferred to the orphanage. Under international law, this would be likely regarded as ‘sale of children’ rather than child trafficking, as international law does not require purchase or sale to have taken place for trafficking to occur. Under Nepali law, it would need to be proven that the child had been sold to the orphanage to prove trafficking had occurred.

Where the components of orphanage trafficking do not fall within the definition of ‘human trafficking’, the unlawful removal of a child from guardianship for the purpose of exploitation may fall within the definition of ‘human transportation’ under the HTTA. There are two versions of the human transportation offence found in section 4(2)(a) and (b) of the HTTA. To meet the first requirements of human transportation under section 4(2)(a), a child would need to be moved over a state border into the orphanage and a sale would need to be evidenced.

The more relevant offence is found in section 4(2)(b) HTTA which states that human transportation includes:

To take anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

The explicit reference to custodians and guardians means that this clause is the most analogous with the process of orphanage trafficking. In orphanage trafficking cases, inducement through fraudulent promises of education is commonly made to persuade families to allow their children to go with the recruiter. Threats and inducements to parents and guardians often form part of the orphanage trafficking process. The United Nations General Assembly Guidelines for the Appropriate Use and
Conditions of Alternative Care of Children 2009 providing that ‘financial and material poverty, or conditions directly and uniquely imputable to such poverty should never be the only justification for removal of a child from parental care’. However, orphanages are often seen by parents as a way of ensuring their child attains an education. UNICEF and Terre des Hommes (2008) reported on orphanages in the Kathmandu Valley having ‘field staff’ whose job it was to ‘explore the villages and bring in children’ with 100 per cent of parents surveyed saying that the promise of a good education was a reason for allowing their children to be taken to an orphanage.

The final element to fulfil is that the child is transported to the orphanage for a purpose of prostitution or exploitation. The definition of exploitation in section 2(e) of the HTTA ‘means an act of keeping a human being as a slave and bonded and this word also includes to remove human organs except otherwise provided by prevailing law’. To meet this definition of exploitation, a child transported to an orphanage where there has been inducement, fear, threat or coercion aimed at the guardian or custodian would need to prove that they were kept as a slave in bonded conditions in order for the offence of transportation to be successfully prosecuted.

If a child is removed from the custody of their legal guardian unlawfully, that act may amount to the offence of human transportation. However, once a child is in an orphanage, forms of exploitation they suffer may fall under the act of violence provision in the Act Relating to Children. The Act Relating to Children guarantees children the right to protection with section 7(3) stating that ‘no father, mother, other member of the family or guardian shall abandon or leave the child of their own or under his or her guardianship unattended’. Section 66(2) of the Act Relating to Children sets out a list of acts of violence against children. Relevant to orphanage trafficking, if the legal process for admitting and keeping a child in an orphanage is not followed, or if a child is forcibly declared or registered as an orphan, these acts can potentially be prosecuted as an act of violence. Therefore, whilst orphanage trafficking itself cannot be prosecuted under the Act Relating to Children, many of the forms of exploitation that are not captured by the HTTA can potentially be prosecuted under this Act. This piecemeal approach to prosecution does not provide satisfactory recourse to orphanage trafficking victims, which is why reform is necessary.

Recommendations for reform

Applying a technical interpretation of the HTTA, particularly as it relates to human trafficking, is difficult in the context of orphanage trafficking because the elements of both trafficking and
transportation under the HTTA are vastly different to those found in international law. Nepal ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (‘Trafficking Protocol’) in June 2020. To fulfil the obligations associated with ratification, Nepal should amend current laws concerning human trafficking to align with international law.

To achieve this, several amendments to the HTTA are required. In the Trafficking Protocol, the offence of trafficking has three components – the act, the means, and a purpose of exploitation. For child trafficking, the means element is removed, meaning that only the act and a purpose of exploitation are required. Currently, section 4(2)(b) of the HTTA includes a ‘means requirement’ for the transportation offence. Due to the inclusion of the words ‘guardian or custodian’, it appears that this provision applies equally to adults or children. To align with international law, this would need to be amended.

The definition of exploitation in the HTTA also represents a divergence from the international law. Section 2(e) of the HTTA defines exploitation as including ‘an act of keeping human being as a slave and bonded’ but does not explicitly define forced labour or bonded labour as forms of exploitation that fall under human trafficking offences. In contrast, article 3 of the international Trafficking Protocol provides that exploitation includes ‘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’. The intention of keeping the definition of exploitation broad was so that State parties could adapt the definition to suit differing contexts which Nepal may consider as part of the amendments.

These limited examples illustrate the significant amendment to human trafficking law in Nepal required to align more closely with the international law on human trafficking. To combat orphanage trafficking and ensure that it is a prosecutable offence, it is strongly recommended that Nepal consider including specific reference to orphanage trafficking as a form of child trafficking in any amendment made to the HTTA. This could be included either by introducing a new stand-alone offence for orphanage trafficking within the HTTA or adding it as an aggravated offence. Such an inclusion would recognise the longstanding issue of orphanages recruiting children for profit and exploitation that Nepal has documented over nearly two decades and provide a ‘fit for purpose’ criminal justice response (van Doore & Nhep, 2021a). It is acknowledged that whilst a more appropriate criminal legal framework will assist, it must be coupled with other mechanisms to ensure the protection of vulnerable children. Such other measures include the enforcement of minimum standards for the
alternative care of children, particularly regarding gatekeeping, a prioritisation on family strengthening, and child protection reform processes including measures to address the potential harms of orphanage tourism (van Doore & Nhep, 2019).

**Conclusion**

Despite extensive evidence of the systemic nature of orphanage trafficking in Nepal, prosecutions remain low. This is in part due to gaps in the legal framework which fail to adequately account for orphanage trafficking, in addition to other social and political factors. This article grapples with the former; that is, the difficulties in prosecuting orphanage trafficking as an offence under the current laws.

Currently, where children are transferred to an orphanage for a purpose of exploitation, the offence of human transportation may potentially be prosecuted. However, if a child is sold to an orphanage, it is more likely to fall under the offence of human trafficking. Where human trafficking or transportation is not able to be prosecuted, but children are exploited or used to gain monetary benefit from others, it has the potentially to be prosecuted as an act of violence under section 66 of the Act Relating to Children. It is the decision of law enforcement and the prosecutor to decide upon the most appropriate offence.

As Nepal aims to satisfy international obligations pursuant to the ratification of the Trafficking Protocol, it is imperative that orphanage trafficking is considered and legislated for. This reform should consider a standalone offence of orphanage trafficking, or the inclusion of orphanage trafficking as a form of child trafficking that is explicitly recognised.

**References**

*Act Relating to Children 2018 Nepal*


Human Trafficking and Transportation Act 2007 Nepal


van Doore, K. E. (2020). Regulating Australia’s Participation in the Orphanage Industry. Institutionalised Children Explorations and Beyond, 7(1), 74–82.
