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## CHAPTER 4

# LEGAL FRAMEWORKS

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In the context of the RETA, a study was conducted to: (i) review existing legislation, regulations, and policies in Bangladesh, India, and Nepal for the protection of persons against trafficking, and the rescue, repatriation, and support of trafficked persons; (ii) to identify aspects of the legal frameworks that could be improved to better protect persons against trafficking, and to rescue, repatriate, and support trafficked persons; (iii) identify areas for possible capacity building of key stakeholders in Bangladesh, India, and Nepal to better implement and enforce the relevant laws; and (iv) consider the comparative experience of countries in the Greater Mekong Subregion (GMS) and elsewhere in combating human trafficking, and identify approaches that could be relevant to countries of South Asia.

### 4.1 Conceptual and Legal Frameworks

The complex nature of human trafficking is mirrored by a similarly complex web of laws and policies operating at international, regional, subregional, national, and subnational levels. These legal frameworks generally reflect one or more of the following conceptual approaches to trafficking, as

- (i) a moral issue,
- (ii) a law-and-order or organized-crime issue,
- (iii) a human rights issue,
- (iv) a migration issue,
- (v) a labor issue,
- (vi) a poverty and development issue,
- (vii) a gender issue, and/or
- (viii) a public health issue.<sup>72</sup>

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<sup>72</sup> This list draws on the analysis in Wijers, Marjan, Lin and Lap-Chew. 1997. *Trafficking in Women: Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*.

The legal frameworks that typically come to mind in the context of human trafficking are criminal laws against “trafficking” (however defined), or against related criminal activities such as kidnapping, wrongful confinement, slavery or forced labor, and rape or sexual assault. Antitrafficking laws have been associated historically with efforts to combat prostitution, and therefore many antitrafficking laws focus primarily or exclusively on trafficking for prostitution. However, there is a trend in recent antitrafficking legislation to recognize that human trafficking may be for a variety of purposes, also including forced labor, forced marriage, sale of organs, and other abusive or exploitative conditions and activities. Recent antitrafficking laws may also focus more on the deceptive or coercive aspect of trafficking and on the involvement of organized criminal elements. The different conceptual approaches to trafficking also highlight the relevance of a number of other legal frameworks, including (i) human rights laws; (ii) migration laws, regulations, and policies; (iii) labor rights and standards; and (iv) frameworks for economic development and integration. Other relevant laws may include those pertaining to extradition, birth and marriage registration, and prohibitions on child marriage, dowry, and other harmful social and cultural practices.

## 4.2 Crosscutting Issues

The following five areas require special attention when analyzing legal frameworks of human trafficking:

- **Links and distinctions between trafficking and prostitution; differences in legal treatment of prostitution.** As reflected in the *UN Trafficking Protocol*, a person may be trafficked into a variety of harmful circumstances, including forced prostitution, bonded labor, or slavery-like working conditions. However, the antitrafficking laws in **Bangladesh** and **India**, as well as the new *SAARC Trafficking Convention*, focus primarily or exclusively on trafficking for prostitution. As noted earlier, antitrafficking treaties and laws may or may not require a separate element of coercion, deception, or abuse of power. Where antitrafficking laws focus primarily on prostitution, and do not require a separate showing of coercion, deception, or other abuse, women engaged in commercial sex work may be presumed to have been trafficked, and may be subject to “rescue” and repatriation to their home

countries, regardless of their wishes. At the same time, an antitrafficking law's focus on prostitution may result in all trafficked women being stigmatized as prostitutes. Ironically, this focus on prostitution can obscure the fact that trafficked women and girls frequently are subject to sexual abuse by traffickers, regardless of whether they are trafficked into prostitution. Because they are viewed as "fallen women," trafficked women may also be sexually abused by law enforcement officers, even after they have been "rescued" and placed in "safe custody."

The linkages made between trafficking and prostitution are complicated by countries' different legal treatments of prostitution. The UN Special Rapporteur on Violence Against Women has identified several possible legal approaches to prostitution, including (i) criminalization, which may include either prohibition or toleration, and may criminalize all or only some actors; (ii) decriminalization, which may or may not include legal protections of sex workers; (iii) and legalization/regulation, which may include zoning, licensing, and mandatory health checks.<sup>73</sup> Commitments to protect the human rights of women and girls trafficked into prostitution are more difficult to fulfill when they are treated as criminals under antiprostitution laws. They are also less likely to seek help from police and other public authorities for fear of being arrested for prostitution.

- **Distinction between women and children; different laws on age of majority.** While international law and national legal frameworks recognize the different legal status of women and children, with different rights and capacities, there is a tendency in many antitrafficking laws to group women and children together. If distinctions are not carefully drawn between the two groups, these laws may have a disempowering effect on women, for example, by not recognizing their capacity and right to make decisions concerning their safety, health, work, and location. Women and children also have different needs in terms of counseling, witness protection, legal assistance, and participation in criminal investigations and trials, which may be ignored if they not treated separately within anti-trafficking laws.

The treatment of children under antitrafficking laws is also complicated by the existence of multiple laws of majority in many

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<sup>73</sup> Coomaraswamy, Radhika, 2000. op. cit., p. 11.

countries. For example, both the new *UN Trafficking Protocol* and *SAARC Trafficking Convention* define “child” as any person under 18 years. However, the age of majority for various purposes under the laws of **Bangladesh**, **India**, and **Nepal** vary from 7 years (the lowest age of criminal responsibility in Bangladesh)<sup>74</sup> to 21 years (the upper age for guardianship in Bangladesh).<sup>75</sup> Labor laws may also set different minimum ages for different types of work. In addition, despite minimum ages for marriage established by statute, religious laws and community norms permit or encourage child marriage, particularly for girls. For example, Muslim personal law in **Bangladesh** allows a child to be given in marriage at puberty, and Hindu personal law in Bangladesh allows child marriage without the child bride having the right to repudiate the marriage at any age.<sup>76</sup> These variations can lead to a number of anomalous results in relation to trafficking, particularly trafficking of adolescents. For example, a 16-year-old could be trafficked into illegal activities (such as drug smuggling). The adolescent might be held criminally responsible and prosecuted for drug smuggling under a country’s penal laws, although the child would not have been considered capable of consenting to participate in these activities under the *UN Trafficking Protocol*.

- **Law enforcement issues.** The effectiveness of antitrafficking laws can be influenced by a number of factors. They include the resources dedicated to enforcement and prosecution of the laws; the training of law enforcement and court personnel on the scope and intent of the laws; community awareness and willingness to report trafficking cases; police powers to investigate trafficking cases; ability and willingness of law enforcement and court personnel to protect trafficked persons during the investigation and prosecution of the traffickers; gender-sensitive and child-sensitive court facilities and procedures; and the insulation of police investigators, prosecutors, and judges from political influence and corruption. There is also evidence from **Bangladesh**

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<sup>74</sup> Under Bangladesh’s criminal laws, the minimum age of full criminal responsibility is 12 years, but there is a presumption of capacity to infringe certain criminal laws at 7-11 years (depending on the offense).

<sup>75</sup> These variations are recognized in the *Convention on the Rights of the Child*, which defines a child as “below the age of 18 years unless, under the law applicable to the child, majority is attained earlier” (Article 1). The Convention also recognizes the need to consider “the evolving capacities of the child” in relation to the child’s exercise of rights thereunder (Article 5).

<sup>76</sup> Hussain, Hameeda, ed. 2001. *Human Rights in Bangladesh 2000*. Dhaka: Ain o Salish Kendro (ASK).

that, while stiff criminal penalties for traffickers may demonstrate a government's resolve to combat trafficking, extremely harsh sanctions such as the death penalty actually discourage prosecutions and convictions of traffickers.

- **Links to labor standards.** The abusive conditions in which trafficked persons typically are forced to work implicitly violate both human rights laws and a range of labor laws and standards. However, women and children often fall prey to traffickers because they are trying to escape a working environment—such as a sweatshop where they are not fairly paid or are sexually abused by supervisors—in which labor laws are routinely violated. Moreover, most of these women and children are working in the informal sector, which is beyond the reach of most labor laws and regulations. Migrant workers are particularly vulnerable to trafficking and other abuses, especially if they are undocumented, since they are unlikely to complain about their working conditions for fear of being arrested and deported.
- **Different national priorities and governance structures.** National policies and legal frameworks to combat trafficking can vary substantially, depending on national perceptions of the nature of the problem and other national priorities. For example, although all three countries included in this study are experiencing both internal and crossborder trafficking, their approaches are influenced by their self-perceptions as “source,” “transit,” and/or “destination” countries. Thus, both **Bangladesh** and **Nepal** focus heavily on the trafficking of young women and girls to brothels in India, while India is more concerned with internal trafficking. Moreover, because of its federal system, India also must deal with differences in approaches among its various states.

### 4.3 International Commitments

Bangladesh, India, and Nepal have signed or ratified/acceded to a number of treaties relevant to human trafficking, including:

#### 4.3.1 Antitrafficking and Antislavery Treaties

As discussed above, the *1949 Trafficking Convention* is the main international instrument relevant to human trafficking, and consolidates

four prior treaties dating back to the turn of the century. Both **Bangladesh** and **India** are parties to the Convention, while **Nepal** is not. The Convention reflects a historical concern with the trade in women for prostitution, and focuses on punishing procurers, exploiters, and brothel owners. Although the Convention includes commitments by state parties to provide for the “rehabilitation and social adjustment of the victims of prostitution” (Article 16), the Convention also allows for the forcible expulsion of aliens who are prostitutes (Article 19). The Convention does not prohibit prostitution directly, but requires punishment of third parties involved in prostitution; at the same time, it does not preclude a state party from prosecuting sex workers as well as third parties.<sup>77</sup> The Convention is considered to have been relatively ineffectual, since it lacks a formal monitoring mechanism.

The *UN Trafficking Protocol*, adopted by the UN General Assembly in November 2000, includes a more expansive definition of trafficking in persons, which also covers trafficking into forced labor, forced marriage, and slavery-like conditions. This definition is generally consistent with the definitions now used by UN agencies and the UN Special Rapporteur on Violence Against Women.<sup>78</sup> To date, over 100 states have signed and eight have ratified the protocol (which will enter into force 90 days after the 40th ratification, accession, or acceptance). None of the three countries included in this study has yet signed the protocol. While the protocol, as a supplement to the *UN Convention Against Transnational Organized Crime*, places strong emphasis on crime control, it also includes a number of measures to support trafficked persons, which may include housing, counseling, medical and psychological assistance, and training and employment opportunities (Article 6.3). At the same time, the protocol has been criticized for not adequately distinguishing between women and children, and for not including more mandatory provisions on assistance to trafficked persons.<sup>79</sup>

### 4.3.2 Human Rights Treaties

Bangladesh, India, and Nepal have also ratified or acceded to a number of human rights treaties that explicitly or implicitly address

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<sup>77</sup> Coomraraswamy, Radhika, 2000. op. cit.

<sup>78</sup> Sanghera, Jyoti. 2001. *Towards the Construction of an Empowered Subject: A Human Rights Analysis of Anti Trafficking Legal Interventions and Trends in South Asia*. Paper presented at the Technical Consultative Meeting on Anti-Trafficking Programs in South Asia.

<sup>79</sup> Ibid.

trafficking in persons. The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*<sup>80</sup> requires state parties to “suppress all forms of traffic in women and exploitation of prostitution of women” (Article 6). The *Convention on the Rights of the Child (CRC)*<sup>81</sup> contains a number of relevant provisions pertaining to the illicit transfer of children abroad (Article 11), protection against abuse, maltreatment and exploitation by parents or other caretakers (Article 19), protection in the case of intercountry adoptions (Article 21), protection against sexual abuse and exploitation (Article 34), prevention of abduction, sale or traffic of children (Article 35), and prohibition of torture and other cruel or inhuman treatment (Article 37). The CRC has recently been supplemented by an *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*,<sup>82</sup> which **Bangladesh** has ratified and **Nepal** has signed. The CRC sets standards for treatment of offenders, protection of victims and prevention efforts, and provides for increased international cooperation in all these areas.

The UN Office of the High Commissioner for Human Rights is currently finalizing Recommended Principles and Guidelines on Human Rights and Human Trafficking, for release later this year. These principles and guidelines will be an extremely valuable resource for government officials and civil society organizations working to ensure that human rights principles are incorporated in antitrafficking laws, policies, and programs.

### 4.3.3 Labor Conventions

Bangladesh, India, and Nepal are also parties to a number of ILO conventions relevant to trafficking in persons, especially women and children. One or more of them have ratified the *Forced Labour Convention, 1930* (No. 29), the *Abolition of Forced Labour Convention, 1957* (No. 105), the *Minimum Age Convention, 1973* (No. 138), and the *Worst Forms of Child Labour Convention, 1999* (No. 182). The *Discrimination (Employment and Occupation) Convention, 1958* (No. 111) and the *Equal Remuneration Convention, 1951* (No. 100) are also relevant, since young women in South Asia frequently respond to the enticing job offers of traffickers because they are earning much less than

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<sup>80</sup> Entered into force on 3 September 1981, 1249 U.N.T.S. 13.

<sup>81</sup> Entered into force on 2 September 1990, 1577 U.N.T.S. 3.

<sup>82</sup> Entered into force on 18 January 2002, UN Doc. A/RES/54/263.

men and may also be subject to harassment and sexual abuse in local workplaces.<sup>83</sup> ILO conventions relating to migrant workers, such as the *Migration for Employment Convention (Revised), 1949 (No. 97)* and the *Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, are also potentially relevant, but none of them has been ratified thus far by Bangladesh, India, or Nepal. The countries also have not yet ratified the *Part-time Work Convention, 1994 (No. 175)* or the *Home Work Convention, 1996 (No. 177)*, which extend labor protections to part-time and home-based workers, many or most of whom are women.

#### 4.3.4 Other International Commitments

Bangladesh, India, and Nepal have also participated in a number of international conferences that have adopted declarations and plans of action relevant to human trafficking. Although not binding obligations under international law, these declarations and plans of action reflect the consensus of the participating countries, and create an expectation that the countries will take steps to implement the commitments set out in these documents. For example, the Vienna Programme of Action adopted by the World Conference on Human Rights in 1993 treated trafficking as a form of gender-based violence. The Cairo Programme of Action adopted by the International Conference on Population and Development in 1994 called on governments to prevent international trafficking in migrants, especially for prostitution; the Copenhagen Declaration on Social Development adopted by the World Summit for Social Development in 1995 also called on countries to take effective measures against traffickers of undocumented migrants and to safeguard migrant workers and their families. The Beijing Platform of Action adopted at the Fourth World Conference on Women in 1995 included a number of measures calling on governments to address the root factors contributing to the trafficking of women and girls; to strengthen existing laws to better protect women's rights; to punish traffickers through both criminal and civil laws; to accelerate cooperation among law enforcement authorities to break up

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<sup>83</sup> The conventions are available at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm>. Since all of the conventions mentioned above are "core" conventions under ILO's *Declaration on Fundamental Principles and Rights at Work*, Bangladesh, India, and Nepal are bound to uphold them as ILO members, even if they have not formally ratified them. The text of the *Declaration on Fundamental Principles and Rights at Work* is available at <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>.

trafficking networks; and to allocate resources to heal and rehabilitate trafficked persons back into society.<sup>84</sup>

### 4.3.5 Findings

The commitments of Bangladesh, India, and Nepal to address the problem of human trafficking, especially of women and girls, would be further strengthened by their ratification of the new *UN Convention Against Transnational Organized Crime* and the Trafficking Protocol that supplements it. In addition, their ratification of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* would establish common standards for the humane treatment of migrant workers in their countries, which could reduce the vulnerability of many of these workers to trafficking. A common challenge for all of the countries is to implement their international commitments to combat trafficking in a realistic and meaningful way. As discussed in later sections, all three countries are taking concrete steps in this regard through various national action plans, which call for actions in the areas of law reform, law enforcement, training, capacity building, awareness raising, and other initiatives. Several international agencies, including ILO, IOM, UNDP, UNICEF, and UNIFEM, and bilateral agencies such as the Canadian International Development Agency (CIDA), the United Kingdom's DFID, the Norwegian Agency for Development Cooperation (NORAD), and USAID, are already supporting a number of these initiatives.

## 4.4 Regional and Subregional Initiatives

A number of initiatives are under way in South Asia to combat human trafficking, including regional and subregional plans of actions, the new *SAARC Trafficking Convention*, and proposals for bilateral arrangements between **Bangladesh** and **India** and between **Nepal** and **India**. Initiatives in the GMS, such as the negotiation of bilateral memoranda of understanding (MOUs) between Thailand and its neighbors, and reform

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<sup>84</sup> Skinnider, Eileen. 1997. *Illegal Labour Movements and the Trafficking of Women: International Dimensions in the Era of Globalization*, in *Proceedings of the 1997 Regional Conference on Trafficking in Women and Children*, Bangkok, Thailand.

of Thailand's criminal laws to conform to the new *UN Trafficking Protocol* and related instruments, also provide useful models for future activities in South Asia.

#### 4.4.1 Plans of Action

The *Bangkok Accord and Plan of Action to Combat Trafficking in Women*, which was adopted at a regional conference convened by the UN Economic and Social Commission for Asia and the Pacific (ESCAP) in November 1998, represents a comprehensive effort by several countries in the region to address trafficking at national, subregional, regional, and international levels. Its recommendations for national-level action include a number of concrete activities in the areas of prevention, protection, and humanitarian treatment of trafficked persons; sanctions against traffickers; medical and psychological intervention; repatriation and reintegration; information/monitoring mechanisms; and participation. The Plan's recommendations for subregional and regional action include creation of subregional and bilateral treaties to outline procedures to take against trafficking; establishment of a regional task force, and regional and subregional focal points in trafficking; establishment of centers for trafficked persons; and consideration of establishing new regional mechanisms to implement the plan and regional funds to assist trafficked persons in any repatriation or reintegration. As one follow-up, ESCAP has convened regional and subregional seminars on using legal instruments to combat trafficking, and is preparing a related resource guide.<sup>85</sup>

Close to 20 Asian countries, including Bangladesh, also participated in an international symposium on migration in April 1999, which resulted in the adoption of the *Bangkok Declaration on Irregular Migration*. Recognizing the various factors contributing to an increase in irregular migration within and out of the region, and the increasing activity of organized criminal elements in both smuggling and trafficking in human beings, the Declaration calls for countries in the region to pass legislation to criminalize smuggling and trafficking in human beings, to cooperate in prosecuting offenders, to provide humanitarian treatment to irregular migrants, to designate national focal points for cooperation on migration issues, and to conduct a feasibility study on a possible regional migration arrangement.

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<sup>85</sup> ESCAP. 2002. *Draft Resource Guide on Using Legal Instruments to Combat Trafficking Women and Children*. Bangkok: ESCAP.

As noted earlier, South Asian governments also endorsed a *South Asia Strategy against Commercial Sexual Exploitation of Children and Child Sexual Abuse*, in preparation for the Second World Conference Against Commercial Sexual Exploitation of Children held in Yokohama in December 2001. This strategy includes the development of national plans of action; the enactment and effective implementation of laws to combat commercial sexual exploitation and sexual abuse of children; the establishment of regional and national focal points and databases; consultations with a wide range of national, regional, and international stakeholders; and advocacy to improve national birth registrations. Specific areas for legal reform under the strategy include establishing legal procedures that are rights-based, gender-sensitive, and child-friendly; ensuring registration of all births and marriages; cooperation with other governments to prosecute foreign perpetrators; and child-rights training for judges, lawyers, police, and other law enforcement officials.<sup>86</sup>

#### 4.4.2 SAARC Conventions and Other Initiatives

In January 2002, representatives of the seven member states of SAARC signed two conventions, a *Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia* and a *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. The first convention essentially reinforces the SAARC member states' commitments under the international CRC, discussed earlier in this report. The second convention (the *SAARC Trafficking Convention*) represents a significant development—the first subregional treaty addressing trafficking in persons. Each convention will come into effect 15 days after ratification by all seven member states.

The *SAARC Trafficking Convention* had been under development since 1997, and was the subject of vigorous debate by women's and human rights groups in the SAARC countries. While still in draft form, the convention also attracted the notice of the UN Special Rapporteur on Violence Against Women, who raised several concerns. In particular, she cautioned that the convention should recognize the conceptual distinctions between trafficking and prostitution, and trafficking and migration, and the different status of women and children.<sup>87</sup> Similar

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<sup>86</sup> United Nations Children's Fund (UNICEF). 2001. *Commercial Sexual Exploitation and Sexual Abuse of Children in South Asia*. Kathmandu: UNICEF Regional Office for South Asia.

<sup>87</sup> Coomaraswamy, Radhika. 2001. op. cit.

comments were expressed by participants in the SAARC People's Forum, a coalition of South Asian NGOs, who recommended (i) broadening the convention's definition of trafficking to include a variety of exploitative purposes, not only prostitution, (ii) ensuring that the convention would not be used to restrict women's right of mobility, and (iii) adding provisions to acknowledge the right of trafficked women to choose the manner of their reintegration, to ensure that no trafficked women would be repatriated against their will, and to provide for the security and maintenance of trafficked persons pending their reintegration.<sup>88</sup> Other concerns expressed were that the draft convention did not adequately address the problem of trafficking from South Asia to other regions, that the regional task force to be set up under the convention should include nongovernment experts on trafficking, and that the provisions on extradition should be more stringent and time-bound.<sup>89</sup>

On its face, the *SAARC Trafficking Convention* does not appear to have been substantially changed from earlier drafts in response to comments from the UN Special Rapporteur on Violence Against Women or civil society groups. As discussed early in this report, the convention limits the definition of trafficking to "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" (Article I.3). Because consent is irrelevant for purposes of the definition, a woman who travels voluntarily to engage in commercial sex work could be deemed to have been trafficked by any third party who assists her. The convention requires state parties to make suitable arrangements for the care and maintenance of trafficked persons, including the provision of legal advice and health care facilities, pending the completion of arrangements for their repatriation in the case of cross-border trafficking (Article X.2). However, the provisions on repatriation do not contemplate any input or choice on the part of the trafficked person. In these and other respects, the convention provides essentially the same treatment to women and children. Moreover, the presumption that trafficked persons will be repatriated to their country of origin (Article IX.1) raises practical issues for women who have migrated from Nepal and Bangladesh to India, but who do not wish to return to their home

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<sup>88</sup> Memorandum to the Honourable Members of the Standing Committee of the 10<sup>th</sup> SAARC Summit from the Participants of the SAARC People's Forum: Combating Trafficking in Women and Children and Ensuring Food Security, Colombo, 25-26 July 1998. Available: <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/repro2/SAARC.htm>.

<sup>89</sup> Neergaurav Research and Development Foundation, 1999. *The Government Draft of SAARC Convention Against Trafficking: Critiqued and Alternative Draft Proposed*.

country, for example, because of fear of rejection or abuse by family members or others. The situation is especially problematic for women who have migrated from Nepal, because they would otherwise be entitled to remain in India under the terms of the *Treaty of Peace and Friendship between the Government of India and the Government of Nepal, 1950*.<sup>90</sup>

In other respects, the *SAARC Trafficking Convention* represents a significant step forward in promoting sub-regional cooperation to address trafficking. The convention includes specifications of criminal offenses for trafficking; provides for mutual legal assistance in conducting investigations, trials, and other proceedings; specifies that trafficking offenses will be extraditable within the terms of any extradition treaty between state parties; and requires judicial authorities to maintain the confidentiality of trafficked persons and provide them with appropriate counseling and legal assistance. With regard to prevention and interception of trafficking, the convention requires state parties to sensitize their judiciaries and law enforcement agencies about trafficking, to exchange information on a regular basis, to promote awareness of the trafficking problem through the media and other means, and to focus “preventive and development efforts” in the areas known to be source areas for trafficking (Article VIII.7). The convention provides for establishment of a regional task force to implement its provisions and conduct periodic reviews. This task force may also make recommendation for establishing a voluntary fund to support rehabilitation and reintegration of trafficked persons.<sup>91</sup> In addition, state parties may set up bilateral mechanisms, for example, to facilitate interception of trafficked women and children, and may take steps to supervise employment agencies in order to prevent trafficking in the guise of recruitment. Proposals are also being considered for the appointment of regional and national rapporteurs on trafficking.

### 4.4.3 Findings

The signing of the *SAARC Trafficking Convention* earlier this year represents a milestone in SAARC member countries’ efforts to combat human trafficking. Although currently limited to the trafficking of women

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<sup>90</sup> The treaty provides that “[t]he Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and privileges of a similar nature.” (Article 7).

<sup>91</sup> SAARC. 2002. *Convention on Prevention and Combating Trafficking in Women and Children for Prostitution*. Kathmandu.

and children for prostitution, the convention provides a framework for regional cooperation that could be extended to address trafficking for other exploitative purposes. Although the convention will not come into effect until it has been ratified by all SAARC member countries, the countries can already proceed to develop bilateral mechanisms for sharing information on trafficked persons and suspected traffickers, and for arranging the prompt, safe, and voluntary return of trafficked persons to their home countries, if appropriate. To facilitate cooperation in the investigation, extradition, and prosecution of crossborder traffickers, it would also be desirable for the SAARC member countries—perhaps through a technical expert group—to compare their respective laws on trafficking and identify areas for possible harmonization. (For example, as discussed in the country sections that follow, there is a wide variation in the sentences imposed by the three countries for particular trafficking offenses. To facilitate extradition of traffickers from one SAARC country to another, it could be useful to harmonize the sentences imposed for similar offenses.) A technical expert group could also assist the SAARC countries in identifying changes in their criminal laws that would be necessary to conform to the new *UN Convention Against Transnational Organized Crime* and its protocols (including the *Trafficking Protocol*). The expert group could benefit from the ongoing work of Thailand's Criminal Law Institute in this area.

## 4.5 Bangladesh

### 4.5.1 Legal Framework to Combat Trafficking

As a party to the *1949 Trafficking Convention*, the *1956 Slavery Convention*, CEDAW, CRC and the *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography*, as well as a participant in recent international and regional conferences and special sessions of the UN General Assembly on women, children, human rights, trafficking, and migration, the Government of Bangladesh has made a number of international commitments to combat human trafficking, particularly trafficking in women and children. These commitments are consistent with a number of provisions of the *Bangladesh Constitution*, including the fundamental rights of equality and equal protection (Article 27); right to be free from discrimination on the basis of religion, race, caste, sex, or place of birth (Article 28); right to protection of the

law (Article 31); prohibition against forced labor (Article 34), torture and cruel, inhuman, or degrading treatment (Article 35); and freedom of movement (Article 36).<sup>92</sup> The commitments are also reflected in various national plans, including the Fifth Five-Year Plan (1997-2001), the National Policy and National Action Plan for Women's Advancement, the National Child Policy and National Action Plan for Children, and the recently developed NPA on Trafficking and Sexual Exploitation of Children.

Trafficking of persons and related activities can be prosecuted under several national laws. The *Penal Code of 1860*, as amended, provides criminal penalties for kidnapping, abduction, slavery, forced labor, rape, wrongful confinement, selling or buying minors for prostitution, and other offenses, with punishments of seven years or more and/or fines. The *Suppression of Immoral Traffic Act of 1933* includes somewhat lesser penalties for detaining a girl under 18 years against her will in a place of prostitution, or for encouraging or abetting the prostitution of a girl under 18 years. Under the Act, police of a certain rank can remove any girl who appears to be under 18 years from a brothel and, if she appears to be under 16 years, can turn her over to a Juvenile Court who can place her in "suitable custody" until she turns 18. The *Child Marriage Restraint Act of 1929* penalizes any male adult who marries a girl under 16 years, and also penalizes any parent or guardian who facilitates this crime. The *Children (Pledging of Labor) Act of 1933* prohibits any parent or guardian from pledging the labor of a child under 15 years. The *Children's Act of 1974* also provides penalties for cruelty to children, use of children for begging, luring children into a brothel, and other types of exploitation. Under the *Emigration Ordinance of 1982*, registered recruiting agents for overseas employment can lose their licenses and forfeit their security deposit if they are found to have violated the ordinance or to have been guilty of other misconduct (including coercion or fraud in inducing someone to migrate).

By the 1980s, women's groups in Bangladesh were increasingly speaking out against the various forms of violence against women and girls, including trafficking. Because the *Penal Code* and other existing laws were not seen as effective in combating these problems, a series of special laws were enacted, beginning with the *Cruelty to Women (Deterrent Punishment) Act of 1983*. This law was superseded by the *Woman and Child Repression (Special Provisions) Act of 1995* (the 1995

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<sup>92</sup> *Constitution of the People's Republic of Bangladesh, as amended*. Available: <http://www.bangladesh.gov.org/pmo/constitution/index.htm>.

Act), which has recently been repealed and replaced by the *Women and Children Repression Prevention Act of 2000* (the *2000 Act*). The *2000 Act* establishes extremely severe penalties for a number of offenses against women and children, including intentional acid burns, trafficking, kidnapping, holding for ransom, rape, sexual harassment, dowry death, and crippling or disfiguring a child for beggary or other purposes. With regard to trafficking in women, for example, the *2000 Act* provides:

Whoever brings or traffics or sends any [woman] abroad with the intention of using that woman in prostitution or using for unlawful or immoral purposes or buys or sells or lets to hire or hands her over for any kinds of torture or . . . similar reason, keeps a woman in his possession, [care] or puts under his custody, shall be punished with death sentence or life imprisonment or be punished with imprisonment which may extend to twenty years but not less than ten years and in addition, shall also be liable to fine (Section 5[1]).<sup>93</sup>

Similarly severe penalties are provided for trafficking in children (Section 6[1]). The penalty for kidnapping or abducting a woman or child for any other purpose is at least 14 years of “rigorous imprisonment” plus a fine (Section 7). Although there is an emphasis on trafficking for prostitution, these provisions also extend to trafficking for “unlawful” purposes, and therefore could conceivably apply to trafficking for illegal purposes such as forced labor. The provisions also apply to both internal and crossborder trafficking. With regard to prostitution, however, Section 5(1) might also be applied to anyone who travels with or otherwise assists a woman engaged in commercial sex work, without a requirement to show coercion, deception, or other abuse.

The *2000 Act* builds on a number of features of the *1995 Act* that were intended to facilitate and expedite prosecutions for trafficking and other offenses against women and children. For example, the Act provides that offenses will be tried in special Tribunals for Suppression of Violence Against Women and Children, 10 of which have been established.<sup>94</sup> The Act also provides a number of time limits to expedite investigation and

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<sup>93</sup> *Women and Children Repression Prevention Act 2000*, translated by S.A. Farouk, Bangladesh National Woman Lawyers' Association.

<sup>94</sup> Coomaraswamy, Radhika, 2001. op. cit. p. 20.

prosecution of cases, permits a case to proceed without a police report, and prohibits the disclosure of the identities of women and child victims by the news media. The fines collected from those convicted under the Act may be turned over by the special tribunal to the victims as compensation. The *2000 Act* also incorporates a number of improvements based on the recommendations of women lawyers and activists, such as providing flexibility to magistrates to take depositions in the place where an offense occurred or any other place, and allowing the admission at trial of depositions, medical examinations, and other expert reports even where the witness or expert cannot appear. In response to the deaths of two women being held in jail, and reports of other abuses of women in jail, the *2000 Act* authorizes the special tribunals to place women or children in other custodial arrangements during the trial of an offence under the act, including government-run homes or the custody of other organizations or individuals.

#### **4.5.2 Enforcement of Laws Against Trafficking**

The Government of Bangladesh itself acknowledges serious problems in the enforcement of laws against trafficking, including the *2000 Act*. In its 1997 report to the CEDAW Committee, the Government noted that implementation of the laws was weak, in part because members of law enforcement were often themselves involved in trafficking activities, and that the laws were sometimes misapplied with the result that victims were charged with immoral behavior and put in jail. In general, the Government noted that the judicial system is difficult for women to access, since court proceedings are lengthy and court officials are often hostile or unsympathetic to them. The Government acknowledged that law enforcement authorities and the judiciary need to be better sensitized, and that the repatriation of Bangladeshi women who have been trafficked to other countries also needs to be facilitated.<sup>95</sup>

Women lawyers and civil-society groups in Bangladesh have also noted a number of weaknesses and flaws in the enforcement of laws against trafficking. In general, they argue that protective laws for women, such as the *2000 Act*, “create an illusion that women enjoy a privileged and protected position in Bangladeshi society” (Ali 2001: 55). In practice, lawyers who represent women who have been trafficked or suffered other

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<sup>95</sup> Government of Bangladesh. 1997. *Combined Third and Fourth Periodic Report on Elimination of Discrimination Against Women in Bangladesh*.

forms of violence find that women are either intimidated by the perpetrators from seeking redress, or if they try to file a report with the police, their reports are not accurately recorded or fully investigated. Although the *2000 Act* provides severe penalties for trafficking, very few defendants have been charged and convicted under the act (or its predecessor, the *1995 Act*). For example, there were only three convictions for trafficking in 2000.<sup>96</sup> In contrast, there is a strong tendency for prosecutors to charge crossborder traffickers of women and children under the *Passport Act*, which only carries a small fine (Tk. 500), rather than the *2000 Act*.<sup>97</sup>

Various explanations are offered for the low number of trafficking convictions: that law enforcement officers and prosecutors are bribed or otherwise pressured to charge under the *Passport Act* or another lesser offense; that they do not have sufficient witnesses and documentary evidence to prosecute under the *2000 Act*, and therefore opt for a lesser charge; or that prosecutors do bring cases under the *2000 Act*, but judges are reluctant to convict where the penalty is death or life imprisonment. The UN Special Rapporteur on Violence Against Women has separately expressed concern about the application of the death penalty under the *2000 Act* from a human rights perspective.<sup>98</sup> The provision of the death penalty for some offenses under Bangladesh law may also hamper efforts to harmonize antitrafficking laws within South Asia under the *SAARC Trafficking Convention*, since some countries (e.g., Nepal) have recently abolished the death penalty. In the case of children who have been trafficked through fraudulent marriages, it is also difficult to prosecute the “husband” and his accomplices under the *Child Marriage Restraint Act* because births are not typically registered, and therefore the child’s age cannot be established easily.

Lawyers who have assisted trafficked women and children acknowledge the difficulty of prosecuting traffickers under the *2000 Act* because of the victims’ reluctance to participate as witnesses, particularly where family or community members or law enforcement personnel participated in the trafficking, or where the trafficker is politically influential. In this case, the “safe custody” provisions of the *2000 Act* become especially important. However, civil-society groups have

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<sup>96</sup> United States Department of State. 2001. *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report*, July 2001. Available: <http://www.state.gov>.

<sup>97</sup> Ali, Salma, ed. 2001b. *Movement Against Trafficking and Sexual Exploitation*, October Special Bulletin. Dhaka: BNWLA.

<sup>98</sup> Coomaraswamy, Radhika. 2001. op.cit. p. 20.

expressed concern that the *2000 Act* gives the special tribunals complete discretion to decide whether a trafficked woman or child needs custodial protection and, if so, whether it should be in a government home, NGO shelter, or other arrangement.<sup>99</sup> The “safe custody” provision is especially problematic in the case of women, who may or may not want protection. There is also evidence that, despite the issuance of a circular by the Prime Minister’s office to direct magistrates that women and children in need of protection should be sent to government shelters rather than kept in jail, a large number of women and children continue to be detained in jail.<sup>100</sup> This is troubling, given several reported cases of abuse of women in custody by jail personnel, including two recent deaths.<sup>101</sup> There are also reports of abuse in government-run vagrant homes and correction centers, including reports of women being sold into prostitution or trafficked from these homes.<sup>102</sup> As an alternative, a number of NGOs have recently set up shelters where victims of trafficking and other offenses can go for protection and rehabilitation. However, it is generally agreed that the number of NGO shelters is insufficient to handle all those in need of assistance.

Crossborder trafficking of women and children raises additional challenges. In particular, because there is no formal arrangement between **Bangladesh** and the destination countries, mainly **India**, for sharing information on trafficked persons and arranging for their rehabilitation and/or repatriation, it can take years to arrange the safe return of a trafficked woman or child, even when family members or NGOs have located the person and she or he wants to return. The repatriation process is complicated by the fact that women or children who have been trafficked, and subsequently “rescued” from a brothel or sweatshop, may not divulge their true names, nationality, and other personal information because of shame or fear that they will be subject to worse treatment as an undocumented foreigner. Where such a person does contact a Bangladeshi consulate, the consular officials may not believe the person is Bangladeshi, or may be reluctant to help for other reasons.

NGOs such as the BNWLA have had considerable success in assisting trafficked women and children to return to Bangladesh, often in partnership with NGOs in the destination country. In some cases, this has required filing a petition in court to direct the Ministry of Foreign

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<sup>99</sup> Hussain, Hameeda, ed. 2001. op. cit. p. 95.

<sup>100</sup> Ibid. p. 95

<sup>101</sup> Ibid, p. 131.

<sup>102</sup> Ibid, p. 132.

Affairs to repatriate the trafficked person. For example, in *Abdul Gafur v. Secretary, Ministry of Foreign Affairs et al.*,<sup>103</sup> a young woman who had been trafficked from Bangladesh to India as a child was subsequently taken into custody and detained in an Indian remand home for 5 years. Reviewing a petition filed on the young woman's behalf by BNWLA, the High Court found that the young woman's right to protection of law under Article 31 of the *Bangladesh Constitution* had been violated by the inaction of the High Commission of Bangladesh in India to provide her with legal support, and directed the Ministry of Foreign Affairs to initiate action to repatriate her.

As the Government of Bangladesh acknowledged in its last report to the CEDAW Committee, victims of trafficking and other forms of abuse can be harassed and re-victimized by the application of laws intended to protect them. The *Bangladesh Constitution* provides for the adoption of measures to prevent prostitution (Article 18[2]), but commercial sex work by a woman over 18 years is not strictly prohibited, although related activities such as soliciting and managing a brothel are criminal offenses. In practice, however, commercial sex workers are often subject to harassment and violence by police. Moreover, women who are considered "suspicious" are liable to arrest and detention under Section 54 of the *Criminal Procedure Code*. Similarly, street children may be picked up by police under the *Vagrancy Act of 1943* and detained in vagrant homes or correction centers. The conditions of these centers have been criticized by both local and international NGOs. However, these centers are considered preferable to jail where, despite the circular noted above, children are still being kept in custody.<sup>104</sup> A growing number of NGOs are establishing and expanding shelters for women and children who are victims of trafficking or other abuse, but the number is still inadequate.

A number of steps are being taken to address inadequacies in enforcement of the laws relating to trafficking. In addition to the special tribunals for hearing cases under the *2000 Act*, women's police units have been set up to investigate cases of violence against women, including trafficking, and arrange protective custody for women if needed. A special unit in the police Criminal Investigation Department has also been established to investigate trafficking and other cases on an expedited

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<sup>103</sup> Writ Petition No. 4031 of 1997, *Bangladesh Legal Decisions* XVII: 560-62.

<sup>104</sup> Hussain, Hameeda, ed. 2001. op. cit., p. 178.

basis. A number of NGOs are engaged in legal literacy and awareness training at the community level, including working with local elected officials, and have set up cells to provide legal advice and investigate cases involving trafficking and other abuses. Some NGOs such as the BNWLA represent trafficked women and children in court proceedings and collaborate with NGOs in other countries to arrange the safe return of trafficked persons. They are also collaborating with government agencies to provide training to border officials, police, and court personnel on proper application of antitrafficking laws and treatment of trafficking victims. Action Against Trafficking and Sexual Exploitation of Children (ATSEC), a coalition of NGOs working to combat trafficking, is also developing proposals to formalize arrangements between Bangladesh and key destination countries such as India to facilitate exchange of information about trafficked and detained persons and to expedite their repatriation. As mentioned in the Bangladesh Country Report for this RETA, efforts are also being made to establish an effective system for registering births and marriages under the draft Local Government Act.

### **4.5.3 Other Relevant Laws and Policies**

As the Government of Bangladesh acknowledged to the CEDAW Committee in its 1997 report, the lack of effective implementation of laws relating to trafficking in women and children is due in large part to women's subordinate status in the society, as well as the corruption of border officials and police. In its report, the Government noted that despite its guarantees of equality and equal treatment, the *Bangladesh Constitution* allows for personal laws that discriminate against women in the areas of inheritance, marriage, divorce, and guardianship of children, and that various discriminatory customs and practices also persist which contribute to women's inferior social, economic, political, and legal status. Many of these discriminatory laws and practices contribute to the vulnerability of women and girls to trafficking. For example, the practice of giving dowry continues, especially in rural areas, despite the *Dowry Prohibition Act* and the tremendous economic pressure that dowry places on poor families. The Association for Community Development (ACD), an NGO that works in poor rural communities, has found that large numbers of girls from poor families are trafficked to India or Pakistan through "marriages" arranged with Indian or Pakistani men who do not insist on a dowry. The marriages typically are not registered, and when the girls

arrive in the destination country, they may be sold to brothels or factory owners, or kept in slave-like conditions to perform domestic work and provide sex to their “husbands” or other men.<sup>105</sup>

Discriminatory laws and practices relating to women’s employment can also increase their vulnerability to trafficking. Women in Bangladesh generally have more limited work opportunities than men because of their more limited access to education and technical training, social constraints on their mobility (particularly in rural areas), and greater household responsibilities. With the expansion of export manufacturing industries such as ready-made garments, increasing numbers of young women have migrated to Dhaka to work in garment factories. However, in the garment industry, women earn 22-30% of men’s wages, reflecting men’s predominance in more skilled occupations.<sup>106</sup> Many garment factories were hastily constructed and are subject to fire and other hazards. Workers complain that they are not paid regularly and that overtime payments are delayed. None of the garment factories provide housing, despite the fact that more than 90% of their workers are migrants, and therefore women workers typically live in insecure accommodations that are far away from the factories. NGOs have received a large number of complaints of harassment, assault, and rape from women workers, particularly when traveling back and forth to work.<sup>107</sup> These conditions persist in spite of the *Factories Act of 1965* and other laws and regulations, which establish standards relating to conditions of work, working hours, occupational health and safety, benefits, and other matters. There is also evidence that garment factories are used as “recruiting stations” for undocumented migration.<sup>108</sup> In addition, a large number of garment factories are closing as a result of the worldwide economic downturn, and women who are laid off are vulnerable to traffickers who promise them good jobs in other countries. This trend is expected to continue as the worldwide market for textiles and clothing is liberalized under the *Agreement on Textiles and Clothing* concluded during the Uruguay Round of multilateral trade negotiations,<sup>109</sup> and Bangladesh loses the benefit of import quotas it was granted previously by the United States and other textile-importing countries.

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<sup>105</sup> ACD. 1995. *International Migration of Women: A Study on Causes and Consequences*. ACD. 2001. *Paradigms of Women Trafficking in Bangladesh*.

<sup>106</sup> ADB. 2001. *Country Briefing Paper: Women in Bangladesh*. Manila. p. 12.

<sup>107</sup> Hussain, Hameeda, ed. 2001. op. cit, p. 200.

<sup>108</sup> Ibid, p. 219.

<sup>109</sup> Population Council. 2001. op.cit. and Shamin, I. and Kabir. 1998. op cit.

With limited work opportunities in Bangladesh, many women seek to migrate for work in other countries of South Asia, Southeast Asia, and the Middle East. However, since the early 1980s the Government has placed restrictions on women’s migration for employment, on the basis that women need protection from abusive work environments overseas. Civil-society groups have resisted these restrictions, and at present the migration ban—contained in a 1998 Circular—applies only to domestic workers working for non-Bangladeshis abroad.<sup>110</sup> Nevertheless, economic necessity still compels many women with limited skills to migrate in search of work. Civil-society groups argue that the ban on migration of female domestic workers may actually lead to an increase in trafficking, since women who are irregular migrants are more likely to rely on unscrupulous agents who may traffic them into abusive work situations.<sup>111</sup> A study recently carried out by the Refugee and Migratory Movements Research Unit of the University of Dhaka recommended that the policy of restricting women’s migration be re-evaluated “in light of the reality that it has given way to undocumented migration of women” and violates women’s constitutional right to work.<sup>112</sup>

The precarious working conditions of children in Bangladesh also contribute to their vulnerability to trafficking. Although the *Children (Pledging of Labor) Act of 1933* prohibits the pledging of children under 15 years for labor, and a number of other laws set minimum ages for different forms of work, these laws are not well enforced. In any case, the minimum age laws apply to formal sector employment, while the vast majority of child workers are in the informal sector. One study identifies ship breaking and domestic work as the most hazardous occupations for children.<sup>113</sup> While children involved in ship breaking can suffer serious physical accidents, children in domestic work are frequently subject to long hours, strenuous tasks, and physical abuse. Child workers who escape such abusive situations frequently find themselves on the street in even more precarious circumstances, where they may be harassed or abused by police or others, or picked up by traffickers.

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<sup>110</sup> Siddiqui, Tasneem. 2001. *Transcending Boundaries: Labour Migration of Women from Bangladesh*. Dhaka: University Press Limited. p. 60.

<sup>111</sup> Hussain, Hameeda, ed. 2001. op. cit., p. 219.

Ali, Salma, ed. 2001a. *Violence Against Women in Bangladesh – 2000*. p. 41.

<sup>112</sup> Siddiqui, Tasneem, ed. 2002. *Beyond the Maze: Streamlining Labour Recruitment Process in Bangladesh*. p. 79.

<sup>113</sup> Hussain, Hameeda, ed. 2001. op.cit., p. 172.

#### 4.5.4 Findings

Government and civil-society sources suggest a number of avenues for improving the enforcement of the *2000 Act* and other relevant laws to deter and punish traffickers, ensure that trafficked women and children are not harassed by the application of these and other laws, and reduce the vulnerabilities of women and children to trafficking. Possible actions include:

- Review of the *2000 Act*, *Penal Code*, *Criminal Procedure Code* and other relevant laws to identify reforms or new legislation needed to bring the laws into conformity with the *SAARC Trafficking Convention*, the *UN Convention Against Transnational Organized Crime* and related *Trafficking Protocol* (including in particular a comparison of criminal penalties for trafficking offenses with those of other SAARC countries);
- Consideration of NGO proposals to revise the safe custody provision of the *2000 Act* (or its implementation by the special tribunals) to take trafficked women's wishes into account in any safe custody decision, and to assign safe custody to reputable NGO shelters rather than to government-run facilities whenever possible;
- Monitoring of complaints, arrests, and prosecutions of trafficking and related offenses under the *2000 Act*, *Penal Code*, *Passport Act*, and other laws to identify patterns and possible biases in the handling of trafficking cases by law enforcement officials and judges;
- Monitoring of arrests and dispositions under Section 54 of the *Criminal Procedure Code* and the *Vagrancy Act* to ensure that women and children are fairly and humanely treated in the application of these laws;
- Consideration of NGO and other proposals to make court procedures more gender-sensitive and child-friendly;
- Collaboration between relevant government ministries and NGOs experienced in repatriating trafficked persons to develop mechanisms for prompt, safe, and voluntary return of trafficked persons, and for extradition of suspected traffickers, for further discussion with counterparts from India and other destination countries;
- Review of the 1998 Circular limiting migration of certain categories of domestic workers, and consideration of alternative

- ways to protect women migrants from abuse in other countries;
- Review of training, compensation, and performance evaluation systems in law enforcement agencies to identify ways to curb corruption and abuse of power by police and border officials;
  - Continued effort to improve enforcement of labor laws, to extend labor protections to the informal sector, and to encourage adoption of voluntary codes of conduct by private-sector associations and firms; and
  - Establishment and enforcement of workable systems for registering births and marriages (for example, through provisions of the draft Local Government Act mentioned in the Bangladesh Country Report).<sup>114</sup>

## 4.6 India

### 4.6.1 Legal Framework to Combat Trafficking

Like Bangladesh, India has made a number of international commitments to combat the trafficking of persons, as a party to the *1949 Trafficking Convention*, the *1956 Slavery Convention*, CEDAW and CRC, and as a participant in recent international conferences and special sessions of the UN General Assembly on women, children, and human rights. There is also a strong constitutional basis for combating the trafficking of persons. Article 23 of the *Constitution of India* prohibits “the traffic in human beings. . .and other similar forms of forced labor,” and the right to be free from trafficking or forced labor is among the fundamental rights that are enforceable by the Supreme Court of India under Article 32. Other fundamental rights that are relevant are the rights to equality and equal protection (Article 14); to be free from discrimination on grounds of religion, race, caste, sex ,or place of birth (Article 15); to life and liberty (Article 21); to protection from arrest and detention except under certain conditions (Article 22); and the right of children under 14 years to be free from work in factories, mines, or other hazardous employment (Article 24). A number of principles of state policy articulated in the Constitution are also relevant, including that men and women should have the right to an adequate means of livelihood and equal pay for equal work, that men, women, and children should not be forced by

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<sup>114</sup> ADB. 2002. *RETA 5948: Combating Trafficking of Women and Children in South Asia – Bangladesh Country Report*.

economic necessity to enter unsuitable avocations, and that children and youth should be protected against exploitation (Article 39); that the legal system should ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities (Article 39A); and that all workers should have a living wage and conditions of work to ensure a decent standard of life (Article 43).<sup>115</sup> The commitments to address the problem of trafficking in persons are also reflected in a number of national and state<sup>116</sup> action plans, including in particular the Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children adopted in 1998.

In India, as in Bangladesh, trafficking of persons and related activities can theoretically be prosecuted under a number of laws. Several of these laws have common roots in British colonial laws that still remain in force, with amendments. For example, the *Indian Penal Code of 1860*, as amended, imposes criminal penalties for kidnapping or abduction for various purposes, buying or selling a person for slavery, buying or selling a minor for prostitution, procuring a minor girl, rape, and other offenses. The *Child Marriage Restraint Act of 1929* prohibits marriages in which the female is under 18 years (under 21 years for the male). The *Children (Pledging of Labour) Act of 1933* prohibits parents or guardians from pledging a child for employment, but has been effectively superseded by the *Child Labour (Prohibition and Regulation) Act of 1986*, which does not prohibit all forms of child labor but rather sets hours and conditions of work for children under 14 years. The *Bonded Labour System (Abolition) Act of 1976* purports to free all bonded laborers, cancel their outstanding debts and prohibit the creation of new bonded labor arrangements, in fulfillment of the constitutional prohibition of all forms of forced labor. The *Juvenile Justice (Care and Protection of Children) Act of 2000* consolidates and amends previous laws relating to both children “in conflict with law” and children “in need of care and protection,” including those who have been or are likely to be trafficked, abused, or exploited. Given India’s position as a destination country for many trafficked persons,

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<sup>115</sup> *Constitution of India, as amended*. Available: <http://alfa.nic.in/const/const.html>.

<sup>116</sup> Under India’s federal system of governance, the national and state governments have both exclusive and concurrent powers. Of relevance here, the national government’s exclusive powers include admission into, and emigration or expulsion from, the country, interstate migration, and implementation of treaty obligations and decisions taken in international conferences and other international bodies. The states’ exclusive powers include maintenance of public order, the police, prisons and reformatories, and public health. The national government and the states have concurrent powers with respect to the criminal law, criminal procedure, preventive detention, administration of justice, vagrancy, personal law matters, labor conditions, and education (*Constitution of India*, Seventh Schedule).

especially from other South Asian countries, the *Foreigners Act of 1946* is also relevant. With regard to trafficking of persons from Nepal, the 1950 *Treaty of Peace and Friendship* between India and Nepal also plays a part, since it provides national treatment to citizens of the other country in matters of movement, residence, and other privileges.

The main legislative tool for combating trafficking in persons in India is the *Immoral Traffic (Prevention) Act of 1956* (ITPA), which was last amended in 1986. The original legislation, passed in 1956 as the *Suppression of Immoral Traffic in Women and Girls Act*, was intended to implement India's obligations under the *1949 Convention*. As discussed earlier, that treaty is concerned exclusively with the suppression of trafficking for prostitution and exploitation of prostitution through various means. The ITPA does not define "trafficking" nor does it establish criminal penalties for "trafficking" as such. It also does not directly criminalize all commercial sex work, though it does criminalize a number of related activities. In the ITPA, "prostitution" is defined as "the sexual exploitation or abuse of persons for commercial purposes" (Section 2[f]). The activities that are criminalized under the act include keeping a brothel or allowing premises to be used as a brothel (Section 3); living on the earnings of prostitution (Section 4); procuring a person for prostitution, with or without consent (Section 5); detaining a person in a brothel or other premises for prostitution, with or without consent (Section 6); prostitution in or near a public place (Section 7); soliciting for prostitution (Section 8); and seducing a person for prostitution while in custody (Section 9). The penalties for these offences vary from 3 months to 10 years, plus a fine, with stiffer penalties (up to life imprisonment) for offences involving a child under 16 years. The penalties for solicitation vary depending on the gender of the solicitor: for a woman, up to 6 months for the first offence and up to one year for subsequent offences; for a man, 7 days to 3 months. In addition, in the case of a female offender, in lieu of a prison sentence, the court may place the woman in a corrective institution for between 2–5 years, or until there is a determination that "there is a reasonable probability that the offender will lead a useful and industrious life" (Section 10A).

The ITPA authorizes warrantless searches of premises, provided the officers conducting the searches are accompanied by at least two women police officers and "two or more respectable inhabitants. . .of the locality" (Section 15), and permits the police to "rescue" any person from a place where prostitution is believed to be taking place (Section 16). The Act also authorizes a magistrate to close down any place believed to be

operating as a brothel (Section 18), and to evict any person determined to be a prostitute from any place in the jurisdiction (Section 20). In the case of a “rescue,” the Act gives a magistrate the discretion to place any rescued child (under 16 years) or minor (16–18 years) in an authorized custodial institution, and to place any rescued person in a protective home or other custodial arrangement for up to 3 years if it is determined that the person is “in need of care and protection” (Section 17). The ITPA authorizes state governments to establish protective homes and corrective institutions (Section 21), special courts (Section 22A), and implementing rules (Section 23) to carry out its purposes. State governments may also appoint “special police officers”—and the national government may appoint “trafficking police officers” to enforce the act. State courts are also authorized to use summary procedures to try offenses under the act (Section 22B). Following the original enactment of the *Suppression of Immoral Traffic in Women and Girls Act*, states adopted fairly uniform implementing rules. The State of Maharashtra has also enacted its own *Organized Crime Act*, which could be used to prosecute more organized forms of trafficking.

#### **4.6.2 Enforcement of Laws Against Trafficking**

In 1998, the Committee on Prostitution, Child Prostitutes and Children of Prostitutes, which had been established by the Department of Women and Child Development under the Ministry of Human Resource Development in response to a Supreme Court order, issued a *Report and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children*. In the report, the Committee acknowledged that, “[i]n spite of many interventions for prevention, law enforcement, rescue and rehabilitation there does not appear to have been much impact on the prevalence of commercial sexual exploitation of women and child. . . .” Several reasons were provided, including:

- Lack of seriousness among law enforcement machinery and administration;
- Risks faced by social workers, NGOs, and government officials working in red-light areas and among victims;
- Insufficient awareness about the prevalence of child trafficking;
- Lure of a comfortable lifestyle, which made it more difficult to “rehabilitate” some victims;
- Social stigma and family problems facing victims;
- Difficulties in estimating the age of child victims;

- Inadequate institutions for care and rehabilitation of “rescued” victims;
- Lack of coordination between border police of neighboring countries to stop cross-border trafficking; and
- Lack of support lines and drop-in centers for women in need.<sup>117</sup>

To address these factors, the Committee made a number of recommendations in a Plan of Action, relating to (i) prevention, (ii) trafficking, (iii) awareness raising and social mobilization, (iv) health services, (v) education and child care, (vi) housing and other amenities, (vii) economic empowerment, (viii) legal reforms and law enforcement, (ix) rescue and rehabilitation, (x) institutional machinery, and (xi) methodology. The UN Special Rapporteur on Violence Against Women commended the Plan for its comprehensiveness and innovation, particularly in its provisions on awareness raising and provision of health services. However, she expressed concern about some of its provisions, such as those relating to the removal of children of sex workers from their mothers by “counseling, cajoling, and/or coercion”.<sup>118</sup> This approach has also been questioned by NGOs who run programs to provide care to children of sex workers in the red light districts.<sup>119</sup>

In the area of legal reforms and law enforcement, the Plan of Action acknowledges that “[t]he present legal framework ... results in revictimisation of the victims of exploitation while the exploiters mostly go scot-free”.<sup>120</sup> In particular, statistics show a strong gender bias in the implementation of antitrafficking laws, with roughly four times as many arrests of women as of men. A study of crime statistics for 1980–1987 also shows a strong class bias, with no landlord ever having been arrested, and fewer than 600 brothel keepers being arrested, compared with over 9,000 sex workers arrested under the ITPA. Sex workers are also extensively harassed under the State Police Acts. For example, the same study of crime statistics found that in 1980–1987 only about 1,400 pimps were arrested, compared with almost 54,000 sex workers, under the Bombay Police Act alone.<sup>121</sup> The Plan of Action therefore proposes a

<sup>117</sup> Government of India. 1998. Department of Women and Child Development, Ministry of Human Resource Development. Report of the Committee on Prostitution, Child Prostitutes and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children. Delhi. pp. 11–12.

<sup>118</sup> Coomaraswamy, Radhika. 2001. *op.cit.*, p. 32.

<sup>119</sup> Joint Women’s Programme. 2002a. *A Uniform Policy for Rescue, Rehabilitation/Repatriation of Victims of Trafficking*. Paper submitted to the Indian Department of Women and Child Development.

<sup>120</sup> Government of India. 1998. *op.cit.*, p. 22.

<sup>121</sup> D’Cunha, Jean. 1991. *The Legalization of Prostitution: A Sociological Inquiry into the Laws Relating to Prostitution in India and the West*. Bangalore: Wordmakers. p. 51.

review of the current laws to ensure that “victims ... are not revictimised and that all the exploiters, not excluding clients, traffickers, parents/guardians and others who collude with them are liable for punishment”.<sup>122</sup> Specific steps to be taken include

- Modification of criminal procedures to make them more gender-sensitive and child-friendly;
- More provision for NGO participation in criminal proceedings on behalf of victims;
- Provision for confiscation of assets and income of exploiters;
- Better enforcement of the *Bonded Labour System (Abolition) Act*;
- Setting up of exclusive antitrafficking and prevention cells, including women police officers, in major cities and high-impact areas;
- Provision of counseling and free legal advice to women in custody;
- Establishment of task forces in major cities to coordinate activities of government agencies, NGOs, and others;
- Review of laws relating to elimination of child pornography; and
- Continuation of police raids on brothels as permitted under the ITPA.<sup>123</sup>

Brothel raids, which began with major raids in the red-light areas of Mumbai in 1996, are one of the more problematic strategies under the ITPA. Although they have been justified in order to “rescue” children forced into prostitution, a number of NGOs working in red-light districts have raised concerns that the police raids are abusive and counter-productive. In particular, they note that there have been instances of police brutality during raids; that the police have rounded up women as well as children during the raids; that these women languish in remand homes for long periods because of delays in medical examinations and court delays, without access to counseling or other services; and that as a result of the raids, many sex workers are leaving the red-light districts and continuing their activities outside the range of health and other established support services<sup>124</sup>. Others have suggested that some police raids are staged for political effect, and may be motivated by communal

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<sup>122</sup> Government of India. 1998. op.cit., p. 22.

<sup>123</sup> Ibid., pp. 22–23.

<sup>124</sup> Joint Women’s Programme. 2002b. Joint Letter to the Chairperson, National Commission for Women, dated 21 February 2002.

or antimigrant bias (since most sex workers in India are from lower castes, tribal groups, or neighboring countries). It has also been suggested that any “rescue” operations must be coordinated with viable alternative livelihood programs; otherwise, sex workers will inevitably return to their former activities out of economic necessity.

Following the recommendation of the Plan of Action to review existing laws on trafficking, a number of proposals have been floated in the last few years to amend the ITPA. A proposal of the national government, which has recently been circulated to state governments, NGOs, and others for comment, includes several notable changes. In particular, the proposal would (i) add a new definition of “trafficking in persons” based on the new *UN Trafficking Protocol*; (ii) change the definition of “child” from anyone under 16 to anyone under 18 years; (iii) delete the provisions on soliciting (Section 8) and removal of a prostitute from any place (Section 20); (iv) increase the penalties for some other offenses; (v) add a provision that trafficking for sexual exploitation should be treated as a multiple rape under the *Indian Penal Code (IPC)*; (vi) provide for confiscation of traffickers’ property; (vii) set time limits for recording of evidence and provide for *in camera* proceedings to protect the privacy of victims; and (viii) provide for protection of voluntary agencies involved in trafficking prevention, rescue, and victim protection activities. The proposed deletion of Sections 8 and 20 is particularly commendable, since these sections appear to have been used primarily against sex workers rather than traffickers. The inclusion of a trafficking definition based on the new *UN Trafficking Protocol* is also forward-looking, and would provide a basis for reorienting the ITPA to address the broader range of abuses covered in the protocol. (At present, the ITPA is still primarily an antiprostitution rather than an antitrafficking statute.) Even with the proposed changes, however, the challenge will still be to enforce the ITPA against traffickers and other exploiters of women and children, but in a way that respects the autonomy of adult sex workers and does not violate their parental and other rights.

As mentioned in the India Country Report for this RETA, it is estimated that about 90% of the trafficking in women and children in India is internal, that is, either within a state or between states. Although the ITPA and other national laws apply in all states of India, their enforcement is primarily left to the state government, and the states may enact their own laws (such as Maharashtra’s new *Organized Crime Act*). Interstate coordination therefore is required in order to address the internal trafficking of persons.

While only representing about 10% of all trafficking activity in India, the trafficking of persons from Bangladesh, Nepal, and other countries raises additional complications. As noted in the previous discussion of Bangladesh, there are no formal bilateral arrangements currently in place between Bangladesh and India to share information about trafficked persons and coordinate their safe, voluntary repatriation. At present, repatriation is taking place on an ad hoc basis, facilitated by the advocacy of NGOs in both countries. Similar coordination problems exist between India and Nepal, although in this case the status of trafficked persons is different by virtue of the *1950 Treaty of Peace and Friendship*, which effectively established an “open border” between the two countries.

Whereas a woman or child trafficked into India from Bangladesh would most likely be considered an illegal migrant under India’s *Foreigners Act*, a woman or child trafficked into India from Nepal would ordinarily have the right to reside in India under the 1950 Treaty. However, the prevailing practice would seem to be to treat trafficked persons from Nepal similarly to those from Bangladesh, and to make arrangements to “repatriate” them after they have been “rescued.” As noted earlier, this also seems to be the assumption under the new *SAARC Trafficking Convention*. In the absence of formal bilateral mechanisms to address trafficking in persons, there have been some informal initiatives. As mentioned in the previous discussion of Bangladesh, proposals are being considered to formalize the repatriation arrangements between India and Bangladesh, based on the cooperative work being done by NGOs on both sides of the border. In addition, law enforcement officials from Nepal and the bordering states of India have begun to meet periodically, to share information and strategies for stemming the trafficking activity along the Nepal-India border. Informal consultations are also beginning to take place among officials from the main antitrafficking agencies in the countries, including India’s Department of Women and Child Development (DWCD).

In addition to the law reform proposals and bilateral discussions discussed above, there are a number of other initiatives at the national and state level to improve the equitable enforcement of laws relating to trafficking. These include the development of a police training manual by the DWCD, with support from UNICEF, and various training and sensitization programs for police being carried out at the state level with the involvement of NGOs. The state of Andhra Pradesh is developing a policy for rescue and rehabilitation, and NGOs are also developing proposals in this area. Several states have established women’s police

cells, as well as dedicated officers or units to deal with trafficking cases. In some red-light districts, sex workers have successfully organized, and are effectively deterring the trafficking of children into the brothels in these areas. Several public interest cases have also been brought in the courts, which have resulted among other things in the monitoring of conditions in some of the protective homes where women and children are remanded under the ITPA. In addition, an NGO, Society to Help Rural Empowerment and Education (STHREE), has challenged corrupt lawyers who assist suspected traffickers through false court submissions and other means.

### **4.6.3 Other Relevant Laws and Policies**

In its 1998 report, the Committee on Prostitution, Child Prostitutes and Children of Prostitutes identified several factors tending to increase the vulnerability of women and children to sexual exploitation and other forms of abuse, including traditional practices, the loss of traditional means of livelihood, economic distress due to lack of economic opportunity, widowhood, separation from husbands, abandonment by families, and migration. In a similar vein, the CEDAW Committee found in its review of the Government of India's initial report in 2000 that "widespread poverty, such social practices as the caste system and son preference, as reflected in a high incidence of violence against women, significant gender disparities and an adverse sex ratio" present major obstacles to women's advancement despite constitutional guarantees of gender equality and a number of affirmative action measures taken by the Government over the years.<sup>125</sup> As in Bangladesh, the practices of dowry and child marriage, both of which are prohibited by statute, persist and directly contribute to the trafficking problem. Poor parents try to avoid the dowry obligation by marrying their daughters at a young age to men from other states or countries who do not demand dowry. The lack of effective birth and marriage registration systems make it more difficult to prosecute these fraudulent husbands and their accomplices when they move their child brides to another city or state and sell them into prostitution or forced labor situations. The persistence of bonded child labor, despite statutory prohibitions on bonded labor and restrictions on child labor, also creates a climate in which the trafficking of children for prostitution and hazardous

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<sup>125</sup> UN CEDAW. 2000. *Report on the Twenty-second Session (17 January–4 February 1999) and Twenty-first Session (7–25 June 2000) of the CEDAW Committee*, p. 9–12.

work—such as carpet weaving, beedi rolling, and silk weaving—can more easily take place.<sup>126</sup>

The India Country Report for this RETA<sup>127</sup> also documents how processes of economic development and integration, such as the commercialization of agriculture and the replacement of traditional livelihoods (such as handloom weaving) with more mechanized processes, are forcing large numbers of poor people, including women, to migrate in search of alternative work. Statutes such as the *Factories Act of 1948*, *Minimum Wages Act of 1948*, *Equal Remuneration Act of 1976* and *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act of 1979*, and special labor regulations for specific industries such as beedi and cigar rolling, mines, and plantations, are well-intended but not vigorously enforced. In any case, India's labor laws do not extend protection to the majority of workers in the informal sector. As the Country Report notes, conditions of work in factories, quarries, and other work sites are typically strenuous and wages for unskilled workers are extremely low. Women and girls working in factories and quarries can be sexually exploited by their supervisors. Women in rural areas who can only find seasonal work may also supplement it with sex work as a survival strategy for themselves and their families. In these circumstances, women and girls are particularly vulnerable to traffickers, who promise them escape and a better life in the city or in another country.

Women lawyers, activists, and NGOs are currently advocating two new pieces of legislation that would address some of the vulnerabilities that can lead to trafficking. One is a proposed bill on domestic violence, which would provide criminal penalties for some of the domestic abuses that force many women to leave their spouses and families. The other is a proposed bill on protection of domestic workers, who are frequently subject to physical and sexual abuse by their employers or other household members.

#### 4.6.4 Findings

The 1998 Report of the Committee on Prostitution, Child Prostitutes and Children of Prostitutes, and experience of lawyers and NGOs working with survivors of trafficking, suggest several approaches to improve the enforcement of the ITPA and other laws against traffickers rather than

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<sup>126</sup> Human Rights Watch. 1996. *The Small Hands of Slavery: Bonded Child Labor in India*. Available: <http://www.hrw.org/reports/1996/India3.htm>.

<sup>127</sup> ADB. 2002. *Combating Trafficking of Women and Children in South Asia (RETA 5948) India Country Report*.

those who have been trafficked, and to decrease the vulnerability of women and children to trafficking. Possible actions, many of which parallel those suggested in the previous section on Bangladesh, include:

- Review of the ITPA (including proposed amendments), *Penal Code*, and other relevant laws to identify reforms or new legislation needed to bring the laws into conformity with the *SAARC Trafficking Convention*, the *UN Convention Against Transnational Organized Crime* and related *Trafficking Protocol* (building on the proposed addition to the ITPA of the definition of trafficking in the *Trafficking Protocol*);
- Monitoring of complaints, arrests, and prosecutions of trafficking and related offenses under the ITPA, *State Police Acts*, and other laws to identify patterns and possible biases in the handling of these cases by law-enforcement officials and judges;
- Strengthening of interstate coordination in enforcement of the ITPA against traffickers, including information sharing, consistent procedures for the safe and voluntary return of persons trafficked across state borders, and provision of integrated support services to survivors of trafficking;
- Consideration of NGO and other proposals to make court procedures more gender-sensitive and child-friendly;
- Consideration by national and state agencies of NGO proposals relating to brothel raids, treatment of the children of commercial sex workers, and safe custody arrangements for survivors of trafficking;
- Collaboration among national and state government agencies and experienced NGOs to develop mechanisms for prompt, safe, and voluntary return of persons trafficked from other countries, and for extradition of suspected traffickers, for further discussion with counterparts from Bangladesh, Nepal, and other source countries;
- Review of training, compensation, and performance evaluation systems in law-enforcement agencies to identify ways to curb corruption and abuse of power by police and border officials;
- Continued effort to improve enforcement of labor laws, to extend labor protections to the informal sector, and to encourage adoption of voluntary codes of conduct by private-sector associations and firms; and
- Establishment and enforcement of workable systems for registering births and marriages.

## 4.7 Nepal

### 4.7.1 Legal Framework to Combat Trafficking

Although Nepal is not a party to the *1949 Trafficking Convention*, it has made international commitments to address trafficking in persons by acceding to both the *1926* and *1956 Slavery Conventions*, CEDAW and the CRC, and participating in several recent international conferences and UN General Assembly special sessions on women, children, and human rights. Article 20(1) of the *Constitution of Nepal* directly supports these commitments by establishing a fundamental right to be free from exploitation, including traffic in human beings, slavery, serfdom, and forced labor. Article 20(2) also protects minors from working in hazardous settings such as factories or mines. Other relevant rights confirmed in the Constitution include rights to equality before law and equal protection (Article 11[1]); freedom from discrimination on the basis of religion, race, sex, caste, or ideology (Article 11[2&3]); personal liberty (Article 12); and rights within the criminal justice system such as freedom from torture and cruel or degrading treatment (Article 14). A number of directive principles and policies set out in the Constitution are also relevant, including policies to raise the standard of living of citizens, to increase labor force participation, to make special provision for the health, education and employment of women, and to take necessary steps to protect children from exploitation (Article 26).<sup>128</sup> Nepal's commitment to combat human trafficking is also reflected in various national action plans, in particular, the National Policy, Action Plan and Institutional Mechanism to Combat Against Trafficking in Women and Children for Commercial Sexual Exploitation (discussed further in the next section).

The *Muluki Ain (Code of Law)* of 1964 provided the original basis for prosecuting human traffickers. It prohibits the taking of persons out of the country, by fraud or incitement, for the purpose of selling them, and imposes penalties of 10–20 years. The Code also prohibits slavery and bonded labor, and imposes criminal penalties for enticing minors away from their legal guardians, rape, assault, and other forms of abuse. To address the increasing trend of trafficking, particularly of young women and girls to India, the Code was supplemented in 1986 by the *Human Trafficking (Control) Act* (the *1986 Act*), which defines human trafficking to include (i) selling a person for any purpose; (ii) taking a person abroad

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<sup>128</sup> *Constitution of the Kingdom of Nepal 2047 (1990)*, translation originally published in *Himalyan Research Bulletin* XI (1-3) (1991). Available: <http://asnic.utexas.edu/asnic/countries/nepalconstitution.html>.

with the intention of selling him or her; (iii) having a woman engage in prostitution by persuasion, enticement, deception, fraud, or pressure, or encouraging anyone to engage in such acts; and (iv) attempting, or assisting or encouraging anyone, to commit such acts. Penalties imposed under the act range from five years (for attempting or assisting in an offense) and 5-10 years (for taking a person abroad for sale), to 10-15 years (for enticing a woman into prostitution) and 10-20 years (for selling a person). The act also establishes extraterritorial jurisdiction, to reach offenses that are committed outside Nepal. A bill for a new Traffic in Human Beings (Control) Act passed the lower house of the Parliament earlier this year, and is expected to be considered by the upper house later in the year. (The draft bill is discussed further in the next section.)

Other laws relevant to trafficking include the *Labour Act of 1992*, which establishes general conditions of work, and has been supplemented by new legislation to raise minimum wages and prohibit bonded labor. The *Children's Act of 1992* prohibited the employment of children below 14 in manufacturing industries, and regulated employment of children between 14 and 18 years, as well as prohibiting parents from selling their children and prohibiting the use of children in pornography and other "immoral acts." Both the *Labour Act* and the *Children's Act* have been superseded in part by the *Child Labour (Prohibition and Regularisation) Act* passed in 2000, which expands the list of hazardous industries in which children (under 16 years) are banned from working, and imposes harsher penalties for violations. Other laws that are relevant to cross-border trafficking in persons include the *1950 Treaty of Peace and Friendship* between Nepal and India, which effectively creates an open border between the two countries, and the *Foreign Employment Act of 1985*. Of particular relevance here, Section 12 of this Act has been amended to prohibit the foreign employment of both minors and women without the permission of both the government and the minor's or woman's "guardian." This and other government directives limiting women's and children's migration are discussed further below.

#### **4.7.2 Enforcement of Laws Against Trafficking**

As discussed in the Nepal Country Report for this RETA,<sup>129</sup> there have been historical movements of kidnapped and bonded laborers from certain areas of rural Nepal to the cities and neighboring countries, as

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<sup>129</sup> ADB. 2002. *Combating Trafficking of Women and Children in South Asia (RETA 5948): Nepal Country Report*.

well as the supply of young women to palaces and houses of the ruling class to work as servants and entertainers. These patterns have evolved and expanded into widespread trafficking, particularly of women and girls, for bonded labor in factories, domestic work, and sex work, both within Nepal and to other countries, particularly India. With regard to trafficking for forced labor and child labor, the Government of Nepal recently emphasized its commitment to address these problems by ratifying the ILO conventions on forced labor (No. 29) and the worst forms of child labor (No. 182) in 2000 and enacting new legislation to implement these commitments, including the release and resettlement of the Kamaiyas, who are bonded agricultural laborers.<sup>130</sup> However, it is recognized that the Department of Labor, which is principally responsible for implementing these conventions and laws, has limited resources and capacity. Moreover, its regulatory powers extend primarily to formal sector industries and workplaces, with little impact on the much larger informal sector.

With regard to trafficking for sexual exploitation, the Government of Nepal has become increasingly concerned, particularly about the trafficking of adolescent and young girls to India, where many of them end up in brothels. In 1998 the Government therefore began work on a National Policy, Action Plan and Institutional Mechanism to Combat Against Trafficking in Women and Children for Commercial Sexual Exploitation. The National Action Plan is broad-based, and includes proposed activities in the areas of (i) policy, research, and institutional development; (ii) legislation and enforcement; (iii) awareness raising, advocacy, networking, and social mobilization; (iv) health and education; (v) income and employment generation; and (vi) rescue and reintegration. The UN Special Rapporteur on Violence Against Women commended the Action Plan as both comprehensive and well thought out, although she noted that more attention could be paid to the prosecution and punishment of traffickers.<sup>131</sup>

The legislation and enforcement program under the National Action Plan includes several initiatives:

- Development of a comprehensive legal/administrative handbook or reference manual;
- Legal awareness programs in every sector of society;

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<sup>130</sup> United States Department of State. 2002b. Country Reports on Human Rights Practices 2001: Nepal, released 4 March 2002. Available: <http://www.state.gov>.

<sup>131</sup> Coomaraswamy, Radhika. 2001. *op. cit.*, p. 24.

- Social justice education and awareness programs;
- Review of current legislation and recommendations for improving its effectiveness;
- Establishment of separate cells within law-enforcement agencies to deal with trafficking and sexual exploitation;
- Legal training programs;
- Development of law information systems;
- Preparation of a document on legal provisions for compensating and rehabilitating victims;
- Development of strategies for making law enforcement free of influence;
- Schemes for the functional decentralization of authority to local governments to protect citizens' rights; and
- Development of mechanisms for bilateral, regional, and international coordination and cooperation to address trafficking and sexual exploitation.

The Government of Nepal is in the process of implementing a number of initiatives from the National Action Plan to improve enforcement of laws against trafficking. For example, a special court was established in Kathmandu to handle trafficking and certain other cases. However, this proved to be counterproductive, since it is extremely expensive and burdensome for prosecutors to bring evidence and witnesses to Kathmandu from other parts of the country. As a consequence, it appears that many trafficking cases are being registered under the *Code of Law* rather than the *1986 Act*.<sup>132</sup> Steps are now being taken to increase the number and dispersion of special courts for trafficking cases. Another innovation has been the establishment of women's police cells in several districts to encourage more women to report crimes, particularly crimes against them or their children. While this has resulted in increased reporting of cases of violence against women, it has not yet led to a corresponding increase in reported cases of trafficking.<sup>133</sup> A handbook on trafficking is also being developed for use by law-enforcement officers, prosecutors, and judges.

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<sup>132</sup> Thapa, Govind Prasad. 2002. Law Enforcement Against Trafficking in South Asia: Strategies for Strengthening Law Enforcement. Paper presented at South Asian Seminar on Using Legal Instruments to Combat Trafficking in Women and Children, sponsored by ESCAP, Kathmandu, 17-19 April 2002.

<sup>133</sup> Pradhan-Malla, Sapana. 2002. Strategies for Enhancing Criminal Justice to Combat Trafficking in Women and Children. Paper presented at South Asian Seminar on Using Legal Instruments to Combat Trafficking in Women and Children, sponsored by ESCAP, Kathmandu, 17-19 April 2002.

A number of NGOs such as CeLRRD and WOREC are also running promising programs in communities on awareness of antitrafficking laws and legal empowerment, training of community paralegals, and safe migration. Some NGOs such as Maiti Nepal are also collaborating with border police to monitor official transit points on the India-Nepal border for possible traffickers. However, with a long, open border, it is recognized that traffickers can easily cross at other points or during nonpeak hours when police and NGO surveillance is low. As mentioned in the previous section on India, law enforcement officials from Nepal and bordering states of India have also started to meet more regularly, and to include antitrafficking strategies in the dialogue.

Law enforcement officials are extremely candid about the factors underlying weak enforcement of Nepal's antitrafficking laws, and their analysis is consistent with the observations of lawyers and women's NGOs in Nepal who are working on trafficking issues. In general, one police official characterizes Nepal's legal system as "more criminal-centric than victim-supportive," and notes that the low status of women and corruption and inefficiency of investigating officials compound the problem in trafficking cases.<sup>134</sup> A number of factors are cited to explain the low reporting of trafficking cases by victims and their families, including intimidation or bribes by traffickers, complicity of family members, mistrust or lack of confidence in investigating officials, lack of information on the true identities of the traffickers, lack of protection, and social stigma.<sup>135</sup> The procedural requirements for filing a complaint under the 1986 Act are also extensive, and particularly burdensome for victims, whose complaints must be authenticated by a district court within 24 hours. Even where a complaint is filed, victims may be threatened or bribed to change their stories, and it appears that a large number of charges are withdrawn by government officials without even notifying the victims.<sup>136</sup> Because of limited police resources and lack of motivation, trafficking cases can take years to investigate, or may never be followed up. Once a case is prosecuted, it can take a long time to complete because of court backlog and frequent postponements. The court proceedings themselves can be particularly unpleasant for women victims, who are required to testify in open court in the presence of their traffickers and often unsympathetic court officials. A recent analysis of judgments in trafficking

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<sup>134</sup> Thapa, Govind Prasad. 2002. *op.cit.*, p. 7.

<sup>135</sup> Pradhan-Malla, Sapana. 2002. *op.cit.*

<sup>136</sup> CeLRRD. 2000. *Condemned to Exploitation: Impact of Corruption in Criminal Justice System on Women*. Kathmandu.

cases reported in 1988-2000 also found that, of the cases that survived to conclusion, 77% resulted in convictions, but only 59% were affirmed by the Supreme Court. Moreover, over 60% of sentences were for 10 years or less, although the *1986 Law* provides for penalties of up to 20 years for human trafficking.<sup>137</sup>

In light of these problems in reporting, investigating, and prosecuting cases of human trafficking, a number of proposals have been put forward in recent years to amend or replace the *1986 Act*, including proposals from CeLRRD and from the police. Based on these and other proposals, the Ministry of Women and Children and Social Welfare (MWCSW) prepared a draft bill, a version of which was passed by the lower house of the Parliament earlier this year as the *Traffic in Human Beings (Control) Bill*. It is expected to be considered by the upper house later in the year. Several provisions in the Ministry's bill respond to criticisms of the *1986 Law* and its enforcement. The improvements include provisions for free legal aid to victims, *in camera* legal proceedings to protect victims, and granting of 50% of all collected fines to the victim. However, other provisions of the bill have raised concerns with some NGOs working in Nepal on trafficking issues, and with the UN Special Rapporteur on Violence Against Women.

In particular, the Ministry's bill significantly expands the range of offenses beyond those in the *1986 Act*. "Traffic in human beings" is defined to include, in addition to the offenses listed in the *1986 Act*, engaging in or instigating others to engage in prostitution and certain other offenses. The bill also provides criminal penalties for the running of brothels; use of any premises or vehicle in connection with the traffic in human beings (as broadly defined in the bill); and production, sale or supply of "vulgar pictures, publications or other materials." The bill also includes broad authorization to conduct searches and seizures without a warrant, and shifts the burden of proof to the defendant for some offences. Although presented as an antitrafficking initiative, the proposed legislation also contains anti-prostitution and anti-pornography provisions. By criminalizing not only the exploitation of prostitution but prostitution itself, the bill goes farther than even existing laws in Bangladesh and India. When coupled with the broad police powers provided in the bill, there is a risk that the legislation could be used to harass sex workers—including women and children who have been trafficked into this work—rather than pursue traffickers. This is especially problematic for women

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<sup>137</sup> Pradhan-Malla, Sapana. 2002. op. cit.

and girls in some traditional communities of Nepal who are socialized or forced into prostitution as a consequence of religious practices or caste exclusion. It has also been pointed out that women and girls who have been trafficked into prostitution may be even more reluctant to file a complaint against their traffickers, or to cooperate in an investigation, for fear of being charged with prostitution under the bill.<sup>138</sup> The pornography provision in the bill has also been criticized as unconstitutionally vague, and the UN Special Rapporteur on Violence Against Women has suggested that the provisions shifting the burden of proof to the defendant for some offenses would violate the *International Covenant on Civil and Political Rights* to which Nepal is a party.<sup>139</sup>

The volume of trafficking in persons from Nepal to India raises a number of additional enforcement issues. There is no formal mechanism in place to coordinate exchanges of information about trafficked persons, or to facilitate their release from custody (for example, where they have been “rescued” from an Indian brothel and placed in a remand home in India) and return to Nepal, if that is their preference. Under the *1950 Treaty of Peace and Friendship* with India, citizens of Nepal would ordinarily have the right to move to and settle in India. However, in the case of women from Nepal who have been “rescued” from Indian brothels, the practice would appear to be to detain the women in custodial homes and return them eventually to Nepal. As in the case of women trafficked to India from Bangladesh, NGOs such as Maiti Nepal have been coordinating with NGOs in India to facilitate the release and return of women to Nepal. Both government officials and NGOs in Nepal see a need for more formal arrangements, which could be developed within the framework of the new *SAARC Trafficking Convention*.

### 4.7.3 Other Relevant Laws and Policies

The Government of Nepal has explicitly linked trafficking, especially of women and girls, with women’s and girls’ poor socioeconomic status, which is reinforced by laws and practices that discriminate against women. Therefore, Nepal’s *National Policy to Combat Against Trafficking of Women and Children for Commercial Sexual Exploitation* aims, among other things, to improve women’s socioeconomic status by removing

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<sup>138</sup> Sanghera, Jyoti and Ratna Kapur. 2000. *An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal*. Kathmandu: The Asia Foundation and New Delhi: Population Council.

<sup>139</sup> Coomaraswamy, Radhika. 2001. op. cit., p. 14.

laws that discriminate against women. In making its latest report to the CEDAW Committee on implementation of CEDAW, the Government also acknowledged that despite constitutional guarantees of equality, women in Nepal face both *de jure* and *de facto* discrimination. For example, the *Code of Law* restricts women from independent use of their property and inheritance of parental property, and a number of traditional practices that discriminate against women continue. These include child marriage, dowry, polygamy, *deuki*<sup>140</sup> and *badi*.<sup>141</sup> Inequalities between men and women are perpetuated by poverty, illiteracy, traditional norms, and stereotypes.<sup>142</sup> As discussed in the previous sections on Bangladesh and India, traditional practices such as child marriage and dowry encourage trafficking. Poor parents who cannot afford to pay dowry for their daughter are often persuaded to marry the daughter off at an early age to a foreigner who does not demand a dowry. This often results in young women being sold to brothels or factory owners. Lack of effective systems for registering births and marriages makes it difficult to prosecute traffickers in these circumstances. Polygamy can indirectly contribute to trafficking where a first wife is abandoned or abused by her husband or does not get along with the other wives, and moves out of the marital home to start a new life. In these circumstances, a trafficker may take advantage, by offering the prospect of a good job in another city or country. Traditional practices and designations such as *deuki* and *badi* have clear links to trafficking, since they initiate young girls into sex work and deprive them of other opportunities; these girls are then sought after by traffickers as a “reliable supply.”

Formal and informal restrictions on women’s access to land and other assets, and to higher education and technical training, severely constrain women’s economic opportunities. Increasing numbers of women have been entering the manufacturing sector out of economic necessity, but they are concentrated in low-skilled, repetitive jobs with little opportunity for promotion.<sup>143</sup> As in Bangladesh and India, women and children enjoy a number of “formal” labor rights, reflected in the *Labour Act* and laws on child labor. However, surveys indicate that women

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<sup>140</sup> *Deuki* is a tradition of dedicating girls to a god or goddess; the girls effectively become “temple prostitutes” (CEDAW Committee 1999, para. 153).

<sup>141</sup> *Badi* refers to an “untouchable” Hindu caste traditionally employed as entertainers. As a result of caste exclusion and lack of access to education and other employment, *badi* women and girls are regularly drawn into commercial sex work (Nepal Country Report).

<sup>142</sup> CEDAW. 1999. *Report on the Twentieth Session (19 January–5 February 1999) and Twenty-first Session (7–25 June 1999) of the CEDAW Committee*.

<sup>143</sup> ADB. 1999. *Country Briefing Paper: Women in Nepal*. Manila. p.31.

are often cheated of their wages by employers, even in the formal sector.<sup>144</sup> In the informal sector, they are likely to work in even more precarious circumstances. Child laborers are in even more tenuous circumstances. In all of these cases, women and children can be easy targets for traffickers who promise them jobs, marriage, and other attractive benefits.

As in Bangladesh and India, poor women are increasingly compelled to migrate for work. However, as in Bangladesh, the Government of Nepal has taken steps to restrict women's migration. The *Foreign Employment Act of 1985*, which licenses and regulates recruiting agencies and other aspects of the formal migration process, was amended in 1998 to bar women and minors from migrating to other countries for work unless they have permission from both the Government and their "guardians." In the case of a woman, her guardian would be her father or mother (if she is unmarried) or else her husband (if she is married). A Foreign Employment Order and Passport Order place additional constraints on women's crossborder movements.<sup>145</sup> These measures have been justified in order to protect women of Nepal from harassment and abuse by overseas employers. Ironically, however, these restrictions lead women to migrate illegally, which brings them into contact with smugglers and traffickers. The Supreme Court recently quashed a petition challenging the constitutionality of these restrictions.<sup>146</sup> These travel restrictions are also closely linked to broader issues of identity for women of Nepal. For example, under the *Citizenship Act*, the father is the sole source of nationality for any child. Similarly, a woman establishes her identity solely through her parents or husband.<sup>147</sup> This constrains women's movements and activities within the country, which can be especially problematic for women and girls who are trying to escape abusive home environments or marriages. To establish their identities—for example, to open a bank account or apply for a formal sector job—they might have to rely on the very persons they were seeking to escape. Similarly, if they wanted to leave the country for work, the *Foreign Employment Act* would require them to obtain permission from these same "guardians."

Through the advocacy of women lawyers and civil society groups, legal reforms are gradually being introduced to improve women's status and protect their rights. These include amendments to the *Code of Law*

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<sup>144</sup> Ibid., p. 35-36.

<sup>145</sup> Sanghera, Jyoti and Ratna Kapur. 2000. *An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal*. Kathmandu: The Asia Foundation and New Delhi: Population Council.

<sup>146</sup> Pradhan-Malla, Sapana. 2002. op. cit.

<sup>147</sup> Sangroula, Yubaraj. 2001. *Trafficking of Girls and Women in Nepal: Building a Community Surveillance System for Prevention*. Kathmandu: Kathmandu School of Law.

relating to women's property rights and a bill to criminalize and punish domestic violence, both of which were passed by the lower house of the Parliament earlier this year. By improving women's economic and personal security, these legislative changes address some of the factors that make women and girls particularly vulnerable to trafficking.

#### 4.7.4 Findings

Both government officials and NGOs have identified various measures that could be taken to improve the enforcement of laws against traffickers, to avoid the mistreatment of trafficked persons, and to reduce the vulnerabilities of women and children to trafficking. Possible actions, many of which are consistent with suggestions made in the previous sections on Bangladesh and India, include:

- Review of the *1986 Act, Code of Law*, proposed bill on trafficking and other relevant laws to identify reforms or new legislation needed to bring the laws into conformity with the *SAARC Trafficking Convention*, the *UN Convention Against Transnational Organized Crime* and related *Trafficking Protocol* (including in particular a comparison of the definitions of trafficking);
- Increase in the number and dispersion of special courts to handle trafficking cases;
- Monitoring of complaints, arrests, and prosecutions of trafficking and related offences under the *1986 Act, Code of Law* and other laws to identify patterns and possible biases in the handling of trafficking cases by law enforcement officials and judges;
- Consideration of NGO and other proposals to simplify the procedures for filing complaints against traffickers, and to make court procedures more gender-sensitive and child-friendly;
- Collaboration between relevant government ministries and NGOs experienced in repatriating trafficked persons to develop mechanisms for prompt, safe, and voluntary return of trafficked persons, and for extradition of suspected traffickers, for further discussion with counterparts from India and other destination countries;
- Review of provisions in the *Foreign Employment Act* and related orders requiring special approvals for women's migration, and consideration of alternative ways to protect women migrants from abuse in other countries;

- Review of training, compensation, and performance evaluation systems in law-enforcement agencies to identify ways to curb corruption and abuse of power by police and border officials;
- Continued effort to improve enforcement of labor laws, to extend labor protections to the informal sector, and to encourage adoption of voluntary codes of conduct by private-sector associations and firms; and
- Establishment and enforcement of workable systems for registering births and marriages.