Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal

Edited by: Sapana Pradhan Malla

2005
Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal

Publication No. 119

October 2005
Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal

Copyright Reserve: FWLD and UNIFEM

All materials published in this book may be used with due acknowledgement.

The views expressed in this publication are those of the authors, and do not necessarily represent the views of FWLD and UNIFEM, the United Nations or any of its affiliated organizations.

ISBN No.

Cover & Layout Design: Himal Shrestha, Raj Bahadur Sapkota
FWLD Computer Section
Research Team

1. Advocate Sapana Pradhan Malla  Lead Consultant
2. Advocate Sabin Shrestha  Research Consultant
3. Mr. Phanindra Gautam  Research Associate
4. Advocate Meera Dhungana  Research Associate
5. Ms. Salina Joshi  Research Associate
FOREWORD

Trafficking continues to pose serious social, developmental and gender related threats in the countries of our region. In our initiatives to address trafficking we have worked towards creating substantial awareness against the problem, building capacity of right holders and duty bearers, strengthening of national and regional mechanisms, promoting gender based legislations with an overarching human rights approach. Reflecting on what we have been able to do so far, we feel that through our collective initiatives we have been able to build a strong foundation on which the anti-trafficking work is initiated and taken forward.

With different interventions against trafficking, we have had some successes in addressing this heinous crime; however, it is found that this crime is on the increase especially because of the diminishing human rights situation due to the conflict. Women and children become more vulnerable to violence in a conflict situation especially those who are displaced and look for security and livelihood options. Also, survivor’s lack of access to systems of justice and even when they have access, justice delivery system is still not very sensitive to the needs, demands and rights of the survivors. It is an established fact that a justice delivery system with a gender lens is a key instrument for promoting equality and addressing gender based violence. With the current surge of gender based violence, and the impunity with which it occurs, the role of the justice delivery system in containing, combating and deterring such violence becomes very crucial. Hence, in our commitment to curb trafficking, it is imperative that women and children’s access to justice is promoted and strengthened, in addition to capacity development of survivors for demanding their rights and seeking redress.

In our attempt to facilitate strengthening of laws and law enforcement mechanisms, UNIFEM has undertaken a regional study to examine the effectiveness of the national laws and law enforcement mechanisms to address trafficking in Bangladesh, India, Nepal and Pakistan. In Nepal, the study was
commissioned to Forum for Women, Law and Development and we hope that the Nepal study titled 'Effectiveness of Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal' would be a substantial contribution to the existing knowledge base. Taking this opportunity in hand, I would like to thank the Study Team for conducting this study in a professional manner.

This study is an important and novel initiative to examine the effectiveness of laws on anti-trafficking and the role of the law enforcement bodies from gender and rights perspective. The study has specifically brought out substantial recommendations to improve the Human Trafficking (Control) Bill proposed by the government of Nepal. The study importantly advocates that the law should promote victim’s rights and not focus on punishing the crime alone. Also, until women have access to easy and prompt delivery of justice, legislations will remain ineffective. This study examines the roles of judges and the law enforcers such as the police and government attorneys. It looks at the understanding of a rights based approach to human trafficking, and need for greater sensitivity towards trafficking survivors. The study upholds the need for a sensitized and informed judiciary to compliment effective legislation ensuring justice for victims and promoting an environment that deters such crimes.

We are confident that this study will be extremely useful to all the stakeholders especially the government, law enforcement agencies, civil society members, and other development partners working to address the crime of trafficking. At this point, I am happy to share that some of the issues identified during the course of the study have already been acted upon. For example the shifting of the jurisdiction of the Special Court from the capital back to the District Courts, repelling of the discriminatory law against women engaged in sex work, to name just a few. These are indeed encouraging proactive steps for which I would like to appreciate the government of Nepal. We believe that the recommendations provided by this study will be implemented effectively especially in adopting the bill on trafficking, and strengthening the legal mechanisms to promote and protect the rights of the survivors to uphold and respect human rights and human dignity.

Chandni Joshi
Regional Programme Director
UNIFEM, South Asia Regional Office
Delhi, India
ACKNOWLEDGEMENTS

Human right violations often create a fertile environment for crimes like trafficking. It is evident that the trafficking in women and children is in increase as an impact of the conflict and economic as well as human rights crisis in the country. The initiatives to combat trafficking is crippled by the everyday worsening human rights situation that have forced women and children in the hands of those who are making profit out of their vulnerability.

Strategic interventions such as prevention, rescue, rehabilitation, reintegration has been a mundane task for agents who are working to address trafficking and empower survivors. Every year not more than 150 cases of trafficking are reported in police, though the figure of trafficked persons per year is several times more (5000 to 7000 per year) than the reported number. Its been observed that very less survivors are willing to go through the judicial process and access justice.

In this context, “Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal” is an initiative to understand the problems and challenges in the law and law enforcement mechanism in imparting justice. The methodology adopted for this study such as court observations, border observations and judgment analysis have made it possible to clearly lay out the problems and challenges in the implementation of laws. The report has raised several pertinent issues in laws and law enforcement mechanism. And it advocates for human rights perspectives in laws and human rights sensitivity among law enforces. Legal aspect of addressing trafficking could only be successful when the law enforcers are committed and sensitive to the needs of the survivors.

This initiative would not have been possible without the support of so many people. Firstly, on behalf of the research team, I would like to thank all the
interviewees (policymakers, law enforcers, judicial officers, survivors, and the civil society) who shared their valuable insight and experience with us. Their experience and knowledge has contributed vitally in shaping the conclusions of this report. I would especially like to thank the survivors from Maiti Nepal, ABC Nepal, Karuna Bhawan and women from badi community for sharing their concerns with us. This report would not be complete without their inputs.

I would also like to thank the informal network of NGOs working on trafficking who expressed their solidarity through active participation to finalise and submit the amendment proposal on Trafficking in Human Beings (Control) Bill, proposed by the government.

I am thankful to Micah Rose, Intern from Washington School of Law, USA, who worked strenuously with the research team in collecting data and writing some parts of the report. I am indebted to Sue Gerseson, Peace Corps Volunteer and Attorney at Law, USA, whose excellent editing has made this report interesting to read.

I would further like to thank Advocate Ratna Kaji Shrestha for his assistance in completing the report and Advocate Basanta Basnet for his work in updating the datas of this study.

We are especially thankful to UNIFEM for their technical and financial support in completing this endeavor and last but not the least we are grateful to Ms. Chandni Joshi, Regional Programme Director, UNIFEM South Asia Regional Office, for her inspirations, her vision and guidance and Ms. Sangeeta Thapa, UNIFEM Programme Coordinator, UNIFEM Programme Office Nepal for her support all through the research. We thank you all for your support, without which it was not possible to carry out such an important research.

Sapana Pradhan Malla
President
# TABLE OF CONTENTS

Research Team I
Foreword II
Acknowledgement IV
Table of Contents VI
Abbreviations VIII
List of Cases X
List of Case Studies XII
Executive Summary XIII

1. Introduction 1
   1.1 Background 1
   1.2 Objectives of the Study 4
   1.3 Methodology 5
   1.4 Limitation of the Study 8
   1.5 Update of the Study 8

2. Human Rights Instruments and State Obligations to Combat Trafficking in Women 9
   2.1 Human Rights Instruments to Combat Trafficking in Women 9
   2.2 Recent Regional and International Initiatives 14
   2.3 Weaknesses or Gaps in Human Rights Instruments 19
   2.4 State Obligations to Combat Trafficking in Women 20
   2.5 Monitoring Mechanisms of Human Rights Instruments 22

3. Analysis of Policies to Combat Trafficking in Women and Children 27
   3.1 The Ninth Plan (1997-2002) 27
   3.2 Labour Policy (1999) 29
   3.3 National Health Policy (1991) 30
   3.4 National Policy on AIDS and STD Control (1995) 31
   3.6 National Plan of Action against Trafficking (NPAT) (1999) 32

Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal
3.7 Reformed National Plan of Action against Trafficking 34
3.8 Institutional Mechanism to Combat Trafficking 37

   4.1 Constitutional Provisions 39
   4.2 Analysis of State Anti-Trafficking Laws 41
   4.3 Other Laws that Impact Trafficking 47
   4.4 Trafficked Women Victimized after Returning to Nepal 52
   4.5 Analysis of Proposed Bills 54

5. Law Enforcement Mechanisms 61
   5.1 Investigation: The Police 61
   5.2 Prosecution: Government Attorneys 65
   5.3 Adjudications: The Court System 75
   5.4 Common Concerns of Law Enforcement Agencies 84

6. Judgment Analysis 85
   6.1 Judgment Trend and Patterns 85
   6.2 Substantive Judicial Approach 92
   6.3 Conclusion 94

7. Challenges and Recommendations 96
   7.1 Address the Underlying Problems 96
   7.2 International Anti-trafficking Conventions and Effective Implementation 98
   7.3 Ensure Strong Legal Framework 100
   7.4 Improve Enforcement Mechanisms 103
   7.5 Provide Rescue and Rehabilitation Service 109
   7.6 Assess Efforts to Curb Trafficking 111

Bibliography 114

Annexes 119
1 International Human Rights Instruments Ratified or Acceded By Nepal
2 ILO Conventions Ratified or Acceded by Nepal
3 List of Interviewees
4 Questionnaire

Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal
ABBREVIATIONS

A.D. - Anno Domino
AIDS - Acquired Immunodeficiency Syndrome
AATWIN - Alliance Against Trafficking of Women and Children - Nepal
ABC, Nepal - Agro-forestry Basic Health and Cooperative, Nepal
AIG - Additional Inspector General of Police
BPFA - Beijing Platform for Action
B.S. - Bikram Samvat (A Nepali Calendar Year)
CAC Nepal - Community Action Center, Nepal
CeLRRd - Center for Legal Research and Resource Development
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
CRC - Child Rights Convention
CWIN - Child Workers in Nepal
CIAA - Commission for Investigation of Abuse of Authority
CSWs - Commercial Sex Workers
DDCs - District Development Committees
DSP - Deputy Superintendent of Police
FGD - Focus Group Discussion
FIR - First Information Report
FWLD - Forum for Women, Law and Development
HIV - Human Immunodeficiency Virus
ICCPPR - International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ICPD - International Conference on Population and Development
INSEC - Informal Sector Services Centre
INGOs - International Non-Governmental Organizations
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>IEC</td>
<td>Information, Education and Communication</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>JIT</td>
<td>Joint Initiatives against Trafficking</td>
</tr>
<tr>
<td>LACC</td>
<td>Legal Aid and Consultancy Centre</td>
</tr>
<tr>
<td>MOWCSW</td>
<td>Ministry of Women, Children and Social Welfare</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>NGOs</td>
<td>Non-Governmental Organizations</td>
</tr>
<tr>
<td>NKP</td>
<td>Nepal Kanoon Patrika</td>
</tr>
<tr>
<td>NLP</td>
<td>National Labour Policy</td>
</tr>
<tr>
<td>NPA</td>
<td>National Plan of Action</td>
</tr>
<tr>
<td>NPAT</td>
<td>National Plan of Action against Trafficking</td>
</tr>
<tr>
<td>NHRC</td>
<td>National Human Rights Commission</td>
</tr>
<tr>
<td>NPC</td>
<td>National Planning Commission</td>
</tr>
<tr>
<td>NNAGT</td>
<td>National Networking against Girls Trafficking</td>
</tr>
<tr>
<td>NTF</td>
<td>National Task Force</td>
</tr>
<tr>
<td>NCC</td>
<td>National Coordination Committee</td>
</tr>
<tr>
<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
</tr>
<tr>
<td>SCB</td>
<td>Supreme Court Bulletin</td>
</tr>
<tr>
<td>STDs</td>
<td>Sexually Transmitted Diseases</td>
</tr>
<tr>
<td>SSP</td>
<td>Senior Superintendent of Police</td>
</tr>
<tr>
<td>UAE</td>
<td>United Arab Emirates</td>
</tr>
<tr>
<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>VDCs</td>
<td>Village Development Committees</td>
</tr>
<tr>
<td>vs.</td>
<td>Versus</td>
</tr>
<tr>
<td>WOREC</td>
<td>Women’s Rehabilitation Center</td>
</tr>
<tr>
<td>S.N.</td>
<td>Cases</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>2.</td>
<td>Batuli Lama vs. HMG/Nepal, (NKP 2054, Vol. 11, p. 651-655)</td>
</tr>
<tr>
<td>5.</td>
<td>Dek Prasad Rijal vs. HMG/Nepal, (S.C.B. 2053, Year 5, Vol. 11, p. 6)</td>
</tr>
<tr>
<td>7.</td>
<td>Dhan Sing Negi vs. HMG/Nepal, ( NKP 2053, Vol. 11, p. 789-792)</td>
</tr>
<tr>
<td>14.</td>
<td>Govinda Prasad Bhattarai vs. HMG/Nepal, (S.C.B. 2055, Year 7, Vol. 11, p. 3-4)</td>
</tr>
<tr>
<td>15.</td>
<td>HMG/Nepal vs. Batuki Tamangni, (NKP 2045, Vol. 11, p. 1163-1166)</td>
</tr>
<tr>
<td>17.</td>
<td>HMG/Nepal vs. Gopal Prasad Dahal, (S.C.B. 2054, Year 6, Vol. 15, p. 8)</td>
</tr>
<tr>
<td>19.</td>
<td>HMG/Nepal vs. Indra Prasad Mainali, (S.C.B. 2055, Year 7, Vol. 20, p. 2)</td>
</tr>
<tr>
<td>20.</td>
<td>HMG/Nepal vs. Om Prakash Biwakarma, (S.C.B. 2054, Year 6, Vol. 15, p. 12)</td>
</tr>
<tr>
<td>24.</td>
<td>HMG/Nepal vs. Suresh Karki, (NKP 2048, Vol. 6, p. 618-621)</td>
</tr>
<tr>
<td>26.</td>
<td>Indra Prasad Chaulagai vs. HMG/Nepal, (S.C.B. 2053, Year 5, Vol. 6, p. 23)</td>
</tr>
<tr>
<td>27.</td>
<td>Kamal Prasad Shrestha vs. HMG/Nepal, (NKP 20 51, Vol. 4, p. 240246)</td>
</tr>
</tbody>
</table>
34. Ram Saran Pudasaini vs. HMG/Nepal, (S.C.B. 2054, Year 6, Vol. 15, p. 7)
36. Subash Kumar Kherwal vs. HMG/Nepal, (S.C.B. 2056, Year 8, Vol. 20, p. 8)
38. FWLD vs HMG Nepal, (NKP, 2058)
## LIST OF CASE STUDIES

<table>
<thead>
<tr>
<th>Case Study No</th>
<th>Title of the Case</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>The intimidated victim: A Trafficking Dilemma</td>
<td>46</td>
</tr>
<tr>
<td>2.</td>
<td>Trafficking Converted into Foreign Employment to Reduce Sentence</td>
<td>48</td>
</tr>
<tr>
<td>3.</td>
<td>Court Arbitrarily Decides Victim is a Prostitute</td>
<td>50</td>
</tr>
<tr>
<td>4.</td>
<td>Denial of Right to Appeal is Denial of Justice</td>
<td>73</td>
</tr>
<tr>
<td>5.</td>
<td>Inadequate Investigation</td>
<td>76</td>
</tr>
<tr>
<td>6.</td>
<td>Extra Territorial Jurisdiction is Illusory</td>
<td>77</td>
</tr>
<tr>
<td>7.</td>
<td>Failure to Reconfirm Statement Led to Acquittal</td>
<td>80</td>
</tr>
</tbody>
</table>
Trafficking in human beings, especially that of women and children for commercial sexual exploitation, is a tragic and long prevailing problem for this country. In 1986, a specific law was enacted with special mechanisms, such as burden shifting and extraterritorial jurisdiction, designed to improve efforts to combat trafficking.

However, even after enactment of this supposedly potent weapon against trafficking, there has been no significant improvement in the enforcement of the law. Despite national attention on trafficking, the number of the cases registered compared to the numbers of women and girls reported to have been trafficked is significantly low. Even where cases are initiated, women are not able to get justice. The state has not been able to protect the rights of women against this severe forms of exploitation.

Trafficking has not got the kind of focused attention that it requires. The Ninth Plan of Nepal did not specifically refer to trafficking. The labour policy is only designed to eliminate child labour but does not address the trafficking of children. The health policy does not give any priority for women’s health despite all of the evidence of the severe health effects of sexual exploitation and trafficking. Trafficked women are at increased risk for HIV/AIDS, yet this epidemic has not been given proper attention. One of the root causes of trafficking is the low status of women and the resulting poverty and expanding global market for sex and cheap labour. The government’s labour policy and migration policy have not taken into consideration these issues while designing plans. Rather, the Ninth Plan treats women’s entry into the labour market as a threat for unemployment in the country. However, the Tenth Plan and for the first time includes program against trafficking. The specific National Plan of Action against Trafficking, the first such initiative in Asia, contains a number of comprehensive approaches to combat trafficking. However, it also lacks expertise on its taskforce; it lacks a secretariat and staff, it lacks coordination, and it lacks an adequate budget.
Furthermore, task forces have been established in only 26 districts. The state lacks conceptual clarity in its approach to the issue. This lack of clarity often makes the problems worse. By assuming a nexus between trafficking and migration, the state violates women’s right to movement; by suggesting that trafficking causes HIV/AIDS, the state stigmatizes trafficking victims and makes it more difficult for them to return home. Finally, the state lacks a monitoring mechanism and monitoring indicators. Without these mechanisms in place, it is impossible to know whether the policies that state is implementing are having any effect at all.

The Constitution of 1990 guarantees the right to equality on the basis of sex, the right to criminal justice, the right to privacy and the right against exploitation. Unfortunately, the laws and policies adopted by the state to combat trafficking lack this rights perspective. The preamble to the 1986 law focuses on moral values, includes a conservative definition of trafficking and incorporates procedures that suggest distrust of the victim. For example, the law requires prior approval of the Court before initiating investigation. A complain has to be filed with evidences of trafficking not realizing that a victim herself is the only witness in these cases. It has no provision for victim/ witness protection. The burden of proof shifts only when the accused is a stranger even though in most of the cases, the traffickers are relatives or friends of the victim. A victim’s failure to appear in court to reconfirm her statement often leads to an acquittal. The Act confers wide discretionary power in punishment for the offence of trafficking but has no provision for aggravated forms of the offence. This moralistic suspicion of the victim incorporated in the law undercuts women’s autonomy and actually fosters trafficking.

Trafficking is an extraterritorial offence. Yet this study determined that the extraterritorial application of the law has not been implemented because the Nepal/India extradition treaty includes 16 different types of offences as extraditable crimes but trafficking is not mentioned. Furthermore, even though parties to the Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 must extradite the offenders.

A bill, drafted by the government to deal with trafficking still lacks a rights perspective. It criminalises voluntary sex works, provides a narrow definition of trafficking and authorizes excessive police power. Prior approval for investigation is still required, and it creates a concept of presumed offences without any meaningful guidance about what affect such proof will have on the prosecution.
The bill provides no victim and witness protection policy, no mandatory provision for government to provide rehabilitation programs for victims and still ignores a victim’s right to care and support. Even though the bill proposes to provide compensation equal to half of the amount of fine imposed on offender, it is silent about compensation in the event that the offender is unable to pay a fine and is imprisoned. Many of the key informants interviewed on the question of criminalising sex workers noted that prostitution should not be criminalized. Decriminalizing sex work protects a woman's right to self determination and employment and assists in the protection of public health. Those key informants who viewed prostitution to be criminalized said it is necessary to sustain general values and norms, to control trafficking of women and children, to prevent sexual exploitation and also to control the crime. These beliefs reflect a societal value system more concerned with enforcing morality than protecting rights.

Although Nepal has ratified 16 international human rights instruments which directly or indirectly relate to trafficking, including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949. The study identified that the 1949 Convention ratified by Nepal was not deposited in the UN. However, after the follow-up with the government, the ratification was deposited only in 2002. However, some of these instruments also lack rights perspective. Rights and state obligations conferred by international instruments are yet to be implemented in the domestic level. This study has indicated the need to ratify the recent UN Protocol on Trafficking. It recommends the adoption of the amendment to SAARC Convention to ensure that recipient countries are accountable, that there are strong treaty bodies and effective monitoring mechanisms.

The Nepalese criminal justice system is an adversary legal system with cases filed and prosecuted by the state and accused persons defended by defense counsel. Until a case is filed, prepared and prosecuted, criminals escape the justice system and victims are denied justice. The study indicates that even though it is estimated that between 5,000 to 7,000 girls are trafficked from Nepal to India each year, the crime report register of the police department shows that over the last eight years the number of trafficking cases filed has not exceeded 150 per year. The respondents suggested that the cause for this minimal number of reporting is the failure of victims coming forward and reporting the crime due to fear of social stigma, discrimination and isolation, lack of awareness, intimidation, harassment during the case proceeding, lack of compensation, lack of protection, lack of confidence in prosecuting agencies, lack of family support, lack of evidence, and
lack of encouragement for the victim to report the case. FIR is found to have been lodged from 15 days to \(7\frac{1}{2}\) years from the date of the commission of offence and only in 15 percent of cases, victims lodged the FIR with evidence.

Clearly these numbers reflect a failure of the system. Effective prosecution of trafficking cases is hampered by limited and out of date investigation methods driven solely by the statements, hostility of victims and witnesses, weak coordination and networking with trans-border police, lack of adequate resources, lack of effective border monitoring mechanisms, and a paternalistic approach to border monitoring that results in harassment for the innocent and curtailing the freedom of mobility for all women. There are major challenges in the investigation system that police are facing today. However, during the study, allegations of massive corruption among the law enforcement agencies was also identified as a major challenge.

The government attorney is the responsible agent in the prosecution system, however, they lack coordination with the police. In 70 percent of trafficking cases, the police submit the case to the government attorney on the 25th day (the last day) for filing the case in the court. Government attorney are also subject to political pressure and threats from traffickers. In a large number of the cases victims/witness are hostile. During the study the key informants said lack of security, false promises, lack of counseling for victims/witnesses, the organized nature of the crime of trafficking, the necessity for repeated statements and lack of confidence are the causes for victims becoming hostile. Prosecutors also face other problems caused by ambiguous charge sheets and a multi-accused approach to prosecution, a lack of conceptual clarity about the crime as well as insensitivity to gender issues. To compound these fundamental problems, government attorneys lack sufficient resources to mount a sustained effort against traffickers. However, the most important thing that government attorneys can do to ensure effective prosecution of these cases is to actually show up. The study identified that in 23 percent of reported trafficking cases, the government attorneys did not appear during the hearing. Similarly, it is also found that only in 5 percent of trafficking cases, the government attorney has given direction to the investigating officer. This resulted in the acquittal of the accused. The study has also highlighted that government attorneys are often ill prepared and therefore their performance in court is very low, often resulting in an acquittal or dismissal.

Government attorneys often fail to appeal these cases and are not accountable for the decision not to appeal. The right to appeal is denied to victim of trafficking.
Among the key informants, 81 percent said that the role of government attorneys are not effective in combating trafficking. The study respondents cited lack of motivation, lack of training, lack of gender awareness, corruption, lack of coordination with police, lack of a rights perspective as the major causes for the failure of government attorneys. It is difficult to determine the actual causes because there are no monitoring or enforcement mechanisms.

The study identified several problems associated with the adjudication system. At the trial level, cases are plagued by insufficient evidence, a lack of mechanism for delivery of the summons, the need to confirm the statement by victim at the court, a lack of adequate resources to ensure the attendance of the victim and witnesses, excessive delay in the court process and non execution of judgments.

The study also highlighted that 79 percent of trafficking cases are pending in the Supreme Court whereas, in Appellate Courts ratio is 24 percent and in District Courts it is 62 percent. Even after a conviction, traffickers often escape severe punishment. Courts exercise broad discretion in sentencing and give no reason for widely disparate sentences which are minimal in most of the cases. The judgment analysis of 10 years shows that in 64 percent of the cases, perpetrators are given minimal punishment. Even the report of Attorney General Office still indicates that in 90 percent of cases, the prosecutor claims maximum punishment of 20 years for traffickers whereas only in 10 percent of cases, the trial court affirm the claim of the maximum punishment. Even though the Appellate Court affirms convictions achieved at the trial level, the Supreme Court reversed 26 percent of those convictions. The Court rarely offers principled justification for these reversals suggesting that the court is second-guessing the factual findings of the trial court. This has the effect of demoralizing the trial court, the prosecutors, the police and the victims.

The study has highlighted some of the initiative taken place during the study such as the tenth plan, which for the first time has specifically mentioned the problem of trafficking of women and children and incorporates programmes to address trafficking, also the ban imposed on women to work in foreign country was lifted, amendment proposal to the Foreign Employment Act is being prepared on rights based perspective, a landmark decision was made on rape law that discriminated prostitute women, amendment proposal to the Human Trafficking (Control) Bill was prepared and submitted and jurisdiction of the special court to adjudicate trafficking cases is shifted back to the district court.
The study has made many recommendations. The majority of these are, at their base, appeals to the state to do its job effectively. The study recommends that the state must move away from its moralistic approach and develop a comprehensive, rights based definition of trafficking and pass comprehensive legislation to deal with the problem from victim justice perspective. It recommends that the police to be trained so that they can understand and investigate the complex networks that comment the organized crime of trafficking. It recommends government attorneys to prepare and present strong cases working in coordination with the police and victims. It recommends the courts to be more accessible and responsive to victims and that the courts convey the clear message that trafficking is a serious crime that will not be tolerated. It urges courts to use many domestic and international laws that have been adopted to deal with trafficking. It recommends the state to ratify SAARC Convention and the UN Protocol on Trafficking and bilateral arrangements are made for transborder collaborations and border monitoring. It recommends state and civil societies to work together and monitor the state’s effectiveness in ridding this society of this terrible crime. These recommendations focus on the mechanisms of law enforcement. The study highlights that the trafficking in persons will always plague this country as long as poverty, illiteracy and gender discrimination exist. It is therefore incumbent upon the state to combat trafficking by addressing these root causes. The result will not only be less fertile ground for trafficking but a better society for all citizens.
CHAPTER 1

INTRODUCTION

Nepal enacted a specific law against trafficking in human beings in 1986.¹ This study examines the effectiveness of that law and other anti-trafficking measures as they apply to trafficking in women. Our research shows that, despite legislation and constitutional prohibitions, trafficking has not been controlled and continues unabated. Trafficking cases are infrequently reported. Even after recognizing trafficking as a serious crime against women and children, the criminal justice system, police, government attorneys and the courts, has yet to effectively respond to the problem.

This study examines the current state of trafficking in Nepal by analyzing policy, applicable state laws and international conventions. The study reports on the response of law enforcement to trafficking and concludes with specific recommendations addressing the problems identified in the study. It is our hope that this study will provide a blueprint for the kind of legal and institutional change that will control, and ultimately eliminate the abhorrent practice of trafficking in human beings.

1.1 Background

Trafficking in human beings, especially women and children, for commercial and sexual exploitation is a long-standing tragedy in Nepal. Gender discrimination, poverty, illiteracy and unemployment render large numbers of women and girls vulnerable to trafficking and sexual exploitation. According to estimates, 5,000 to 7,000 women and girls are trafficked every year, ending up as sex workers or domestic servants, primarily in India and the Middle East.² And according to a ILO study, 12,000 children

¹ Traffic in Human Beings (Control) Act, 1986.
² However, this data is more than a decade old and not based on any empirically tested method. Collecting reliable data has been a great challenge.
are trafficked every year from Nepal.\textsuperscript{3} However, census data 2001 on female population absent from households have raised questions about the validity of the hitherto data on trafficked women. The data shows altogether 87,712 absentee women and 40.6 percent of them are absent without known reasons. This phenomenon of female absenteees with unknown reasons indicates the possibility of their being trafficked.\textsuperscript{4} Approximately 200,000 Nepalese women and girls, reportedly sold for 25,000 to 50,000 rupees, are employed as sex workers in many countries.\textsuperscript{5}

In regard to the age of trafficked women and girl it is seen that 72 percent of them are less than 18 years of age.\textsuperscript{6} In addition to trafficking of women and children, boys are also trafficked. According to a study on trafficked boys, 63 percent of trafficked boys are under 18 years of age.\textsuperscript{7} Among the trafficked, hill ethnic groups form the highest (43.13 percent) proportion, followed by Brahmin and Chhetri (23.8 percent) and occupational castes (22.4 percent).\textsuperscript{8} Trafficking has been taking place from 39 districts spread over all five development regions. Development region-wise, the western region (47.2 percent) has the highest number of female absentees without known reasons, followed by the far western region (22.8 percent). By district, the highest number of absent female population is in Gulmi, followed by Syanja, Nawalparasi, Kathmandu and Kaski, whereas the ratio of absenteees without known reasons is the highest in Pyuthan (68.2 percent), followed by Baitadi (60 percent), Achham (58.2 percent), Arghakhanchi (57.6 percent) and Palpa (56.4).\textsuperscript{9}

In many cases, the victims of trafficking return home with HIV and AIDS and other diseases. Even if they are not infected with HIV and AIDS or other sexually transmitted diseases (“STDs”), others presume they are infected; their families and the rest of society neglect them. Ignored by family and society, without recourse to effective rehabilitation programs, the women eventually return to sex work in order to earn a living. Trafficking is a multi-dimensional issue. It is a gender problem because unequal power relations reinforce women’s secondary status in society. It is an economic


\textsuperscript{4} Status and Dimensions of Trafficking Within Nepalese Context, IIDS and UNIFEM, March 2004.

\textsuperscript{5} The Trafficking of Women and Girls: A Comparative Study of Two VDCs. Gothenburg University, Sweden, Spring 1999.

\textsuperscript{6} Status and Dimensions of Trafficking Within Nepalese Context, IIDS and UNIFEM, March 2004.

\textsuperscript{7} Cross Border Trafficking of Boys, WOREC, ILO/IPEC, March 2002.

\textsuperscript{8} Status and Dimensions of Trafficking Within Nepalese Context, IIDS and UNIFEM, March 2004.

\textsuperscript{9} Ibid.
problem because the vast majority of women, seeking to escape poverty, are lured into trafficking by false promises of economic gain. Trafficking is a health problem because women and children who are trafficked are at risk for HIV infection. It is a legal problem because law enforcement is generally ineffective. Victims lack access to the justice system and are denied redress for the crimes committed against them. Finally, a series of human rights violations take place during trafficking. These violations highlight Nepal’s lack of compliance with international conventions that protect women and children from exploitation.

Until recently, trafficking was seen exclusively as a woman’s problem; confined to clandestine sex workers. It was not perceived as a glaring abuse of human rights and an assault on human dignity. The patriarchal value system that treats women as a commodity is a root cause of the unconscionable offense of trafficking in women. Patriarchy also ensures that trafficking receives less attention and a low priority in government policies and programs. Violence against women is acceptable in many societies. Once women become victims, unworthy of protection, buying and selling by traffickers and their clients is easily justified. The women themselves are so demoralized, they are unable to resist their captors.

Even though, there was a law under Country Code 1963 of Nepal to criminalize trafficking, the 1986 law, a special law was enacted specifically to combat trafficking in Nepal, contains some significant provisions including shifting the burden of proof to the accused and extraterritorial application of the law. Further, the Constitution explicitly prohibits, “…traffic in human beings, slavery and serfdom or forced labor in any form.” Finally, Nepal is a party to several international instruments to combat trafficking: The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949); the 1979 Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”) and the 1989 Convention on the Rights of the Child (“CRC”) along with many other convention which calls state party to combat heinous crime of trafficking.

Despite these laws and conventions, prosecution of trafficking offenses has not improved. Trafficking is clearly a significant national issue, but the number of cases

---

11 According to a UN estimate, trafficking is a five to seven billion US dollar operation annually, with four million persons moved within countries or from one country to another. See: Raymond, Janice G., Guide to the New UN Trafficking Protocol, European Women’s Lobby, MAPP, AFPM, 2000 P.A.
registered in the courts compared to the estimated number of women and girls trafficked is extremely low. State initiatives to eliminate trafficking are ineffective. Rehabilitation programs and transit homes for the victims of trafficking are woefully inadequate. The HIV infection rate of girls and women returning back from the brothels of India and other parts of the world is increasing rapidly. Human rights concerns of victims have not been taken into account. Even when a case is initiated, the victim does not get justice. Thus far, the state has not been able to protect the rights of women against this severe form of exploitation.

It is extremely important to determine where the problem lies. Is the problem in the law itself or in the preventive and remedial policies of the government? Does trafficking persist due to the failure of enforcement mechanisms? This study attempts to answer these questions. This study is particularly significant because it is the first comprehensive study undertaken to evaluate anti-trafficking laws and policy from a human rights perspective. Issues relating to trafficking should be linked to international conventions and the state obligations arising out of them, although this has never been done in a systematic way. This study does both. It analyzes existing laws and institutional mechanisms to combat trafficking, reviews the judicial interpretation, implementation, gaps and impact of those laws and provides recommendations for future action.

This study is timely in that it includes recommendations for improving the proposed draft bill on Human Trafficking (Control), prepared by the Ministry of Women, Children and Social Welfare. There is an urgent need to improve the draft bill in order to incorporate issues raised in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the United Nations Convention against Transnational Organized Crime (2000) and the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

1.2 Objectives of the Study

The goal of the study is to examine the existing laws and institutional mechanisms to combat trafficking in women. The specific objectives are:

- To review and identify gaps in the existing laws and policies relating to human trafficking control.

- To examine the relevance of different national and international initiatives

- To assess the effectiveness of the institutional mechanisms dealing with human trafficking, especially the court, the government attorney and the police.

- To make recommendations to improve the effectiveness of the legal framework and institutional mechanisms to control trafficking in women and children and rehabilitate victims of trafficking.

1.3 Methodology

Study Sites

As most of the key informants, government offices, and courts are based in Kathmandu, most of the data were gathered in Kathmandu. To understand the situation outside the Kathmandu Valley, one focus group discussion (“FGD”), one court observation and interviews with key informants were conducted in Nepalgunj in Banke district. Border observations were conducted in Sunauli in Rupandehi district and Jamuna in Banke district, two of the busiest Nepal-India border points.

Time Frame

Data gathering took place from May 2001 through August 2001. Updated data was gathered in 2003 and 2004.

Data Collection

Researchers gathered quantitative and qualitative data using the data gathering tools described below. All the tools were pre-tested and refined in Kathmandu.

a) Law and Policy Analysis

The study team analyzed existing laws directly or indirectly related to trafficking including constitutional provisions, judicial interpretations, immigration laws, foreign
employment laws, labor laws and extradition laws. The analysis focused on identifying gaps in existing laws and examining the effectiveness of these laws in controlling trafficking. The study also examines international human rights instruments related to trafficking to determine their application to domestic laws and policies.

b) Judgment Analysis

The study reviewed all published Supreme Court interpretations on trafficking in the Nepal Kanoon Patrika (“NKP”) and the Supreme Court Bulletin (“SCB”) from 1987 to 2003 (2044 to 2060 B.S.) to evaluate the effectiveness of the court system in controlling trafficking. Thus, the sample included all opinions delivered after the new Traffick in Human Being (Control) Act was enacted in 1986. Quantitative and qualitative methods were used to interpret the opinions. The quantitative analysis revealed the judicial trends in trafficking decisions and the qualitative analysis illuminated the substance of the decisions.

c) National Consultation

The study team organized a National Consultative Workshop on the Human Trafficking (Control) Bill 2001 on July 29, 2001 to identify the concerns and recommendations of many individuals and groups concerned with human trafficking. Through the presentation of papers and group discussion, the participants thoroughly examined each provision of the Bill and formulated amendments to the Bill.

d) Core Group Meetings

Following the national workshop, NGOs actively working to combat trafficking met at the UNIFEM/Nepal office in Kathmandu on August 22 and 27, 2001 to finalize the proposed amendments to the Human Trafficking (Control) Bill.

e) Focus Group Discussions

Three Focus Group Discussions (FGDs) helped identify stakeholder concerns about the effectiveness of existing laws and institutional mechanisms related to trafficking.

- Participants in the first FGD July 1, 2001 in Kathmandu included government attorneys, judges, police officials and lawyers. This discussion identified the reasons anti-trafficking laws and institutional mechanisms are not effective and formulated recommendations for improvement.
The second FGD composed of rescued trafficked women took place on July 11, 2001 in Kathmandu. In this discussion, information about problems victims encounter with the legal system and participants’ concerns about existing laws and institutional mechanisms was collected.

The third FGD brought together Badi women at Padanaha village of Bardiya district on June 18, 2001. This discussion examined the vulnerability of Badi women to trafficking and collected their concerns with existing laws, policies and programs dealing with prostitution and trafficking.

f) Scheduled Interviews

The study team interviewed 47 key policy makers and legislators to collect their views on trafficking, identify gaps and inconsistencies in existing laws, policies and procedures, and evaluate rehabilitation and reintegration mechanisms. The interviews also focused on identifying the root causes of trafficking and its impact using open and close-ended questions. The interviewees included:

- Ten legislators (five men and five women)
- Seven policy makers from the Ministry of Women, Children and Social Welfare, the Ministry of Labor and Transport Management, the Ministry of Law, Justice and Parliamentary Affairs, the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Ministry of Health and the National Planning Commission
- Nine representatives of law enforcement agencies including police, the Office of the Attorney General, the National Human Rights Commission and the Cabinet Secretariat
- Four judicial officers (three judges and one immigration officer)
- Twelve representatives of civil society including NGOs, human rights activists, women’s rights activists, members of the media, lawyers and rehabilitation workers
- Five rescued women

The team manually collated the interview data according to themes and issues and processed the quantitative data using an Excel program.

13 Traditionally, women of the Badi community practice prostitution as their livelihood. It is a socially institutionalized practice in their community. However, there is an increasing trend to give up this profession.
g) Case Studies

Seven brief case studies based on data from primary and secondary sources including interviews, court observations, FGDs, border visits, newspaper and magazine reports, judicial opinions and books put a human face on the substance of the report.

h) Court Observations

Observers viewed trafficking cases for seven days to gather data on the treatment of victims, the quality of the prosecution and the use of international conventions. The observations took place in the Special Court in Kathmandu for five days, the Appellate Court in Lalitpur (Patan) for one day and the Banke District Court in Nepalgunj for one day.

i) Border Observations

Border observations at the transit points of Sunauli near Bhairawa, (May 9 and 10, 2001) and Jamuna in Nepalganj (June 19, 2001) document the procedures used to control trafficking and evaluate the border mechanisms for rescue and delivery of victims. The study team also interviewed Nepali and Indian border police, border-monitoring volunteers, transit home staff, owners of hotels near the border, Riksha pullers and Tanga drivers. These interviews focused on the rescue process and the monitoring mechanisms of the police and civil society.

j) Secondary Sources

Governmental and non-governmental organizations supplied published and unpublished information and statistics for the study.

1.4 Limitations of the Study

Even though trafficking of women and children is a serious crime prevalent in many parts of the country, this study is limited to a few districts. This study is primarily designed to raise the issue with lawmakers and policy makers to create strong laws and policies with effective enforcement mechanisms.

1.5 Update of the Study

The study was updated in 2004.
HUMAN RIGHTS INSTRUMENTS AND STATE OBLIGATIONS TO COMBAT TRAFFICKING IN WOMEN

Human trafficking is national as well as transnational issue. Therefore, national, regional and international efforts are needed to control and combat trafficking. This chapter analyzes State obligations arising out of international instruments and examines their relevance in the domestic context. Also it analyses the national and international machineries that directly or indirectly monitor trafficking. Human rights are provided in number of international instruments, however the analysis under this chapter is limited to relevant and major conventions.

Human rights violations create a context in which human trafficking is allowed to flourish. Lack of status and rights guaranteed by international human rights law also increases vulnerability to trafficking in persons. Similarly, human trafficking violates fundamental human rights such as the right to freedom from torture or slavery and deprives individual of other rights such as the right to life, liberty and security.

2.1 Human Rights Instruments to Combat Trafficking in Women


Recently, the United Nations has considered trafficking as a form of transnational organized crime and adopted the UN Trafficking Protocol as a supplement to the United Nations Convention against Transnational Organized Crime and Optional
Protocol to CRC on Sale of Children. The South Asian Association for Regional Cooperation (SAARC) has also adopted a Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

2.1.1 The Slavery Convention

Slavery and slavery-like practices are prohibited under a number of international conventions. The United Nations Slavery Convention of 1926 defines slavery as “possessing ownership over another person for the purpose of exploitation” and slave trade as “an act that acquires, disposes or exchanges an individual for the purpose of slavery.” Parties to this convention are required to provide all necessary assistance to other state parties to accomplish the objectives of the Convention and are required to discourage all forms of forced labor. The Slave Trade and Institutions and Practices Similar to Slavery of 1956, the Supplementary Convention on the Abolition of Slavery requires State Parties to bring about the complete abolition of institutions and practices similar to slavery—namely, debt bondage, serfdom, institutions and practices where women are sold or transferred for marriage for exploitation of them or their labour—regardless of whether they are covered by the definition of slavery in the Slavery Convention.

---

1 United Nations Convention against Transnational Organized Crime was adopted by the United Nations General Assembly on November 2, 2000. This Convention promotes cooperation to prevent and combat transnational organized crime more effectively. The Convention provides this definition, “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” The Convention requires each state party to adopt legislative and other measures to establish the following as criminal offences when committed intentionally and to distinguish them from offences involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim; (b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of a serious crime involving an organized criminal group.


3 Slavery Convention, Article 1.

4 Slavery Convention, Article 4.
2.1.2 International Labor Organization ("ILO") Conventions

The ILO Forced Labor Convention No. 29 (1930) requires parties to suppress trafficking in women and children and the consequent forced labor. According to this Convention, each member of the ILO ratifying the Convention must suppress the use of forced or compulsory labor in all its forms within the shortest possible period.\(^5\) Similarly, the Abolition of Forced Labor Convention No. 105 (1957) requires each ratifying member country to implement measures to secure the immediate and complete abolition of forced labor.\(^6\) ILO Convention on Worst Forms of Child Labour No. 182 (1999) defines worst form of child labour as all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour\(^8\) and urges the state party to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.\(^9\)

2.1.3 Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) \(^10\)

Prior to the 1949 Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ("CSTP"), there were several international initiatives to suppress human trafficking. These include, International Agreement for Suppression of the White Slave Trade, 1904, International Convention for Suppression of Traffic in Women and Children, 1921, International Convention for Suppression of Traffic in Women of Full Age, 1933 and Draft Convention on Traffic in Women and Children (The League of Nations, 1937). Article 4 of the Universal Declaration of Human Rights ("UDHR"), adopted by the General Assembly of the United Nations in 1948, provides that, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

CSTP consolidates past efforts and embodies the substance of the 1937 League of Nations Convention. CSTP requires that the offenses of trafficking elaborated in

---

5 For the purpose of this Convention “Forced or compulsory labor” means all work or service which is exacted from any person under the menace of any penalty or for which the said person has not offered himself voluntarily. (Article 2(1)).
6 ILO Convention, No. 29 Article 1(1), 1930.
7 ILO Convention, No. 105 Article 2, 1957.
8 ILO Convention, No. 182 Article 3(a), 1999.
9 ILO Convention, No. 182, Article 1, 1999.
10 Nepal acceded to this Convention on Dec. 27, 1995, however, the instrument of accession was not deposited at the UN until Dec. 10, 2002.
Articles 1 and 2 be regarded as extraditable offenses in any current or future extradition treaty between any of the parties to the Convention. The Convention provides that a previous convictions in a foreign state for offences described in the Convention be taken into account when establishing recidivism and disqualifying the offender from the exercise of civil rights.

The Convention further requires state parties to execute letters of request to judicial authority, Ministry of Justice of other state party relating to the offences according to their domestic law and practice. These letters become important mechanisms for mutual cooperation and coordination in combating trafficking. Moreover, in order to control trafficking for the purpose of prostitution, the Convention requires state parties to adopt appropriate immigration and emigration policies. The Convention requires state parties to supervise employment agencies in order to ensure that people seeking employment are not exposed to the danger of prostitution.

During this study in 2001 it was identified that even though Suppression of Immoral Trafficking Convention, 1949, was acceded by Nepal on December 27, 1995, the ratification was never deposited to Secretary General at the UN. Hence, the issue was raised with the Ministry of Law, Justice and Parliamentary Affairs, as a result, the instrument of accession was deposited on 10 December 2002.

2.1.4 The International Covenant on Civil and Political Rights (1966)

The International Covenant on Civil and Political Rights ("ICCPR") prohibits all forms of slavery. As most victims of trafficking do not freely consent to being taken across the border and put to work, trafficking would be considered a form of slavery and

11 CSTP, Article 8.
12 Ibid., Article 7.
13 Ibid., Article 13.
14 Ibid., Article 17. "The parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution. In particular they undertake:

(1) To make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route;

(2) To arrange for appropriate publicity warning the public of the dangers of the aforesaid traffic;

(3) To take appropriate measures to ensure supervision of railway stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution;

(4) To take appropriate measures in order that the appropriate authorities be informed of the arrival of persons who appear, prima facie, to be the principals and accomplices in or victims of such traffic.

15 Ibid., Article 20.
17 ICCPR, Article 8.
prohibited under the ICCPR. Moreover, Article 23(3) of the Covenant prohibits any marriage that is conducted without the full consent of both parties. Forced marriages lack the consent of both parties and violate Article 23(3). Forced marriages may also be considered a form of trafficking and thus, a prohibited form of slavery.

2.1.5 The Convention on the Elimination of All Forms of Discrimination against Women (1979)\(^\text{18}\)

Article I of the CEDAW defines discrimination as, “... any act of restriction, exclusion or distinction which has the effect or purpose of denying women the exercise of any right.” However, we must first establish the rights denied to women who are trafficked in order to show that the process of trafficking leads to the denial of a range of rights and to help us seek a wide range of remedies. For example, trafficked women are denied the right to free choice of profession and employment, Article 11(c), the right to protection of their health and safety in working condition, Article 12 and the right to an education, Article 10.

The comprehensiveness of CEDAW makes it an effective instrument to address the wide range of issues involved in trafficking.\(^\text{19}\) Article 6, for example, requires member parties to “... take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” In including this directive, CEDAW concludes that trafficking in women is one of the Convention’s prohibited forms of sex discrimination. By extension, Article 6 also obligates state parties to confront the additional forms of sexual exploitation described in General Recommendation No. 19. These include sex tourism, recruitment of domestic labor from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals.\(^\text{20}\)

2.1.6 The UN Convention on the Rights of the Child (1989)\(^\text{21}\)

In order to prevent trafficking of children, the Convention on the Rights of the Child (“CRC”) requires states to implement measures that prevent the illegal transfer of

---

children abroad. In addition, the CRC explicitly requires state parties to take measures to prevent all forms of abduction, sale or traffic of children and to create or to improve existing bilateral and multi-lateral agreements.

2.2 Recent Regional and International Initiatives

2.2.1 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)

The United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to supplement the Convention against Transnational Organized Crime. Transnational Organized Crime Convention establishes a link between trafficking in persons and the obligation of the State Parties to prevent and combat organized crime across borders through its Protocol on Trafficking. The protocol reflects the United Nations view that trafficking in persons is a form of organized crime. It is a wide-ranging international agreement addressing the crime of trafficking in human beings, especially women and children, on a transnational level. It creates a universal language to define trafficking in persons, suggests mechanisms to assist victims of trafficking and requires states to create legislation and administrative measures to prevent trafficking. The protocol establishes the parameters of judicial cooperation and exchanges of information among countries.

“Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”

22 CRC, Article 11.
23 CRC, Article 35.
24 Other supplemental protocols include the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol on the Illicit Manufacturing or Trafficking in Firearms. As of December 2000 the Convention against Transnational Organized Crime required ratification by 40 countries to become international law. Over 80 countries have signed at least one of the supplementary protocols.
Although the protocol anticipates accomplishing what national legislation cannot do alone, it is also intended to standardize national laws and to harmonize regional legislation against trafficking in women and children. The Trafficking in Persons supplemental protocol also addresses the human rights dimensions necessary for protecting victims of trafficking. This Protocol recognizes the need for a combined approach that integrates the protection of human rights and assistance to victims with effective prevention, prosecution and judicial cooperation.

### Measures to be Taken to Implement the Protocol

<table>
<thead>
<tr>
<th>Legislative Measures</th>
</tr>
</thead>
<tbody>
<tr>
<td> Criminalise the offenses of trafficking in persons</td>
</tr>
<tr>
<td> Protect the rights of the victims</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Administrative Measures</th>
</tr>
</thead>
<tbody>
<tr>
<td> Address underlying causes of trafficking in persons</td>
</tr>
<tr>
<td> Establish cooperation among the governments</td>
</tr>
<tr>
<td> Provide appropriate training</td>
</tr>
<tr>
<td> Ensure effective information exchange among law enforcement</td>
</tr>
<tr>
<td> Establish cooperation with NGOs and Civil Society</td>
</tr>
<tr>
<td> Ensure voluntary repatriation of the victims</td>
</tr>
<tr>
<td> Research and mass media campaign</td>
</tr>
<tr>
<td> Ensure security and control of documents</td>
</tr>
<tr>
<td> Prevent re-victimization of the victims</td>
</tr>
</tbody>
</table>

According to the Protocol, trafficking occurs whether or not a victim consents. The Protocol provides a comprehensive definition of trafficking including the range of criminal means employed in trafficking including force, coercion, abduction, deception or abuse of power, and less explicit means. State parties must also consider the special requirements of children, including appropriate housing, education and care.

---

25 The provisions of the Convention apply mutatis mutandis to this Protocol unless otherwise provided therein.  
26 UN Trafficking Protocol, Article 6(4).
The Protocol also protects the victim’s right to privacy and ensures that victims receive information on legal proceedings. Further, it provides victims’ right to participate in criminal justice system and provides provision for voluntary repatriation. States parties are required to formulate policies, programs and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimization. The Protocol is a significant step forward in the fight against trafficking and related exploitation. Perhaps the most significant achievement is securing an internationally agreed-upon definition of trafficking.  

### Rights Protected by the Protocol

- Right against Exploitation
- Right to Non-discrimination
- Right to Privacy and Confidentiality
- Right to be Represented and Heard
- Right to Safety
- Right to Compensation
- Right to Voluntary Repatriation
- Right to Residence
- Right to Mobility
- Right to Access to Justice


The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) prohibit and penalize the sale of children for the purpose of sexual exploitation, transfer of organs of children for profit and engagement of children in forced labour; child prostitution and child pornography, as well as the activities, which facilitate the exploitation of children. It also aims to protect the rights and interests of child victims of the prohibited practices.

---

27 All of this section is taken directly from Janis Raymond, “Guide to the New UN Trafficking Protocol.” European Women’s Lobby, et. al.
and give appropriate assistance to the victims of prohibited practices including their social reintegration and full physical and psychological recovery.

The Protocol specifies the nature of activities punishable in relation to the sale of children and describes the activities related to child prostitution that are punishable, including offering, procuring or providing a child for prostitution and penalizes the offences, whether such offences are committed in the country or transnationally or on an individual or organized basis.  

The Protocol states that the State adopt measures to protect the rights and interests of child victims of the offences stated in the Protocol at all stages of the criminal justice system. The Protocol provides that the States should take all possible measures to help the child victims overcome the trauma they have faced and also help in their full physical and psychological recovery as well as social reintegration.

The Protocol requires the State Parties to take all necessary steps to strengthen international cooperation by multilateral, bilateral and regional agreements for the prevention, detection, investigation, prosecution and punishment of those responsible for the acts involving sale of children, child prostitution, and child pornography and sex tourism. Such international cooperation shall be to assist child victims in their physical and psychological recovery, social reintegration and repatriation.

2.2.3 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2000)

The SAARC Convention aims to eliminate all forms of trafficking and includes punishment for all persons who manage, maintain, provide or finance any facility used in trafficking. One purpose of the Convention is to promote cooperation in the region to effectively suppress the various aspects of trafficking. State parties are

---

28 Article 3(1) of Optional Protocol to CRC.
29 Article 9(3) of Optional Protocol to CRC.
30 Article 10(1) of Optional Protocol to CRC.
31 Article 10(2) of Optional Protocol to CRC.
32 SAARC Convention, Article 3(2).
33 Article 2 of the Convention states, “The purpose of this Convention is to promote cooperation among member states so that they may effectively deal with the various aspects of prevention and suppression of trafficking in women and children; the repatriation and rehabilitation of victims of trafficking and prevent the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination.”
required to grant each other broad mutual legal assistance in investigation, inquiries, trials or other proceedings dealing with trafficking.\textsuperscript{34} State parties are required to exchange information regarding agencies, institutions and individual involved in trafficking in the region.\textsuperscript{35}

Other significant provisions of the Convention include identifying trafficking as an extraditable offense, maintaining victim confidentiality and providing rehabilitation services for victims. The Convention also identifies aggravating circumstances that increase penalties for trafficking offences.\textsuperscript{36}

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
Report on the Recommendations to address the Gaps in the SAARC Convention on Trafficking and Develop a Implementation Plan \\
\hline
At the request of the SAARC Secretariat, UNIFEM commissioned Ms. Sapana Pradhan Malla from FWLD to conduct a study on the SAARC Convention on Trafficking, 2002. The objective of the study was to review the SAARC Convention from human rights perspective, to identify the gaps in the Convention and provide recommendations to address the gaps. Also the objective was to develop an implementation plan to implement the Convention. Inputs from the national and regional non-governmental organization were invited to strengthen the Convention. 23 recommendations were adopted out of 31 recommendations provided to the SAARC Secretariat from UNIFEM and FWLD.
\hline
\end{tabular}
\end{table}

A comments and advocacy material on SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002 was prepared and published by FWLD with the support of The Asia Foundation.

\textsuperscript{34} SAARC Convention, Article VI(1).
\textsuperscript{35} Article VIII(5) of the Convention reads, “The State Parties to the Convention shall exchange, on a regular basis, information in respect of agencies, institutions and individuals who are involved in trafficking in the region and also identify methods and routes used by the traffickers through land, water or air. The information so furnished shall include information of the offenders, their fingerprints, photographs, methods of operation, police records and records of conviction”.
\textsuperscript{36} Article IV of the SARRC Convention includes the following aggravating circumstances:

\begin{enumerate}
\item Offender’s involvement in an organized criminal group;
\item Involvement of the offender in other international organized criminal activities.
\item Use of violence or arms by the offender;
\item The offender holds a public office and the offence is a misuse of that office;
\item Victimization or trafficking of children;
\item The offence is committed in a custodial institution, an educational institution or social facility, in their immediate vicinity or in other places visited by children and students for educational, sports, social or cultural activities; and
\item Previous conviction in a member state of other country, particularly for similar offences.
\end{enumerate}
2.3 Weaknesses or Gaps in Human Rights Instruments

As human rights instruments applicable to trafficking have evolved, conflicting rights have appeared. For example, the Preamble to the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others essentially equates trafficking and prostitution and criminalizes activities related to prostitution but does not define trafficking.\(^{37}\) On the other hand, Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (1966) states, "The State Parties to the present covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his (sic) living by work which he (sic) freely chooses or accepts and will take appropriate steps to safeguard this right." Thus, the Covenant appears to recognize voluntary prostitution as a protected "right to work."

The 1949 Convention also requires state parties to obtain a declaration from alien prostitutes in order to establish their identity and civil status and to discover who has caused them to leave their state.\(^{39}\) Such requirements violate the right to privacy, which has been guaranteed and secured under a host of international human rights instruments.\(^{39}\)

The SAARC Convention attempts to criminalize trafficking in all forms, however it provides only a narrow definition of trafficking. It limits trafficking to acts related to prostitution.\(^{40}\) The definition in the SAARC Convention denies protection and assistance to the large number of persons trafficked for other purposes such as forced labor, forced marriage or organ transplant. It omits provisions for a treaty body to monitor implementation of the Convention. The Convention ignores the important role of the country of destination in preventing, monitoring, rescuing, rehabilitatating and repatriating trafficked victims and does not define the specific responsibilities of the destination country.\(^{41}\)

\(^{37}\) The Preamble reads, "Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community."

\(^{38}\) CSTP, Article18.

\(^{39}\) For example, Article 12 of the Universal Declaration of Human Rights provides, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Similarly, Article 17(1) of the International Covenant on Civil and Political Rights provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation."

\(^{40}\) Article I(3) reads, "Trafficking means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking."

\(^{41}\) Article IX (1) of the Convention reads, "The rehabilitation of the victims of trafficking shall be the responsibility of the country of origin. The state parties to the Convention shall work out modalities for repatriation of the victims to the country of origin."
The rights afforded to non-citizens under contemporary international law are particularly relevant to evaluating the rights of trafficked persons. While the precise boundaries of state responsibility in this area have not been determined, traditional international law recognizes certain duties (“equal treatment” or an “international minimum standard) owed by a host state to aliens or non-nationals within its territory. Despite claims of universal application, the major international human rights treaties contain numerous provisions either specifically excluding non-nationals or evidently inapplicable to them.

The Protocol on Trafficking is Supplementing Protocol to Transnational Organized Crime Convention, therefore, without ratifying Transnational Organized Crime Convention, Protocol on Trafficking can not be ratified.

### Declarations that create obligation for state parties to effectively suppress trafficking

- Universal Declaration on Human Rights, 1948
- The UN Declaration on the Elimination of Violence against Women (1993)
- Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action (2000)
- Commitment under UN Millennium Declaration 2000

### 2.4 State Obligations to Combat Trafficking in Women

Trafficking is a human rights problem because it involves a series of human rights violations from the time the woman or girl is taken from her village through her repatriation and rehabilitation and during the prosecution of the cases. The extent of state responsibility under international law for the human rights violations associated
with trafficking is a question that needs to be answered by state parties under the applicable conventions.

State parties to human rights conventions are obligated by international law to respect, protect and fulfill human rights. The obligation to respect human rights requires the state party to refrain from committing any act or omission that violates human rights. Finally, the obligation to fulfill rights requires the state to implement affirmative measures to enable all persons to realize their rights.42

The Vienna Convention is the main international law governing treaty obligations under bilateral and multilateral treaties.43 The Convention provides that each treaty in force is binding upon the parties to it and must be performed in good faith.44 It further provides that a party may not invoke the provisions of its municipal laws as justification for its failure to abide by a treaty.45 By incorporating the major provisions of the Vienna Convention in the Nepal Treaty Act of 1991, Nepal must enforce its treaty obligations, even those signed but not ratified by Parliament.46 The country is also obligated to implement as national law all international treaties ratified by parliament to which Nepal is a party.47 The Nepal Treaty Act accepts that international human rights treaties shall supercede Nepali law. Accordingly, Nepal can be liable under domestic and international law if it does not fulfill its obligations under the treaties to which it is a party.

An analysis of all ratified human rights instruments to combat trafficking of women reveals that Nepal is obligated to take all measures including legislation to suppress all forms of trafficking. As a state party to these treaties, Nepal must extradite offenders, cooperate regionally and bilaterally, build a partnership with representatives of civil society and prohibit trafficking in persons. Nepal must create appropriate immigration and emigration policies, supervise employment agencies, include the aggravated form of the criminal offence of trafficking in its definition of trafficking and create a process to execute Letters of Request.48

42 See, for example: Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and CEDAW.
44 The Preamble to the Vienna Convention recognizes the universal principle of good faith.
45 The Vienna Convention, Article 27.
46 Section 9(2) of the Nepal Treaty Act reads, “In cases where any treaty which has not been ratified, acceded to, accepted or approved by Parliament, but to which the Kingdom of Nepal or His Majesty’s Government (HMG) has become a party, imposes any additional obligation or burden on the Kingdom of Nepal or HMG, and in cases where legal arrangements need to be made for its enforcement, HMG shall initiate action as soon as possible to enact laws for the same.”
47 This provision is based on the “specific adoption theory” with regard to implementation of a treaty under the national (municipal) law.
48 For the specific treaties and applicable provisions, see the preceding discussion in this chapter.
Core rights, including the prohibition of slavery, forced labor and debt bondage appear to be protected by the human rights instruments. For example, the rights set forth in the Universal Declaration of Human Rights apply to “everyone,” without distinction of any kind.\textsuperscript{49} The ICCPR applies to “all individuals,” without distinction of any kind.\textsuperscript{50} The Human Rights Committee charged with overseeing the implementation of the ICCPR confirmed, “In general, the rights set forth in the Covenant apply to everyone, irrespective of . . . his or her nationality . . .”\textsuperscript{51} The provisions of the Convention on the Rights of the Child apply to all children within the jurisdiction of the state party, irrespective of race or citizenship.\textsuperscript{52}

Along with the major regional human rights treaties, the ICCPR reiterates the prohibition of slavery and the slave trade as set out in the UDHR.\textsuperscript{53} Both the UDHR and the ICCPR further stipulate that no person shall be held in “servitude.”\textsuperscript{54} The provisions of the ICCPR relating to both slavery and servitude cannot be suspended by a State, even in times of emergency.\textsuperscript{55}

The foreign laws to control trafficking, especially the United States Anti-Trafficking Law, could have serious consequences if Nepal does not act quickly and effectively to meet minimum standards. These standards may be applicable during border supervisions, rescue of victims, judicial proceedings, and the rehabilitation of victims. The consequences range from adverse publicity to economic sanctions.\textsuperscript{56}

\section*{2.5 Monitoring Mechanisms of Human Rights Instruments}

\subsection*{2.5.1 Monitoring bodies}

Very few international instruments on combating trafficking establish a formal body to monitor the implementation of the instrument by state parties. There are, however, some exceptions. For example, Article 43 of the Convention on the Rights of the Child establishes a ten-member “Expert Committee.” Similarly, Article 17 of the CEDAW Convention creates a “Committee on the Elimination of Discrimination against Women” of 23 expert members.

\begin{flushright}
\textsuperscript{49} Universal Declaration of Human Rights, Article 2.  \\
\textsuperscript{50} ICCPR, Article 2(1).  \\
\textsuperscript{51} Ibid.  \\
\textsuperscript{52} CRC, Article 2.  \\
\textsuperscript{53} ICCPR, Article 8.  \\
\textsuperscript{54} UDHR, Article 4, ICCPR, Article 8(2).  \\
\textsuperscript{55} ICCPR, Article 4  \\
\textsuperscript{56} Comprehensive Anti-trafficking in Persons Act, S. 1842, Sec. 6(a)(2), 8(a), 1999.
\end{flushright}
Of the international instruments reviewed for this study, the Slavery Convention, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitutions of Others, the UN Trafficking Protocol, the United Nations Convention against Transnational Organized Crime, and the SAARC Convention do not provide for a treaty monitoring body. The absence of a review or supervisory mechanism undermines the political commitment to these agreements and ultimately, their effectiveness.

2.5.2 Complaint mechanisms

The CEDAW Convention and the CRC have optional protocols that provide a complaint mechanism if a state fails to comply with the Convention. According to the CEDAW Protocol, the committee may review complaints after the complainant has exhausted all domestic remedies. The Optional Protocol to CEDAW also provides inquiry process in case of grave and systematic violence. Nepal signed the Optional Protocol to the CEDAW Convention on December 18, 2001, but it has not been ratified. Unless the Protocol is ratified, complain mechanism or group process cannot be utilizes.

2.5.3 Reporting mechanisms for state accountability

Countries that are party to the CEDAW, CRC, ICCPR and many other human rights instruments are required to submit country reports detailing progress in implementing the respective convention.57 Under CEDAW, the report should include challenges and progress in fulfilling the obligations under the convention.

In its initial report to the CEDAW Committee, the Nepal government acknowledged that enforcement of the anti-trafficking law is extremely weak and that the government has been unable to launch specific programs against trafficking.58 The CEDAW Committee in it’s Concluding Comments on Nepal’s Initial Report showed concern about the high incidence of prostitution and the increase in trafficking in women and girls, in particular for the purpose of prostitution. It expresses its concern that girl children are taken across the border for the purpose of child marriage. The Committee urges the Government to take effective steps to review existing legislative provisions on prostitution and trafficking in women and their compatibility with the Convention, and to ensure their full implementation and compliance. It also calls upon the Government to initiate regional and bilateral cooperation, taking into account sub-

57 CEDAW, Article 18, CRC, Article 44.
Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal

regional, regional and international agreements and standards on this issue. It urges the Government to review its criminal code, to punish persons who procure women for prostitution or for trafficking, to establish repatriation and rehabilitation programs, as well as support services for victims of trafficking.

Through the reference an information made of this study in the Shadow Report Concluding Comments on Nepal’s Second and Third Combined Periodic Report to the CEDAW Convention mentions that the Committee remains concerned about the continuing prevalence of this problem in Nepal. It is also concerned about the large discrepancy between reported instances of trafficking and the actual number of cases brought to court. It is further concerned that the enactment of the amendment to the Human Trafficking (Control) Bill has been delayed.

The Committee urges the State party to intensify its efforts to address trafficking in women and girls. It recommends that its anti-trafficking strategy should include measures of prevention, the prosecution and punishment of perpetrators and increased international, regional and bilateral cooperation.

The Committee requests the State party to provide in its next report information about the legal and actual situation with respect to trafficking in women and girls.

In the Shadow Report to Second and Third Combined Periodic Report to the CEDAW Convention trafficking of women was raised as a critical issue making reference to this study.

The Nepal Country Report on the CRC states that due to poverty in the hills, traffickers have found it easy to lure thousands of girls to India every year with promises of jobs or roles in films. As soon as these girls reach puberty, many of them are sent to India, some by their parents or with parental knowledge and consent. The wealth some of these girls bring back to their families is one factor that encourages parents to send their daughters to India.\(^5^9\)

In the Concluding Remarks on Nepal’s Initial Report on the Convention on the Rights of the Child, the CRC Committee is concerned that there is girl trafficking, but there are no specific laws and policies to combat it. There is child prostitution, but no rehabilitation. There is drug addiction, but no effective measures of control. The Committee has suggested that measures, both administrative and legislative, be taken to combat the trafficking and sale of children.

\(5^9\) Ibid., p. 52.
Civil society also plays a significant role in monitoring the implementation of human rights instruments, national laws, policies and programs. A 1999 and 2003 “Shadow Report on the CEDAW Convention” highlighted trafficking of women and girls as the burning issue of the nation and region.\(^60\)

In the Concluding Remarks on Nepal’s Initial Report on the Covenant on Economic, Social and Cultural Rights, while reviewing the Initial Report of Nepal on the ICESCR, the Committee on Economic, Social and Cultural Rights is deeply concerned at the high number of women and girls being trafficked for prostitution. The Committee recommends that the state party enforce its legislation in an effective way and establish administrative mechanisms and monitoring systems to prevent and combat trafficking in women and children. It further recommends the strengthening of measures to allow the return, rehabilitation and reintegration into society of trafficked women.

2.5.4 The UN Human Rights Commission Special Rapporteur

Special rapporteur appointed by UN High Commission investigates on violence against women including trafficking of women. The UN Special Rapporteur questioned the criminalization of prostitution in Nepal’s draft bill to combat trafficking of women. She observed that modern legislation advocates that decriminalization of prostitution so that only the exploitation of prostitution is criminalized. When prostitution is criminalized, the victim, rather than the trafficker, becomes the criminal. This provision is a major step backwards for Nepal and will create great hardship for the women concerned.\(^61\)

2.5.5 National Human Rights Commission

The National Human Rights Commission is the key institution monitoring the implementation of human rights instruments in a domestic level in Nepal. The Human Rights Commission Act of 1997 created the National Human Rights Commission and charged it with protecting and promoting human rights under various international

---


The act empowered the Commission to take all appropriate measures to implement human rights instruments including, with proper approval, investigation of current court cases. 63

2.5.6 National Rapporteur on Trafficking

The National Rapporteur on Trafficking in Women and Children was established at the National Human Rights Commission. 64 The National Rapporteur is envisaged to integrate a gender perspective into the functions and procedures of the Commission – thereby strengthening the capacity of the Commission to respond to issues relating to the human rights of women and children with special focus on the issue of trafficking.

Advocacy to Appoint a National Rapporteur on Trafficking

During the study, advocacy was also carried out to appoint a National Rapporteur on Trafficking who would also coordinate with the UN Special Rapporteur on Trafficking. UNIFEM through a Joint Initiative Programme with the MWCSW and the UN System in Nepal supported the establishment of the National Rapporteur at the National Human Rights Commission in 2002. Present status: The ONRT is already included into the organogram of NHRC as well as activities of the ONRT are well included on the work plan of the NHRC 2004-2008. This simply shows that the effort has been institutionalized at the NHRC.

2.5.7 National Women’s Commission

The National Women’s Commission was established 65 with goals to ensure women’s rights by advising the government on how to effectively implement international human rights instruments and how to develop plans and policies specifically aimed at advancing women. In addition the Commission is responsible for coordinating with the relevant government agencies to support the victims of violence. 66

62 Human Rights Commission Act, Section 9(1).
63 Ibid., Sec. 9(2), 9(2)(d).
64 Dr. Renu Raj Bhandari , the first National Rapporteur on Trafficking was appointed on January 10, 2003. The new National Rapporteur on Trafficking Ms. Padima Pathema has been appointed on February 13, 2004.
65 National Women’s Commission was established on March 8, 2002.
ANALYSIS OF POLICIES TO COMBAT TRAFFICKING IN WOMEN

The Government has formulated policies and programs to combat trafficking of human beings. This Chapter analyzes government policies relating to child labor, women’s employment, poverty alleviation, literacy (especially adult and functional literacy), skill development for girls and women, labor and foreign employment. We also reviewed the Tenth Plan, the Ninth Plan, the National Plan of Action against Trafficking in Children and Women for Sexual and Labour Exploitation, National Plan of Action on CEDAW, and National Policy on AIDS and STD Control, 1995.

3.1 The Ninth Plan (1997-2002)

The overall objective of the Ninth Plan was to reduce the percentage of those living below the poverty line from forty-two percent to thirty-two percent. Because of constitutional provisions and Nepal’s international commitments to women’s development, the poverty alleviation program targeted women. Although the plan did not specifically refer to trafficking, it contained a policy that governmental and non-governmental organizations and local bodies mobilize to control all crimes and violence against women. The plan outlines various strategies to accomplish this, including preventive measures and rehabilitation programs.

The primary goals of the Ninth Plan were to identify crimes, prescribe punishment, formulate appropriate remedies and rehabilitation programs for victims and raise social consciousness about violence against women. The plan also proposes

---

1 The Ninth Plan (1997-2002) is a comprehensive government document that sets out the plans and programs the government plans to carry out within the five year period of the plan.
3 Ibid. p. 721.
4 Ibid. p. 723.
integrating women into the mainstream of development by promoting gender equality and increasing women’s participation in every sector of society. The hope is that these efforts will gradually eliminate violence, exploitation, injustice and other atrocities committed against women.  

3.1.1 Biased employment policy

Unfortunately, the Plan contained some unenlightened and even contradictory ideas. For example, the plan stated that because women have entered the labor market, there was a grave unemployment problem. This reasoning reflects a gender-bias that blames women for a broader social problem and treats unemployment as a problem for men only. This kind of statement diminishes the credibility of the plan as a whole and undermines women’s faith in the government.

3.1.2 Lack of integrated planning

The Ninth Plan endorses the concept of prospective planning, which required planning conducted in a deliberate, integrated manner. However, due to a lack of long-term vision, the objectives of each periodic plan vary and lack strategic continuity. For example, the Ninth plan aimed at accelerating national development through poverty alleviation. However, earlier plans had different goals. The Ninth Plan also admitted the government was unable to formulate annual programs according to the objectives and targets set by the plan.

The Tenth Plan (2002-2007)

The Tenth Plan, for the first time includes the issue of trafficking of women specifically. It acknowledges lack of improvement of law with gender sensitivity; lack of government’s investment on social sectors and lack of women’s participation in use of modern technology. Also it acknowledges that women are forced to work in unsafe situation and women lack access to financial resources and opportunities. Encouragingly, it has made references to international instruments such as CEDAW and CRC to reflect the instruments standards of promoting and protecting women’s and children’s rights. It has also put forward

---

5 Ibid, p. 102.
6 Ibid, p. 211.
7 Ibid, pp. 27-28.
8 The Ninth Plan, did not referred to addressing trafficking, though contained a policy that governmental and non-governmental organizations and local bodies mobilize to control all crimes and violence against women. The plan outlined various strategies to accomplish this, including preventive measures and rehabilitation programs.
the substantive model of equality as a workable model. It has stressed on education and employment opportunities for women, which are imperative to address the root causes of trafficking.

The plan includes provision for compensation, counseling, health treatment, legal support, and community based rehabilitation and reintegration programmes in a package to the women who have been victims of trafficking. This provision however, has missed out on one of the most important aspect of addressing trafficking, which is repatriation. Often trafficking interventions are focused on prevention, rehabilitation, and reintegration, and seldom on repatriation.

3.2 Labor Policy (1999)

The National Labor Policy (“NLP”) does not specifically mention forced labor or trafficking. However, it recommends that programs designed to eliminate child labor should be conducted on a national level by mobilizing the cooperation of national and international organizations. In order to effectively eliminate child labor, the country must recognize the importance of comprehensive rehabilitation programs and combat the root causes of poverty that often make child labor appear to be a necessity. A policy that forces children out of work without providing another form of economic assistance is detrimental because it increases children’s vulnerability to abuse, trafficking and further exploitation. The labor laws does not address other factors that contribute to trafficking including low social status, poverty and expanding global markets for sex and cheap labor.

3.2.1 Skill development programs for women

The policy promotes employment for women and the handicapped through special skill development programs of women and handicapped persons and to encourage them to be employed. However, women have yet to see any measurable benefits from these programs.

---

9 The Tenth Plan 2002-2007 p. 439. The Tenth Plan is a comprehensive government document that sets out the plans and programs the government plans to carry out within the five-year period of the plan.
10 Ibid, p. 448.
11 The Ministry of Labor and Transport Management formulated and enforced the National Labor Policy of 1999 that makes human resource development and increased productivity a priority. One of the objectives of the NLP is to encourage entrepreneurship and enterprise in order to increase employment of women and the handicapped.
3.2.2 Loan programs fail to benefit women

The Labor Policy attempts to promote and expand self-employment and foreign employment for skilled workers by providing collateral-free loans. However, the law discriminates in its impact because women are barred from employment to unorganised sector in the Gulf countries.

3.2.3 Minimum wage policy not adopted

The Labor Policy states that it will determine a minimum wage for agricultural, domestic and other workers in unorganized sectors of the labor force. However, the government has not established a minimum wage for agricultural workers or the unorganized sectors. A minimum wage might prevent some women from being trafficked as traffickers use the pretext of more lucrative employment abroad to lure women away from their homes.

3.2.4 Tax incentive not implemented

The Labor Policy provides a tax exemption for business as an incentive to employ more women. However, this initiative has not been incorporated into the current tax law and remains unimplemented.

3.2.5 Ineffective job creation programs

The problem of unemployment is increasing daily and is most acute among unskilled or semi-skilled young men and women in rural areas. The lack of training and apprenticeship programs for women combined with antiquated social attitudes about working outside the home means women have few, if any, prospects for employment. As yet, there are no effective government programs to generate employment opportunities for women.

3.3 National Health Policy (1991)

The goal of the National Health Policy is to create a socio-economic environment that enables Nepalese citizens to lead healthy lives. The primary objectives of the Health Policy are to upgrade the health standards of the majority of the rural population.

---

14 National Labor Policy, Strategy No. 3(8).
by extending basic primary health services to the village level and providing opportunities for rural people to obtain the benefits of modern medical institutions.

3.3.1 HIV/AIDS assigned low priority

The National Health Policy includes measures to prevent and control of HIV/AIDS. However, HIV/AIDS is not a high priority. Rather, the policy targeted raising the average life expectancy from fifty-three to sixty-five years by 2000. In 2004, this objective has not been met. The policy does not give proper emphasis to controlling the spread of HIV/AIDS, which is likely to have the greatest impact on life expectancy in Nepal over the next few years. Further, the policy fails to specifically address women’s health issues including the impact of violence, caused by trafficking.

3.4 National Policy on AIDS and STD Control, 1995

The National Policy on AIDS and STD Control provides various preventive, curative and rehabilitative measures for HIV/AIDS fails to acknowledge that large number of HIV/AIDS are women and children who are trafficking survivors. Therefore, the policy needs to specifically pronounce the measures for trafficked survivors.¹⁵

Cabinet Decision: Reinforces Stigma and Discrimination

“Records of people who are involved in sex related offences, women who have been repatriated from abroad after their involvement in sex related offences and those who are into drug addiction shall be kept in Ministry of Home. Ministry of Health will conduct blood test of these people to test for HIV/AIDS referring to this record.”

Source: His Majesty’s Government, Cabinet Decision, April 3, 1989, (2046 B.S. Baisakh 21)

This government’s policy pronounces that trafficked survivors would be mandatorily tested for HIV/AIDS. This indicates a lack of human rights perspective and further violated the rights of trafficked survivors and others, reinforcing stigma and discrimination.

¹⁵ National Policy on the Control of AIDS and Sexual Disease, 2052, National AIDS and Sexual Disease Control Centre, Ministry of Health.

National Plan of Action on CEDAW\(^{16}\) has specific section on Trafficking of women and has brought forward measures for prevention, rehabilitation, reintegration and other measures. This Plan has indicated of establishing bilateral mechanism between country of destination and country of origin of trafficking. The National Plan of Action on trafficking and the NPA of CEDAW has similar plans to address trafficking. Therefore, instead of duplicating the activities, the plans need to complement each other for their effective implementation.

3.6 National Plan of Action against Trafficking (“NPAT”), 1999

The National Plan of Action against Trafficking,\(^{17}\) the first such initiative in Asia, offers a comprehensive approach to combating trafficking. The plan includes ideas on policy, research, institutional development, provisions for legislation and enforcement and sections on raising awareness, advocacy, networking, social mobilization, health, education, income and employment generation, rescue and reintegration. This ambitious plan is yet to be fully implemented and presents of number of problems.

Lack of attention to trafficking in children

The National Plan of Action does not differentiate trafficking of children from trafficking of women and thus, does not address the specific needs of each group. The same approach is used to combat both types of trafficking. Treating women and children in the same manner deprives women of their own agency and does not recognize the special issues that arise when dealing with child trafficking.

No link to the National Health Policy

Providing free primary health care services to all should be a part of the national health policy, but it is not. Similarly, allocating or adding beds in hospitals for HIV/ AIDS and STD patients should be a part of any strategic plan to provide care and

---


\(^{17}\) The Ministry of Women, Children and Social Welfare/HMG developed this policy with the cooperation of the International Labor Organization International Program on the Elimination of Child Labor. The government approved the policy in July 1999.
support to HIV and AIDS patients. The National Plan of Action acknowledges this but provides no details on how to provide these services.

**Government uninvolved in rescue and reintegration programs**

The rescue and reintegration component in the NPAT suggests that the government perceives rescue and reintegration as a task limited to NGOs and the community.\(^\text{18}\) NGOs actively working in rescue and rehabilitation have their own problems and challenges. The government must participate in this effort.

**Inadequate rehabilitation programs**

The emphasis on rescue and rehabilitation operations and income generation programs is short term. The National Plan of Action does not specify the desired outcome or content of such programs or the duration of stay at such centers.\(^\text{19}\)

**Human right perspective omitted**

The National Plan of Action lacks a human right perspective. It does not require the protection of women and children’s rights during rescue and rehabilitation. The plan provides for keeping records of victim’s progress but does not provide adequate protection of the victim’s privacy. The NPAT does not provide any definition of trafficking, let alone a clear, comprehensive rights-based definition.

**Silent on migration, prostitution and abortion**

The National Plan of Action is silent on the closely related issues of migration, prostitution and abortion. Rather, it proposes to review current legislation and recommend appropriate measures to make the legal system more effective.

**Minimizes in-country trafficking**

The National Plan of Action gives less attention to in-country trafficking of girls and women than to trafficking to foreign countries. Furthermore, the policies focus on trafficking for sex work and fail to address trafficking for other purposes.

\(^\text{18}\) For example, The NPAT action plan states, "Institute a referral system for victims of sexual exploitation for NGOs for care and counseling.

Strategic planning and management not addressed

One aspect of an effective enforcement policy is a strategic management plan. The Policy has no such mechanism for involving the various partners who should be involved in implementing the plan.

Information system omitted

Effective enforcement of the policy requires a proper information system for planning, implementation, monitoring and evaluating all the programs and activities. Without an information, education and communication (“IEC”) strategy, the present enforcement mechanism is weak.

Heavy dependence on external resources

Enforcement programs at the government and non-government levels are donor-driven which creates dependence on outside resources leaves sustainability uncertain.

Program emphasis should be changed

Most government and non-governmental programs are directed towards raising awareness, advocacy, training and conducting studies. Programs for rescue, rehabilitation and reintegration are marginal, very limited and minimally effective. The Plan should emphasize programs to generate employment and income.

Counseling services should be included

Because victims of trafficking face psychological pain and trauma, proper and timely counseling services are vital for rehabilitation and reintegration. The existing policy omits these important services.

3.7 Reformed National Plan of Action Against Trafficking

The National Plan of Action against Trafficking 1999\textsuperscript{20} has been reformed to amend some of the problematic provisions and to make it workable. The reformed \textit{National

\textsuperscript{20} The Ministry of Women, Children and Social Welfare/HMG developed this policy with the cooperation of the International Labor Organization International Program on the Elimination of Child Labor. The government approved the policy in July 1999.
Plan of Action Against Trafficking in Children and Women for Sexual and Labour Exploitation in addition to existing areas of intervention such as policy, research, institutional development, provisions for legislation and enforcement and raising awareness, advocacy, networking, social mobilization, health, education, income and employment generation, rescue and reintegration, includes two more areas which are trans-border, regional and international issues, and monitoring and evaluation.

Also the reformed Plan is developed in logical framework identifying the focal agencies, implementing agencies, time frame, indicators and sustainability, which the earlier plan did not identify. Some of the concerns in the reformed plan of action are as follows:

3.7.1 Other forms of exploitation needs to be included in the scope of reformed Plan

The background of the Plan, though, indicates sale of organ in boys as increasing problem, this is not reflected in the title of the Plan which is “The National Plan of Action Against Trafficking in Children and Women for Sexual and Labour Exploitation.” The title needs to include other forms of exploitation to include problem like organ transplant and forced marriage in addition to sexual and labour exploitation.

3.7.2 No separate provisions for addressing the problem of women and children

The Plan talks of having separate provision for women and children in the background however, it is not reflected in the activities section. The National Plan of Action does not differentiate trafficking of children from trafficking of women and thus, does not address the specific needs of each group. The same approach is used to combat both types of trafficking. Treating women and children in the same manner deprives women of their rights and does not recognize the special issues that arise when dealing with child trafficking.

3.7.3 Women not included under the legislation section

The legislation section in its objective says “to promote and assert the entitlement of children’s legal rights” however does not include provision to promote women’s

---

legal rights.\textsuperscript{22} Under the enforcement section the plan says that “a provision for filing trafficking cases in district courts will be created, however, such provision already exits.

\textbf{3.7.4 No new law has been enacted}

The Plan provides for the implementation and enforcement of the New Anti-trafficking Act, however, such Act has not been enacted. Though government had submitted the Trafficking in Human Beings (Control) Bill, it was lapsed after the house of representative was dissolved.

\textbf{3.7.5 Registration for entry and exit biased}

The rescue programme indicates that only women and children have to register their entry and exit. This reinforces their vulnerability as victims and stigmatizes them. The registration should be for all as it also helps in monitoring the movement of perpetrators.

\textbf{3.7.6 Minimizes in-country trafficking}

The National Plan of Action gives less attention to in-country trafficking of girls and women than to trafficking to foreign countries.

\textbf{3.7.7 Heavy dependence on external resources}

Enforcement programs at the government and non-government levels are donor-driven which creates dependence on outside resources leaves sustainability uncertain.

\textbf{3.7.8 More than one Focal Agency}

It is indeed encouraging to see the Plan is a logistic framework, with focal agency and implementing agency. However, there are more than one focal agency. Focal agency should be the main responsible agency, and needs to be one agency that will take the lead. More than one focal agency will create confusion on taking the lead responsibility.

\textsuperscript{22} National Plan of Action on Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW) 2003.
3.8 Institutional Mechanism to Combat Trafficking

Policy, Action Plan and Institutional Mechanism to combat Against Trafficking in Women and Children for Commercial Sexual Exploitation also purposes to set up task forces at national, district and VDC or municipality level.

The National Task Force created under institution mechanism has sixteen members from different governmental agencies. The District Task Forces have eighteen members from different district level governmental agencies. Because all the task force members are ex-officio, they have other full-time jobs. Because of the geographic diversity and multiple commitments of the proposed task force member, the plan provides for only one meeting per year. This schedule could affect the teamwork, commitment and productivity of the task forces. The National Plan of Action provides for a revolving, emergency fund. However, because the resources were not used at the district level, the government decreased the matching funds.23

Border observations in Bhairahawa and Nepalganj and interviews with the member-secretaries of the Banke and Rupendehi District Task Forces revealed the following additional problems.

3.8.1 Lack of office space and staff

The task forces have no administrative support. There is no secretariat office or staff. The task forces have no physical property except a book for taking minutes. Although trafficking is a serious problem requiring regular observation and programs to combat it, the task forces charged with implementing NPAT function only on a ceremonial basis.

3.8.2 Lack of coordination

The national task force and the district level task forces carry out their activities independently. There is no coordination between national and district task forces. District task forces are required to submit an annual report to the national task force. However, this provision is a mere formality. The national task force does not follow-up on the reports of the district task forces or monitor their activity. The national task force has not developed any annual programs for the district task forces nor issued any guidelines or directives to the subordinate task forces.

23 The study team became aware of this during a discussion with the Ministry of Women, Children and Social Welfare officials.
3.8.3 No accountability

Because the task force consists only of ex-officio members, no member has direct responsibility. The members do not share a commitment to eliminate trafficking. In general, members are unwilling to devote time to the task force because they do not consider it a part of their “real job.” These problems are exacerbated because members of the task force are not accountable to anyone.

3.8.4 Failure to form task forces

Although the government is obligated to create task forces to combat trafficking in all seventy-five districts, only twenty-six have been created.24 The government reports that it is in the process of forming other district task forces. However, the government has not begun to form the village or municipality level task forces required by the National Plan.

3.8.5 Inadequate budget

The each task force has a limited budget that restricts its ability to launch effective programs. Although initially each district task force received an inadequate allocation of NRs 50,000 to initiate programs for the entire district, the budget was reduced to NRs 40,000, further limiting the activities of each district task force. In this low budget, the taskforce spends money for meeting allowances. In general, each district task force organizes an awareness workshop for its annual program and distributed the rest of the budget to members of the task force selected among themselves as resource person for the workshop.

3.8.6 Ineffective program

The national and districts task forces are yet to meet the objectives set out for them. The task force has not been able to actively carry out its function. The task force generally organize an awareness workshop in the headquarter of the district in their annual programme where most of the participants are already aware on trafficking issue. The task forces have not been able to launch any action-oriented program or any program to address the target group or those most vulnerable to trafficking.

24 The government’s justification is that formation of a task force is based upon whether a particular district is prone to trafficking.
4.1 Constitutional Provisions

The 1990 Constitution sets out the fundamental obligations of the state. The following are the major constitutional provisions that obligate the state to prevent trafficking in human beings and guarantee basic human rights to all citizens of Nepal.

4.1.1 Guarantee of basic human rights

The Preamble to the Constitution of Nepal guarantees human rights as a basic structure of the Constitution. Amending the Constitution cannot abrogate the basic human rights of every citizen. The fundamental rights, delineated in Part Three of the Constitution, are described below.

**Right to equality:** The Constitution differentiates between “citizens” and “persons” in its guarantee of the right to equality. Citizens are entitled to “the right to be equal before law” and “the right not to be denied equal protection of the laws.” Persons, those who are not Nepalese citizens, are entitled only to the right of equal protection of the law.
The Constitution upholds the concept of equality recognizing substantive equality to protect and advance the interests of, among others, women and children. Special provisions to protect women and children from trafficking are permitted under this doctrine.

**Rights regarding criminal justice:** The Constitution contains protections for the rights of the accused including:

(a) Protection from *ex post facto* laws;
(b) Protection from double jeopardy;
(c) Protection from self-incrimination;
(d) Protection from physical and mental torture or any inhumane or degrading treatment;
(e) The right to compensation incase of torture;
(f) The right to consult and be defended by a legal practitioner of choice;
(g) The right to appear before a judicial authority within 24 hours of arrest.

**Right to privacy:** The Constitution guarantees every person the right to privacy. “Privacy promotes independence, independence helps to secure autonomy and autonomy is essential if a person is to address his/her personal and spiritual concerns.” The right to privacy guaranteed under this Article can be interpreted to extend to almost all privacy issues including: freedom from interference; breach of confidentiality; public disclosure of private information; access to personal information; physical intrusion and bodily and sexual privacy.

**Protection from exploitation:** Trafficking in human beings is prohibited by the Constitution. Although Nepal does not have a law criminalizing prostitution, the act of soliciting or making contact for prostitution is punishable under ordinary criminal law.

---

4 The Constitution of the Kingdom of Nepal, 1990, Article 14(1) et. seq.
5 The Constitution of the Kingdom of Nepal, 1990, Article 22 reads, “Except as provided by law, the privacy of the person, house, property, documents correspondence or information of anyone is inviolable.”
6 Dhungel et.al., op. cit., p. 187.
7 The Constitution of the Kingdom of Nepal, 1990, Article 20 prohibits traffic in human beings, slavery, serfdom or forced labour in any form.
Health, education and welfare: The Constitution directs the State to develop special policies for the education, health and social security of orphans, helpless women, the aged, the disabled and incapacitated persons. Such policies are intended to ensure the welfare, education, health and employment of women.\(^8\) Although these principles and policies are not enforceable in any court, they are “... fundamental to the activities and governance of the state, and shall be implemented in stages, through laws, within the limits of the resources and the means available in the country.”\(^9\)

The chief objective of the state is “... to promote conditions of welfare on the basis of the principles of an open society, by establishing a just system in all aspects of national life.”\(^10\) The extent to which these principles and policies are put into practice can be an indicator for evaluating state activities. In Balkrishna’s case, the Supreme Court made it clear that directive principles and policies can be used to construe provisions of the Constitution.\(^11\) In Yogi Narhari Nath v. Prime Minister the Court said that though the directive principles and policies shall not be enforceable in the court, if directive principles violate Constitutional guidelines, the court would declare them unconstitutional. The court may identify government actions that contravene the directive principles of the Constitution.\(^12\)

Right to freedom and profession: All citizen have freedom to move throughout the Kingdom and reside in any part thereof, it has also provided freedom to practice any profession or to carry out any occupation including freedom to form unions and associations.\(^13\)

4.2 Analysis of State Anti-trafficking Laws

4.2.1 Legislative history

The history of anti-human trafficking legislation in Nepal is a long one. It has been in the existence since the centuries. Human trafficking was declared an offence for the first time in 1749 during the reign of King Rana Bahadur Shah. While sketching out the legal history of trafficking, it can be analyzed dividing it into two stages; before

---

\(^8\) The Constitution of the Kingdom of Nepal, 1990, Article 25(9).
\(^10\) The Constitution of the Kingdom of Nepal, 1990, Article 25(1).
\(^11\) 35 NKP 450, 1993 (2050) (para. 14)
\(^12\) 5 Supreme Court Bulletin, Aug. 17-31, 1996 (Bhadra 1-15, 2053).
\(^13\) Article 12 of the Constitution of the Kingdom of Nepal, 1990
the codification or the first Country Code 1853, and after the codification. The period before the codification is also known as the period of unwritten law, therefore, the criminal law and offences were regulated by the Hindu scripture and established custom and practices.


For the purpose of analyzing anti-trafficking laws, this study examines substantive laws that directly and indirectly affect the trafficking in women and girls. This analysis includes the Chapter on Trafficking of Human Beings in the Country Code, the Traffic in Human Beings (Control) Act of 1986, the Foreign Employment Act of 1985, the Labor Act of 1991, the Children’s Act of 1991 and the Child Labor (Regulation and Control) Act of 2000.

4.2.2 The specific law on trafficking

The provisions contained in the Chapter on Trafficking of Human Beings in the Country Code are applicable so long as no other laws specifically deal with the same subject.

14 No. 1 of the chapter reads, “No one shall sell or take any person beyond the frontiers of Nepal for the purpose of trafficking. The person who takes a human being for trafficking shall, if the trafficking is not committed, be liable to a punishment with imprisonment for ten years, and if trafficking is committed, be liable to a punishment with imprisonment for twenty years. If the person buying any person is found within Nepal, he/she shall also be liable to the punishment as same as to the seller.

15 This legislation was enacted to control and regulate foreign employment and protect people from being exploited in foreign countries.

16 This Act was enacted to provide for the rights, interests, facilities and security of the workers and employees engaged in various enterprises and to make timely provisions with regard to labor.

17 This legislation was enacted following the ratification of the Convention on the Rights of the Child. The major purpose of the Act is to protect the rights and interests of children and provide for their physical, mental and intellectual development. Section 16 of Act stipulates that no one shall engage or use a child in an immoral profession, and no photograph shall be taken or shall be taken for that purpose. Section 18 of the Act provides that no child shall be engaged work that adversely impacts the health of the child or is likely to adversely impact the life of the child.

18 This Act prohibits employing a child below the age of fourteen. It also prohibits employing a child in any of the hazardous business referred to in the schedule of the Act. The schedule contains a long list of businesses hazardous to children. The Act also prohibits using a child as a laborer against his/her will by way of persuasion, misrepresentation, false promise, fear of undue influence.

19 No. 4 in the chapter on Preliminary Matters in the Country Code reads, “If there are specific laws enacted on the specific subject matter, it shall be as per that specific law, and if no such laws are there, it shall be as per this Act.”
After 1986, when the Traffic in Human Beings (Control) Act was enacted, many of the provisions of this Chapter became inoperative. Only provisions not specifically dealt with in the act remain enforceable.

The Traffic in Human Beings (Control) Act was enacted because the provisions of the prevailing laws were inadequate to deal with the rise in trafficking offences. There are following two major features of the Act:

**Extra territorial application:** In principle, a state may only exercise its jurisdiction over offences committed within its borders. This Act allows Nepal to prosecute traffickers for trafficking offences committed outside of Nepal. Unlike other offences, such as murder or rape, in which the law of the country in which the offence occurs is applicable, the offences punishable under this Act shall be subject to Nepalese jurisdiction, no matter where the offence occurred. This provision is necessary because a substantial number of women and girls are trafficked outside Nepal.

**Burden of proof on the accused:** One significant aspect of this Act is that it alters, in a limited way, the fundamental principle of “the presumption of innocence until proven guilty.” The Act shifts the burden of proof to the accused when trafficking is committed across the border by the persons other than guardians or close relatives.

**No time limitation to file case:** Trafficking of human being is recognized as a crime against state and considering the seriousness of the crime of trafficking there is no time limitation to file the case against offenders.

20 Section 11 of the Traffic in Human Beings (Control) Act reads, “Notwithstanding anything contrived in the country code chapter on Human Trafficking, it shall be as per this Act with regard to the provisions made in this Act.

21 Those provisions are as follows:

No. 2 “No person shall separate or persuade or convince to separate a person of sixteen or a person with unsound mind of whatever age from his/her lawful guardian without the consent of such guardian. The person who separates or persuades or convinces to separate in such manner shall be liable to a fine up to five hundred rupees or an imprisonment up to three years or both.”

No. 1 “. . . if the purchaser is found within the boundaries of Nepal, he/she shall also be liable to the punishment as the same as the seller.”

22 Section 2 of the Act reads, “Even if a person has committed any offence punishable under this act outside the Kingdom of Nepal, he shall be prosecuted and punished under this act as if he had done so within the Kingdom of Nepal.”

23 Section 7(1) of the Act reads, “When any woman is being taken to a foreign country by any person other than her guardian or close relatives and when there is a complaint filed that the woman is being taken with the intention of trafficking to engage in prostitution, the accused person shall have to prove that she was not being taken there for that purpose.”
4.2.3 Critique of the Traffic in Human Beings (Control) Act

The legal analysis indicated many gaps on the trafficking legislation. Eighty nine percent respondent of the study said that the present law is not adequate to control trafficking and implementation of the law. Specific problems with the act are discussed below.

Preamble focuses on moral values: The Preamble to the Act lacks a human rights perspective. The Preamble states that the Act was enacted to control the offences of trafficking in order to maintain the morality of the people. It fails to focus on the need to protect the rights of the victims on the basis of serious nature of crime.

Conservative definition results in the violation of women’s human rights: The Traffic in Human Beings (Control) Act, 1986 stipulates the acts that constitute the offence of human trafficking. For example, the definition does not include the act of separating a person from his or her lawful guardian for the purpose of trafficking. The act uses the word “prostitution” but does not define its meaning. Prostitution as such is not criminalized; therefore, the offence of getting a woman involved in prostitution is a vague offence. Because of this vagueness of the law, women’s human rights are violated.

Extra-territorial jurisdiction of the law is inadequately supported: Strong extradition laws are required to support this provision. In most cases, once a case is reported, the perpetrators escape across the border. Extradition is subject to treaty and Nepal has an extradition treaty with India. However, the Nepal-India extradition treaty is practically dormant and the treaty has been invoked in only a few celebrated cases.

Trafficking is not included in the extradition treaty: The Nepal-India extradition treaty allows extradition for sixteen offences, including abduction and kidnapping.

24 Section 4 of the Act reads, “It shall be deemed to have committed the offence of human trafficking if anyone commits any of the following acts:
  Trafficking of human being for any purpose whatsoever;
  Taking any human being to a foreign country with the intention of trafficking; Getting any woman involved in prostitution by way of persuasion, allurement or misrepresentation, fraud or threat or coercion or by any other way whatsoever; and abetting, assisting, conspiring or attempting to carry out any of the acts refers to in the aforementioned clauses.”

25 The extradition treaty between India and Nepal was ratified in 1953 and has not been reviewed since.

26 For example: Suchcha Sing’s cases and the Nepalgunj murder case.

27 Other offences include: Murder or attempt or conspiracy to murder; Culpable homicide not amounting to murder; Grievous hurt and Rape. “Nepal’s Relations with India and China,” Documents 1947-1992, Vol. 2, Edited by Avatarsing Bhasin, Siba Exim Pvt. Ltd., Delhi, reprint 1997.
However, the treaty is silent on trafficking in human beings. This may be because trafficking was not regarded as a serious problem when the treaty was adopted. However, the current magnitude of the problem merits including trafficking offences in the extradition treaty.\footnote{Focus Group Discussion conducted with the law enforcement agencies in Kathmandu, July 1, 2001.}

**No provision for aggravated forms of the offence:** The Act confers broad discretionary power in sentencing for the offence of trafficking in human beings. However, the Act is silent on the grounds for a grave punishment in aggravated forms of crime.

**Prior court approval required before investigation:** Section 5 of the act dilutes the normal investigation power of the police and the government attorney. It states, “(1) Any person having the knowledge of commission or preparation for commission of the offence of human trafficking may file a First Information Report (“FIR”) at any of the police offices and while filing such FIR, she/he shall enclose the evidences available. (2) The police shall forward the FIR filed pursuant to sub-section (1) before the nearest District Court and if the court finds appropriate grounds to begin proceedings and gives the order accordingly, the police shall begin necessary investigation with regard to the FIR.”\footnote{Under the State Cases Act of 1991, the police can only conduct an inquiry and investigation after forwarding the complaint to the nearest district court and getting a court order to proceed. The act appears to incorporate this provision in order to check the abuse of authority and ensure that evidence is properly collected.} However, this provision insulates the offender from prosecution because the delay allows perpetrators to escape before the court orders for an investigation.

**No provision for in camera hearings:** Participants in a focus group discussion noted that appearing in open court could traumatize a victim of trafficking.\footnote{Focus group discussion with victims of trafficking, Kathmandu, July 11, 2001.} These offences are sensitive and require attention to the privacy of victims. Failure to provide an in camera hearing often results in human rights violations because trafficking victims do not feel comfortable testifying in open court. Victims of trafficking may endure further victimization from stigma associated with having been trafficked. Open court intimidates victims and defeats efforts to curb trafficking. Trafficking cases should be entertained in camera to encourage victims to come forward and ensure that traffickers are punished.
Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal

Victims and witnesses are not protected: Most trafficking victims are women and girls. These victims endure physical pain, social stigmatization, psychological trauma, physical threat or threat of killing etc. The Act contains no mechanism to protect victims of trafficking from the pain, stress and humiliation and threat they may experience as their case is prosecuted. Without protection for victims and witnesses, they may view court proceedings as a damaging experience and be reluctant or unwilling to participate.

Case Study No. 1 The Intimidated Victim: A Trafficking Dilemma

Tara, a 16 year old Badi women, was married to a man from her own community. Since her husband worked in India, she stayed with her brother-in-law. One day, her uncle, aunty and brother-in-law falsely informed her that her husband was in Delhi and wanted Tara to visit him. They took Tara to Delhi and sold her for 16,000 Indian rupees. Luckily, the Indian police raided the brothel the next day and Tara and the other trafficked women were rescued.

After rescuing her, the Indian police sent Tara to an ashram. Tara remained there for a few days and then managed to return to Nepal with the help of Maiti Nepal, an NGO. Tara returned to her home and lodged an FIR against her uncle, aunt, brother-in-law, grandmother and brother for trafficking. In her FIR, Tara clearly identified the people responsible for taking her to Delhi and selling her. During the investigation, the suspects confessed to the authorities. The case was filed in the Banke District Court and all the suspects were remanded to judicial custody.

---

31 Nepal Rajpatra, Nov. 17, 2003 (B.S. 2060/8/1).
32 Traditionally, women of the Badi community earned a living by singing and dancing to entertain people. However, modern entertainment replaced them and some of these women turned to prostitution. Increasingly, Badi women are leaving this profession. However, they have no other skills to earn a living.
However, on the day of the final hearing, the case took an unexpected turn. The court received a letter from Tara in which she stated that she was threatened to report against the accused and that she had not been trafficked by anyone and had not been rescued from the brothel. Instead, she said that the Indian police arrested her while she was walking on the street in Delhi. She accused Maiti Nepal and the Nepal police of pressuring her to lodge a false FIR against her relatives. She asked the court to release her relatives because they were all innocent.

Source: Court Observation, Banke District Court, June 19, 2001.

Note: Pseudonym used

The above is a case that reflects examples of victim’s intimidation. Delayed proceedings, threats and pressure contribute to the victim’s intimidation. Therefore, perpetrators escape criminal liability. Unless there are adequate protections for victims/ witness and comprehensive support services, such intimidation will continue.

**Limited shift of the burden of proof:** Shifting the burden of proof to the accused is not adequate as the burden only shifts when the accused is a stranger. Burden of proof is not shifted if offenders are of close relatives. In many cases, the trafficker is a relative or close friend of the victim.

### 4.3 Other Laws that Impact Trafficking

#### 4.3.1 Foreign Employment Act, Restricted Women’s Mobility

A woman who wishes to work abroad must obtain her guardian’s consent or government approval if she wishes to go for employment through an employment agency. According to the government, this provision is necessary because of the mistreatment and harassment experienced by Nepali women working abroad. This paternalistic approach makes women more vulnerable to illegal trafficking and violates their right to work and travel. In 1999, the government promulgated Foreign Employment Rules. These rules do not eliminate the discriminatory and restrictive

---

33 Section 7 of the Act.  
34 Section 12 of the Act reads: Control in providing Foreign Employment: Notwithstanding anything mentioned elsewhere in this Act, the license-holder shall not provide foreign employment to children and to women without the consent of her guardian.  
provisions of the 1985 Act and the Supreme Court squashed a writ petition challenging the constitutionality of this provision, where in the case the said prohibited provision which requires a woman who wishes to work abroad must obtain her guardian’s consent and government approval if she wishes to go for employment through an employment agency. The Court ignored the gender discrimination inherent in the law by arguing the law protects women from sexual exploitation in the case.36 It shows lack of conceptual understanding of protectionist approach and corrective approach among the law interpreters.

<table>
<thead>
<tr>
<th>Case Study No. 2</th>
<th>Trafficking Converted into Foreign Employment to Reduce Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rama Thapa worked in Gulf countries for three years. When she returned to Nepal, many women, including Rita, sought her guidance on how to get work aboard. Rita gave Rama one thousand rupees and her jewelry in exchange for arranging a job for her in a Gulf country. Rama advised Rita to travel via Bombay to avoid the requirement of governmental and parental approval. Rama told Rita that such approval was time consuming and difficult and the government usually rejected a women’s requests to travel to a Gulf country. Meanwhile, the people in Rita’s village learned that Rama had trafficked many girls from the village under the pretense of helping them get a job in the Gulf countries. Rama sent these girls to Bombay where middlemen trapped them and took them to brothels. After learning the truth, Rita filled an FIR alleging that Rama was engaged in a conspiracy to traffic her. After collecting substantial evidences against Rama, the investigator forwarded the case to the government attorney and requested severe punishment. The office of Attorney General filed the case on violation of the Foreign Employment Act, that substantially reduced Rama’s sentence.</td>
<td></td>
</tr>
</tbody>
</table>

Source: information obtained from the Office of the Attorney General

Note: Pseudonyms used.

---

4.3.2 Inadequacy in Labor Laws

The existing labor laws apply only to enterprises with ten or more employees.° Unprotected and easily exploited domestic workers and workers in the unorganized sectors are the most common victims of trafficking. Until there are better employment opportunities for women in Nepal, women will seek better employment opportunities elsewhere. The lack of opportunity provides a fertile ground for traffickers who prey on these women with promises of better employment opportunities elsewhere.

Similarly, child labor laws do not protect children in unorganized work sectors such as agriculture and domestic work. Child domestic workers are paid little or nothing and are often exploited. Therefore, child workers are particularly vulnerable to sexual exploitation and trafficking.

4.3.3 Children Act is not able to protect vulnerabilities

The Children’s Act of 1991 stipulates that no one shall engage or use a child in an immoral profession or take photographs of a child for an immoral purpose. The act also provides that no child shall be engaged in work that causes an adverse impact

---

37 The ban restricts women from foreign employment through employment agencies without the approval from her guardians and government.
38 The drafting committee comprises of Mr. Pratap Pathak, Joint Secretary, MOLTM, Advocate, Ms. Sapana Pradhan Malla, President, FWLD, Mr. Ghanasyam Subedi, Trade Union, Mr. Prem Bahadur Gurung, Foreign Employment Entrepreneur’s Association, Mr. Manika Marasini, Under Secretary, Ministry of Law, Justice and Parliamentary Affairs, Mr. Chandra Kanta Poudel, Legal Officer, Ministry of Labour and Transport Management, Ms. Sharu Joshi Shrestha, Programme Coordinator, Empowering Migrant Women Workers of Nepal, UNIFEM-Nepal Field Office, formed on Oct. 24, 2003. FWLD has been providing technical assistance to draft the Act with support from UNIFEM.
39 Labor Act, Preamble and Section 2(b) (1991).
40 Section 3(1) of the Child Labor (Prohibition and Regulation) Act of 2000 prohibits employing a child below the age of fourteen years. Section 3(2) of the same Act also prohibits employing a child in any of the hazardous businesses referred to in the schedule of the Act. The schedule contains a long list of businesses (industries and trades) that are hazardous to children. Section 4 prohibits employing a child against his/her will by way of persuasion, misrepresentation, false promise, fear or undue influence.
41 Section 16 of the Act.
on the life or health of the child.\textsuperscript{42} Sadly, the law has had little effect on children’s lives. After almost a decade, there are thousands of children involved in hazardous trades or professions. Many children are sexually abused, exploited, trafficked or employed in hazardous industries such as the carpet garment and pashmina industries, transportation, the circus and many others. Poverty, lack of awareness on the part of the parents or guardians, weak law enforcement and the absence of a monitoring mechanism all contribute to this grave situation.

4.3.4 Rape Law Discriminated against Commercial Sex Workers

The existing law against rape reduces the punishment for rape of a prostitute to one year in prison or a fine of Rs. 500.\textsuperscript{43} In a focus group discussion, commercial sex workers noted that the current rape laws discriminate against sex workers.\textsuperscript{44} One participant said, “If a woman is raped, the punishment is severe and the perpetrator has to go to jail for many years. If a prostitute is raped, the perpetrator is fined Rs. 500 and goes scott-free.” Another participant added, “Rape is rape whether it is committed against a prostitute or any other person. We are as human as other people. We are forced into this life. The laws should not discriminate against us just because we are forced to take this work to put food on our plates.” Focus group participants also commented that the police do not take their cases seriously and blame them for making unnecessary complaints.

\begin{center}
\textbf{Case Study No. 3 Court Arbitrarily Decides Victim is a Prostitute}
\end{center}

Rita, age 19, approached Lal Bahadur for a job in his shop. Lal Bahadur and his friend Shyam agreed to give her a job and asked Rita to go inside the shop. They rolled down the shutters and both of them raped her. She tried to escape but was overpowered. After the rape, Rita filed an FIR at a police station and described her story.

The police arrested the suspects who confessed they had intercourse with the victim. The charge sheet was filed for the offence of rape under No 3 of the Chapter on Rape of the Country Code.

The suspects verified their statements in the court. The trial court decided the victim was a prostitute and, therefore, the defendants were only liable for a fine of Rs. 500. The Appellate Court in Pokhara upheld the decision and the Supreme Court is currently reviewing the case.

\textit{Source:} The ongoing case in the Supreme Court of Nepal.

\textsuperscript{42} Ibid. Section 18.
\textsuperscript{43} No. 7 of Chapter on Rape of the Country Code 2020.
\textsuperscript{44} Focus Group Discussion with Commercial Sex Workers, June 18, 2001, Padnaha, Bara.
FWLD filed a case in the Supreme Court on July 30, 2001 challenging the constitutionality of the discriminatory legal provision of the Chapter on Rape of the Country Code, which allows minimal punishment for rape of women who have engaged in the sex trade. The case asserted that the provision is a violation of equal protection, the right to life and a host of International Human Rights Instruments ratified by Nepal.

Where in the case, in May 2, 2002, the Supreme Court declared No. 7 of Chapter on Rape unconstitutional and discriminatory amongst women on the basis of their status.

“Prostitution, in some countries is legalized. However, prostitution is a profession or occupation irrespective of whether or not it is legal. Article 12 (2)(e) has provided the right to freedom to practice any profession or to carry on any occupation, industry or trade until and unless it is prohibited by laws due to being contrary to public health or morality. The provision, which provides less punishment for rape to a prostitute, has discriminated against them without any reasonable grounds, construing them as lower class. The existence of such laws, which are discriminatory and unequal among citizens, does not comply with the spirit of the Constitution. It is not reasonable to think that the punishment for the crime should be different only on the basis of any profession or any individual’s character. If we keep in force such discriminatory legal provisions, it further encourages the rape of prostitutes. It is, therefore, not reasonable to keep in force such legal provisions that encourage grave crimes.

The main components for Rape are threat, intimidation and use of force. Mens rea and actus reus of the criminals exists in a same manner in a rape no matter if it is against any women. And the legal provision which punishes less and more for the same type of crime only on the basis of a victim’s character and profession becomes discriminatory according to the spirit of the Constitution and various International Conventions on Women and Human Rights and the recognized principles of the Justice as well.”

[Decision of Rape Law]

4.4 Trafficked Women Victimized after Returning to Nepal

4.4.1 Lack of repatriation, rehabilitation and reintegration policy and law

No specific policy and law deals with the rehabilitation of victims of trafficking. The Social Welfare Act, 1992 provides that the government may create special programs to secure a decent life and rehabilitation of persons victimized by juvenile delinquency, drug abuse and other social evils. There is no law or bilateral agreements for the repatriation of the victims of trafficking.

4.4.2 Property rights and the right to live with dignity are denied

Participants argued they were denied their Constitutional right to hold and enjoy property. One participant reported, “The Government came and threw us off of our property. We had our homes taken from us. Having nowhere to go, we wandered the countryside, living as refugees. We tried building small huts but before we finished, the police destroyed everything down. Later on, we were able to secure this very small patch of land (in Bardiya). We have tried to grow food to sell, but we are barely able to grow enough food to feed ourselves.” Another participant continued, “We despite the sex work that we do, we are treated like animals. We want to live a decent life and to be accepted as human beings by society. We have no other choices though, there is no other work to take up and our children are malnourished and in need of food and care.”

Parents or guardians do not provide care and support to trafficked women and girls when they return to Nepal. Although married women are entitled to maintenance or a share of property from their husband or in-laws and unmarried women over thirty-five are entitled to a share of parental property, they often left with nothing because it is particularly difficult for trafficked women and girls to exercise these rights. Without power, financial support or property, trafficked women and girls are rejected by their families and ostracized by society.

### Recent Initiative: Changes on Inheritance Law

Right to property is the base for right to live with dignity. However, Nepalese women are deprived from this right since the centuries. Recently, daughters are accepted as an heir of the parental property for the first time in the Nepalese history. The Eleventh

---

46 Social Welfare Act, Sec. 4(c).
47 Focus group discussion with commercial sex workers, June 18, 2001, Padnaha, Bardiya.
4.4.3 No provision for victim compensation

Victims of trafficking face tremendous hardship as a result of human rights violations and uncertain futures. Without some form of compensation, it is impossible for victims to rebuild their lives. However, the law does not provide compensation for victims of trafficking.

4.4.4 Trafficking victims have no access to abortion

One of the most traumatic effects of trafficking and the resulting sexual exploitation is unwanted pregnancy. Sometimes they are forced to abort the pregnancy. If she is pregnant, the victim is often required to leave the brothel without any support. If the victim manages to escape or is rescued and returns to Nepal, she is subjected to a harsh abortion law, which does not allow abortion for any reason, even if she is HIV positive. 48 Unless she establishes she is raped she cannot have abortion under the Nepali legislation.

Recent Initiative: Liberalization of Abortion Law

The Eleventh Amendment in the country Code has liberalized the law relating to the abortion. Realizing the reproductive health right of women as women’s human right it has allowed to perform abortion in some certain condition from September 26, 2002. Such as; abortion up to 12 weeks of pregnancy upon pregnant woman’s voluntary consent, abortion up to 18 weeks in case the pregnancy is due to rape or incest, and abortion with the advice of medical practitioner at any time in case any pregnancy poses danger to the life of the pregnant woman or to her physical or mental health or it leads to the birth of a disable child.

48 Country Code, Chapter on Homicide, No. 28 (2002) and Legal Aid Act, Section 3 (1997). However the eleventh amendment to the Country Code, legalized abortion up to 12 week of pregnancy.
4.4.5 Children of trafficked women denied citizenship

According to the Constitution, only a father or a husband can confer Nepali citizenship.\textsuperscript{49} This legal provision highlights the second-class status of women in Nepal.\textsuperscript{50} Because children born to trafficked women are often not in a position to establish paternity, they are left stateless by Nepal’s discriminatory citizenship law.

\begin{center}
\begin{tabular}{|c|}
\hline
\textbf{No Birth Registration and Citizenship of Children} \\
The harsh life of the Badi is not limited to sex work. Because abortion is illegal in Nepal, a Badi woman is forced to give birth to an unwanted child. Abortion is expensive and unsafe if procured here. The alternative of going to India for abortion is neither affordable nor practical for many of them. The children of the Badi women face harsh discrimination. These women usually do not get married and the father of the child is usually not determined. The existing law requires the identity of the father for both birth registration and reestablishing citizenship. The participants reported that without a husband they could not register their child’s birth or have their citizenship transferred to their children. Participants disclosed that even members of Parliament visit them as clients, but ignore their pleas for help in ensuring citizenship for their children. \\
\textit{Source: Focus Group Discussion with Commercial Sex Workers, June 18, 2001. Padnaha, Bardiya} \\
\hline
\end{tabular}
\end{center}

4.5 Analysis of Proposed Bills

Both governmental and non-governmental organizations have drafted legislation to control trafficking in human beings. A Bill prepared by the Nepal Police\textsuperscript{51} is nearly identical to the Bill drafted by the Ministry of Women, Children and Social Welfare (“MWCSW”). A Bill was also prepared by Center for Legal Research and Resource Development (CeLRRD). None of the Bills protects the human rights of the victim during repatriation, rehabilitation and reintegration.

\begin{itemize}
\item \textsuperscript{49} Article 7 of the Constitution of the Kingdom of Nepal, 1990.
\item \textsuperscript{51} The bill proposed by the police criminalizes homosexual activity, sex tourism and visiting a prostitute and includes these activities in the definition of trafficking. It is irrational and irrelevant to criminalize homosexuality. The human rights perspective is that private behavior of consenting adults that involves no victimization, is not a legal matter. Criminalizing of sex tourism and soliciting a prostitute will not control trafficking. The proposed police bill provides up to 120 days custody to investigate a trafficking offence. This is extremely long and could easily be misused by investigating agencies.
\end{itemize}
4.5.1 Human Trafficking (Control) Bill, 2001

The proposed Bill of MWCSW corrects some of the problems of the 1986 Trafficking Control Act, which are as below:

- The Bill protects a victim’s privacy by prohibiting publication of information about the victim without the victim’s consent.
- The Bill eliminates the confirmation requirement once the victim gives a statement in court, protecting victims from additional harassment in court.
- A victim may request an in camera hearing to ensure privacy.
- Victims or potential victims are guaranteed the right of self-defense.
- The Bill provides for a rehabilitation fund and the creation of rehabilitation centers.

Despite these new concepts, the proposed Bill overlooks many human rights issues, which are as follows:

**Focus on moral values rather than human rights and dignity:** As in the existing act, the purpose of the new Bill is to control trafficking in human beings and related acts of a sexual nature and maintain the good conduct and morals of the general public by rehabilitating victims not looking into trafficking as a severe forms of crime against humanity, it links the whole purpose only for prostitution and morality. According to the UN Special Rapporteur on Trafficking, this Bill takes a moralistic approach rather than promoting a concern for the human rights of trafficked persons.

**Criminalization of commercial sex work:** The proposed Bill does not distinguish between prostitution and trafficking. Rather, the Bill includes voluntary engagement in sex work in the definition of trafficking in human beings. Criminalizing prostitution will not protect the rights of trafficked women or sex workers. Without basic human rights, a sex worker cannot fight against the exploitation or violence that she experiences in her work. Further, criminalizing prostitution does not create incentives

---

52 Under this provision, if a potential victim reasonably believes there is imminent risk of being trafficked, any injury to the alleged trafficker is considered self-defense.

to find other work. Even today, though voluntary prostitution is not illegal, they are criminalized, abused and exploited even by those authorities who are suppose to maintain peace and security in the society.

The UN Special Rapporteur severely criticizes the current draft of the Human Trafficking (Control) Bill labeling it “draconian” and concluding, “The Bill appears to have been drafted from a law and order perspective without consideration for the human rights either of the perpetrator or of the victim.” The Special Rapporteur offers this criticism, “… modern legislations have all advocated that prostitution not be criminalized and that only the exploitation [of] prostitution should be criminalized. This is because experience has shown that criminalization of prostitution results in the double victimization of the woman concerned as she, and not the traffickers, become the main target of police action. This provision is a major step backwards for Nepal and will create great hardship for the women concerned.”54

Sex workers from the Badi community also criticized the decision to address trafficking and prostitution in a single law. They expressed concern about a law making process that creates laws without considering the adverse impact of those laws.

Figure 1 summarizes the attitudes of key informants toward criminalizing prostitution.55

54 Ibid.
55 We interviewed forty-seven key informants to assess the effectiveness of laws and institutional mechanisms in controlling trafficking. Informants included lawmakers, judges, law enforcement personnel victims and representatives of civil society.
This chart shows majority of informants from law enforcement agencies believe commercial sex work should not be criminalized. Legislative informants believe that commercial sex work should be criminalized. Generally, law interpreters, policymakers, civil society and victims have voiced that commercial sex should not be criminalized.

**Figure 2** Why commercial sex work should not be criminalized? (N=47)

Of those respondents who believe commercial sex work should be decriminalized, the largest percentages of all four groups believe the primary reason is to protect the right to self-determination. Victims appear to believe that providing appropriate care and information is another compelling reason to decriminalize commercial sex work. Generally, the profile of respondents from civil society matches that of victims. Alternatively, policy makers believe the right to work is a more compelling reason for decriminalization. Law interpreters expressed interest in protecting the right to self-determination, with relatively little interest in the other choices. More than other respondents, law enforcement agencies recognize demands of the changing times as a reason to legalize commercial sex work.
Legislators strongly believe commercial sex work should be criminalized for all the reasons provided except to prevent sexual exploitation. This response is particularly interesting because exploitation is exactly what should be criminalized. Law interpreters, consistent with their attitude about decriminalization, offer little support for any reasons to criminalize commercial sex work. These results do not support the common belief that criminalizing commercial sex work will control trafficking. In fact, criminalizing prostitution will discourage women from going to the police out of fear of prosecution, leaving them more vulnerable to trafficking.

**Inadequate definition of trafficking:** Although the Bill improperly criminalizes prostitution, it fails to include all aspects of trafficking. The Bill criminalizes selling and purchasing a human being, but not transporting, transferring, or harboring a person. The Bill ignores the sale and purchase of human beings using threat, fear or misrepresentation, or the misuse of power and post. By conflating trafficking and prostitution, the Bill undermines the understanding of trafficking as a violation of human rights.

**Prior approval unconstitutional and impractical:** The Bill continues the present requirement of court approval before beginning an investigation of a trafficking case. However, the Constitution gives the Attorney General the power to decide whether to initiate proceedings in a state case. This provision contradicts the Constitution by conferring this decision-making power on the district court. Furthermore, the prior approval requirement creates a delay that may result in the disappearance of the accused, and witnesses and the loss of evidence.
**Excessive police power is unconstitutional:** In the name of controlling and investigating trafficking cases, the Bill invests the police with broad, unchecked powers of preventive detention and arrest without a warrant and shifting the burden of proof blatantly ignores the presumption of innocence. Such powers may also encourage abuse of the right to privacy. The UN Special Rapporteur commented that, given the impunity with which many police forces act, this provision may result in the “harassment of innocent people as well as victims.”

**Concept of presumed offence is vague:** The Bill contains the concept of “presumed offence” without any meaningful guidance on the implication of such acts for the prosecution. Presumed offences include conspiring, aiding or abetting the offence of trafficking by any governmental official or official local body. If these acts constitute separate offences, they should be incorporated into the definition of trafficking. Moreover, prosecutors need clarification about whether proof of these offenses constitutes a *prima facie* case of trafficking or are merely evidence of trafficking. The use of the term “presumed” suggests that these actions constitute independent acts of trafficking and, when proved, should be sufficient for conviction.

**Victim and witness protection inadequate:** The low number of reported trafficking cases is often attributed to the lack of support and protection for victims and witnesses from continued threats and retaliation from traffickers. This Bill fails to protect victims and witnesses from traffickers and from family coercion to change their statements and to provide financial support during court proceedings. Without such protection, victims have little ability to protect their rights.

**Victim rehabilitation not compulsory:** Another serious human rights omission in the Bill is a requirement to establish rehabilitation centers for victims. Rather, the Bill states that the government may, if necessary, establish rehabilitation centers for women who have no home and family. Thus, rehabilitation is an option, not an obligation of the state. Even if the government was to create rehabilitation centers, the human rights of victims living in the rehabilitation centers are not protected. The Bill does not specify what constitutes rehabilitative support. Rehabilitation is more than providing a victim with shelter and food, it is a long process of socialization and training. Counseling, medical care, legal aid, skills training and employment are all part of rehabilitation.

Compensation inadequate: The Bill provides compensation to the victim equal to half the fine imposed on the offender.\(^{57}\) This does not compensate victims for their physical and mental suffering and if there are several victims, the compensation will be negligible. Furthermore, it is irrational to link compensation to the amount of the fine imposed. If the offender is unable to pay a fine and is imprisoned instead, the victims would not receive any compensation.

<table>
<thead>
<tr>
<th>Many Recommendations of NGOs were taken in the Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>After the National Workshop on the Human Trafficking (Control) Bill, a core group of NGOs(^{58}) developed alternate provisions based on feedback from the workshop. The core group finalized the proposed amendment to the Human Trafficking (Control) Bill and presented them to the Ministry of Women, Children and Social Welfare, the Ministry of Law, Justice and Parliamentary Affairs and all the members of Parliament. All the recommendations proposed by the NGOs were taken in by the lower house except the provision on criminalizing voluntary prostitution. However, after a meeting with the member of National Assembly, it was also agreed that this provision would be taken out of the Bill. Ironically, despite all the effort, the House of Representatives dissolved and the Bill was lapsed.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Process that the Bill went through</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Human Trafficking (Control) Bill was registered at the Parliament Secretariat in 2000. However, the Bill lapsed because the then Prime Minister resigned on 21 July 2001. The new government re-registered the Bill on 22 February 2002. The Bill was then presented at the House of Representative on 24 February 2002. The House of Representative forwarded the Bill to the Population and Social Committee. Discussion on the amendment proposal in the Population and Social Committee took place from April 9 to 11, 2002. The Committee passed the Bill with 31 recommendations. The recommendations given by the committee was tabled at the House of Representatives. The House passed the Bill with the amendments however; as the House of Representatives dissolved on May 23, 2002 the Bill lapsed.</td>
</tr>
</tbody>
</table>

\(^{57}\) Ibid.  
\(^{58}\) ABC NEPAL, AATWIN, CAC NEPAL, CIWIN, JIT, HIMRIGHTS, LACC, Maii Nepal, NNAGT, SHAKTI SAMUHA and UNIFEM.
LAW ENFORCEMENT MECHANISMS

The Nepalese criminal justice system is an adversarial system in which the court is neutral and the police investigate under the direction of a government attorney. ¹

5.1 Investigation: The Police

A criminal investigation begins when the first information report (“FIR”) is registered with the police. ² However, in case of trafficking the police must obtain approval from the nearest district court before pursuing an investigation. If the court approves, which it usually does, the police begin the investigation. Unfortunately, the state has limited success prosecuting criminal cases, including trafficking cases. The reasons for this are discussed below.

5.1.1 Under Reporting of Trafficking Cases

Our data suggest that between 5000 to 7000 girls are trafficked from Nepal to India each year. However, only a very small number of these cases are reported to the police. This problem is compounded because police claims the evidence is insufficient or unreliable and is reluctant to register the FIR. The nation-wide crime report register of the police department shows that the number of registered trafficking cases never exceeds 150 per year.

² Ibid., Section 6.
Table 1  Trafficking Reports from Seventy-five Districts Registered with the Police

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases registered with police</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993/94 (2050/51)</td>
<td>102</td>
</tr>
<tr>
<td>1994/95 (2051/52)</td>
<td>150</td>
</tr>
<tr>
<td>1995/96 (2052/53)</td>
<td>133</td>
</tr>
<tr>
<td>1996/97 (2053/54)</td>
<td>117</td>
</tr>
<tr>
<td>1997/98 (2054/55)</td>
<td>130</td>
</tr>
<tr>
<td>1998/99 (2055/56)</td>
<td>110</td>
</tr>
<tr>
<td>1999/2000 (2056/57)</td>
<td>125</td>
</tr>
<tr>
<td>2000/2001 (2057/58)</td>
<td>92</td>
</tr>
<tr>
<td>2001/2002 (2058/59)</td>
<td>40</td>
</tr>
<tr>
<td>2002/2003 (2059/60)</td>
<td>54</td>
</tr>
</tbody>
</table>

Source: Annual Reports of Attorney General’s Office, 1993-2003

According to a recent study conducted by Public Attorney office, the victims lodge forty-five percent of FIR’s and the relatives lodge fifty-five percent. Complainants lodge FIR within fifteen days to seven and half years, after the offence occurs. Unfortunately, victims are able to provide evidence of trafficking in only fifteen percent of the cases.³

Figure four presents the results of a focus group discussion with judges, police, government attorneys and lawyers.⁴ Participants in that discussion felt that victims avoid reporting trafficking offences because they fear the investigating process. This fear stems from a widely held belief among the victims that they are certain to face further abuse by authorities. In fact, victims report incidents of exploitation and harassment during both investigation and judicial process.

Figure 4  Reasons Trafficking is Under-reported (N = 47)

---

⁴ Conducted by FWLD July 1, 2001 in Kathmandu.
5.1.2 Outdated investigation system

Police are not adequately trained in the techniques of investigating the modern organized crime of trafficking. Traffickers change names, identities and methods of trafficking, making the crime more difficult to investigate. Police lack equipment and trained personnel and the investigation methods are out of date and perfunctory. There is no systematic treatment of information gained from different investigations. The investigation is limited to the FIR, the victim’s statement and, if available, statements of witnesses and the accused.

Criminal investigation in Nepal, even in trafficking cases, usually ends with a statement from the accused. However, it is often not possible to locate the suspect of witnesses because there is no mechanism to identify their correct address. The investigator arrests the suspects and obtains a statement, rather than investigating and collecting independent evidences. Thus, primary and independent evidence may be stale or unavailable when the case is tried.

5.1.3 Hostile victims and witnesses

Victims and witnesses sometimes become hostile or change their statement out of fear or intimidation. One reason for this is inadequate police protection from threat and intimidation. Without the cooperation of victims and witnesses, effective investigation and prosecution of trafficking crimes is virtually impossible.

5.1.4 Poor coordination between Law enforcement agencies of Nepal and India

Trafficking is a transborder crime. It needs collaborative efforts from police in country of origin, country of transit and country of destination. No collaboration or bilateral mechanism has been developed among law enforcers for prevention, investigation, rescue and reintegration.\(^5\)

5.1.5 Ineffective border monitoring mechanisms

Trafficking of women and girls to brothels in India creates the most serious problem for Nepal. India has one of the largest sex markets in the world and a long, porous border with Nepal. Although the Ministry of Women, Children and Social Welfare (MWCSW) and some NGOs are working together to monitor the border with India, these efforts are insufficient. In fact, observers’ noted only two police officers were

---

\(^5\) However, UNIFEM and JIT has taken initiatives in these issues.
available to assist the volunteer monitors. Despite these problems, the proposed anti-trafficking act does not provide for a border monitoring mechanism.

During the border observation of this study, the researchers noted that monitoring was limited to the hours that the border officers assumed as high-risk times. Further, monitoring occurred only at formal transit points. It was observed that the border police required women to produce village development committee’s (“VDC’s”) recommendation justifying her visit but did not require men to do the same. This approach is ineffective and paternalistic.

The physical layout of the border monitoring agencies was also a problem. They are located on the wrong side of the road resulting in an obstructed view of trafficking activities. (See figure five.) In an interview with check post personnel, both police and Maiti Nepal monitors said that immigration authorities refused to allow placement of the check posts on the opposite side, despite available space.6

Other informers at the border described massive corruption. They reported that suspected traffickers are released after paying bribes to border police and innocent people are harassed until they pay bribes too. The police raid hotels located at the border, but after extorting money from the guests, they ignore suspected trafficking activities.7

---

5.2 Prosecution: Government Attorneys

Government attorneys are agents of the Attorney General. In their role of public prosecutor, they are responsible for prosecuting trafficking cases. Public prosecutors may also direct police investigators if they notice any flaw in the investigation. The police typically record the suspect's statement in writing in the presence of the government attorney. The government attorney then reviews the evidence collected by the police. After examining the case and evaluating the evidence collected by the police, the government attorney frames a charge sheet and files it with the appropriate court. The police may also request legal advice from the government attorney. Members of civil society can also play an important role in collecting evidence and apprehending alleged traffickers, although the law does not specifically provide for such a role.

Problems in the current system of prosecuting trafficking are discussed in the following sections:

5.2.1 Hostile victim and witnesses

Victims and witnesses are reluctant to cooperate with government prosecutors for many of the same reasons cited in section 5.1.3. This hostility can interfere with successful prosecution.

Victims feel abandoned by their families, police, prosecutors and the courts during the trial. False promises of love or marriage from traffickers can also make a victim change her statement. Giving a statement is particularly traumatic and a victim may change her statement to avoid going to a trial. A smaller portion of respondents believes victims are so demoralized by the experience of being trafficked, that they often lack confidence to withstand a trial.

---

8 See: State Cases Act (1992), Chapter on Court Management (Country Code), Evidence Act (1974), State Offenses Regulation (1992). See also: Traffic in Human Beings (Control) Act (1986) that sets out special procedures such as obtaining prior approval from the concerned District Court when prosecuting trafficking cases.
5.2.2 Inadequate training

Government attorneys receive no specific training in prosecuting trafficking offenses. They are uninformed and unprepared to manage the gender issues, human rights violations and emotional and legal issues that arise. For example, government attorneys may not be clear about the difference among trafficking, prostitution and migration and may not understand the complex issues involved in the international aspects of trafficking.

Recent Initiative: Consultation with Law Enforcement Agency

A Consultative workshop for Law enforcement machineries especially judges, government attorneys and police was conducted by FWLD from December 25-28, 2003 on antitrafficking law, human rights instruments and conceptual understanding with the support from UNDP-REACH, Delhi. The consultation was conducted for four days including field visit to rehabilitation centers, and survivor’s hearing. The participants thought that the consultation was first of it's kind, as the methodology adopted was fresh and interesting. Also the consultation brought different stakeholders within the enforcement agency together to discuss the issue of trafficking. The consultation was able to identify the problem in specific law enforcement agency, and the challenges they faced in providing justice to the trafficked person. The law enforces said that such consultation is necessary to internalize the sensitivity of the issue among the law enforces.
5.2.3 Threats from traffickers and political pressure

Government attorneys face political pressure, social pressure and threats from traffickers that includes the lives of government attorneys, their relatives and families.9

5.2.4 Inadequate representation of victims

Government attorneys are supposed to represent victims although they prosecute crimes on behalf of the state. However, government attorneys rarely interact with the victim and do not inform the victim about the progress of the case and other relevant information. Further, government attorneys fail to appear in court in twenty-two percent of trafficking cases because they are unprepared or they have been pressured by outside parties.10 This leaves victims without representation and the defendant is usually acquitted.

5.2.5 Ambiguous charge sheets and multiple defendants

A well-prepared charge sheet is essential to prosecuting a trafficking case. It should be based on a clear claim and supported by direct evidence. However, in practice, the claim portion of the charge sheet is often vague because of time constraints and haphazard reporting of claims. Trafficking prosecutions often involve multiple defendants and accessories. When there are multiple defendants, the prosecution faces a substantial challenge in proving the charges against each one.

5.2.6 Lack of accountability

The Constitution grants the Attorney General the ultimate authority to decide which cases to prosecute.11 The Attorney General has the authority to direct lawyers and investigators and to file charge sheets with supporting evidence or return cases for further investigation. However, they are uninvolved in many cases. Therefore, the Attorney General is accountable for the declining success rate of government cases against traffickers.

Government attorneys sometimes view accusations of trafficking as an act of revenge by the victim and assign them a low priority. Government attorneys do not give any priority for trafficking cases and prosecuting them promptly. It is handled as any other ordinary criminal cases.

---

9 Based on interviews for this study with the key stakeholders.
10 See Chapter 6 - Judgement analysis.
5.2.7 Inadequate cooperation between police and government attorneys

Before starting an investigation, police should clearly state the reason for the investigation and submit the initial report to the office of the government attorney. After receiving the initial report, the government attorney may guide the police in the investigation procedure. Upon completing the investigation, the police present the information to the government attorney who must decide whether there is sufficient evidence to proceed. Police and the government attorney must communicate and consult regularly if a case is to be prosecuted successfully.

However, coordination between police and government prosecutors often breaks down and the conviction rate suffers. Police do not submit the investigation report to the government attorney on time. The government attorney does not have adequate time to prepare charge sheet. A recent study found that the investigating police officer submitted the charge sheet to the government attorney on the last (twenty-fifth) day allowed in seventy percent of the cases. The study also found that government attorneys provide direction to investigating officers in only five percent of trafficking cases. These problems and associated delays often allow the suspect to escape and irreversibly impair evidence collection.

5.2.8 Low conviction rate

Because of the problems discussed above, the conviction rate is very low and the majority of cases result in an acquittal or a dismissal. The charts below show the outcome of trafficking cases in the Supreme Court, the Appellate Courts and the District Courts.

<table>
<thead>
<tr>
<th>Year</th>
<th>Carried forward</th>
<th>New Regis.</th>
<th>Total Case</th>
<th>Successful</th>
<th>Partially Successful</th>
<th>Unsuccessful</th>
<th>Total Decided</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989/90</td>
<td>35</td>
<td>38</td>
<td>73</td>
<td>6</td>
<td>1</td>
<td>36</td>
<td>43</td>
<td>30</td>
</tr>
<tr>
<td>(2046/47)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1990/91</td>
<td>30</td>
<td>19</td>
<td>49</td>
<td>4</td>
<td>-</td>
<td>13</td>
<td>17</td>
<td>32*</td>
</tr>
<tr>
<td>(2047/48)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1991/92</td>
<td>8*</td>
<td>6</td>
<td>14</td>
<td>2</td>
<td>-</td>
<td>1</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>(2048/49)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Carried</th>
<th>Trials</th>
<th>Convictions</th>
<th>Partially Successful</th>
<th>Successful</th>
<th>Unsuccessful</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992/93</td>
<td>11</td>
<td>3</td>
<td>14</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>(2049/50)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12</td>
</tr>
<tr>
<td>1993/94</td>
<td>12</td>
<td>5</td>
<td>17</td>
<td>1</td>
<td>- #</td>
<td>3#</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>(2050/51)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>13</td>
</tr>
<tr>
<td>1994/95</td>
<td>13</td>
<td>9</td>
<td>22</td>
<td>1</td>
<td>-</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>(2051/52)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>19</td>
</tr>
<tr>
<td>1995/96</td>
<td>19</td>
<td>10</td>
<td>29</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>(2052/53)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>26</td>
</tr>
<tr>
<td>1996/97</td>
<td>26</td>
<td>15</td>
<td>41</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(2053/54)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>34</td>
</tr>
<tr>
<td>1997/98</td>
<td>34</td>
<td>14</td>
<td>48</td>
<td>3</td>
<td>2</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>(2054/55)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>36</td>
</tr>
<tr>
<td>1998/99</td>
<td>36</td>
<td>17</td>
<td>53</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(2055/56)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>46</td>
</tr>
<tr>
<td>1999/2000</td>
<td>46</td>
<td>13</td>
<td>59</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>(2056/057)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>2000/2001</td>
<td>50</td>
<td>17</td>
<td>67</td>
<td>9</td>
<td>2</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>(2057/058)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>2001/2002</td>
<td>50</td>
<td>24</td>
<td>74</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(2058/059)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>64</td>
</tr>
<tr>
<td>2002/2003</td>
<td>64</td>
<td>70</td>
<td>134</td>
<td>11</td>
<td>17</td>
<td>28</td>
<td>106**</td>
</tr>
<tr>
<td></td>
<td>(2059/060)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* The number of cases carried forward does not match the balance. The data given in the Annual Report of Attorney General’s Office is different on pages 6 and 14.

** Unpublished data received from the Attorney General Office (March 19, 2004).

*Source: Annual Report of the Attorney General of the Kingdom of Nepal, 1996/97 (2053/54) to 2002/03 (2059/60).*

According to the Attorney General’s Office, “partially successful” means at least one defendant is convicted or less punishment is given on what have been claimed. A case is considered “unsuccessful” if no defendant is convicted or if the sentence given is less than the sentence requested by the prosecuting attorney.
### Figure 8 Appellate Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Cases</th>
<th>Successful</th>
<th>Partially Successful</th>
<th>Unsuccessful</th>
<th>Total Decided</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997/98</td>
<td>159</td>
<td>7</td>
<td>11</td>
<td>56</td>
<td>74</td>
<td>85</td>
</tr>
<tr>
<td>(2054/55)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998/99</td>
<td>126</td>
<td>6</td>
<td>4</td>
<td>20</td>
<td>30</td>
<td>96</td>
</tr>
<tr>
<td>(2055/56)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999/00</td>
<td>234</td>
<td>27</td>
<td>59</td>
<td>69</td>
<td>155</td>
<td>79</td>
</tr>
<tr>
<td>(2056/57)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000/01</td>
<td>129</td>
<td>18</td>
<td>9</td>
<td>47</td>
<td>74</td>
<td>55</td>
</tr>
<tr>
<td>(2057/58)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001/02</td>
<td>142</td>
<td>19</td>
<td>11</td>
<td>69</td>
<td>99</td>
<td>43</td>
</tr>
<tr>
<td>(2058/59)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002/03</td>
<td>72</td>
<td>14</td>
<td>15</td>
<td>26</td>
<td>55</td>
<td>17*</td>
</tr>
<tr>
<td>(2059/60)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Unpublished data received from the Attorney General Office (March 19, 2004).

### Figure 9 District Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Cases</th>
<th>Successful</th>
<th>Partially Successful</th>
<th>Unsuccessful</th>
<th>Total Decided</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997/98</td>
<td>317</td>
<td>53</td>
<td>43</td>
<td>48</td>
<td>144</td>
<td>173</td>
</tr>
<tr>
<td>(2054/55)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998/99</td>
<td>38</td>
<td>7</td>
<td>2</td>
<td>10</td>
<td>19</td>
<td>19</td>
</tr>
<tr>
<td>(2055/56)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999/00</td>
<td>321</td>
<td>66</td>
<td>49</td>
<td>51</td>
<td>166</td>
<td>155</td>
</tr>
<tr>
<td>(2056/57)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000/01</td>
<td>244</td>
<td>55</td>
<td>36</td>
<td>43</td>
<td>134</td>
<td>110</td>
</tr>
<tr>
<td>(2057/58)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001/02</td>
<td>136</td>
<td>29</td>
<td>17</td>
<td>26</td>
<td>72</td>
<td>64</td>
</tr>
<tr>
<td>(2058/59)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002/03</td>
<td>133</td>
<td>22</td>
<td>10</td>
<td>18</td>
<td>50</td>
<td>83*</td>
</tr>
<tr>
<td>(2059/60)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Unpublished data received from the Attorney General Office (March 19, 2004).
Figure 10  District Courts

Geographical Distribution of the Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Registered Cases</th>
<th>Terai</th>
<th>Hill</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990/91 (2047/48)</td>
<td>141</td>
<td>64</td>
<td>77</td>
<td>No mention of detail disposal</td>
</tr>
<tr>
<td>1991/92 (2048/49)</td>
<td>97</td>
<td>45</td>
<td>52</td>
<td>of the cases from district</td>
</tr>
<tr>
<td>1993/94 (2050/51)</td>
<td>99</td>
<td>40</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td>1994/95 (2051/52)</td>
<td>143</td>
<td>47</td>
<td>96</td>
<td></td>
</tr>
<tr>
<td>1995/96 (2052/53)</td>
<td>130</td>
<td>60</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td>1996/97 (2053/54)</td>
<td>107</td>
<td>63</td>
<td>44</td>
<td></td>
</tr>
</tbody>
</table>

Figure 11  District Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Cases</th>
<th>Successful</th>
<th>Partially Successful</th>
<th>Unsuccessful</th>
<th>Total Decided</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998/99 (2054/55)</td>
<td>317</td>
<td>53</td>
<td>43</td>
<td>48</td>
<td>144</td>
<td>173</td>
</tr>
<tr>
<td>1999/00 (2055/56)</td>
<td>38</td>
<td>7</td>
<td>2</td>
<td>10</td>
<td>19</td>
<td>19</td>
</tr>
<tr>
<td>2000/01 (2056/57)</td>
<td>321</td>
<td>66</td>
<td>49</td>
<td>51</td>
<td>166</td>
<td>155</td>
</tr>
<tr>
<td>2001/02 (2057/58)</td>
<td>244</td>
<td>55</td>
<td>36</td>
<td>43</td>
<td>134</td>
<td>110</td>
</tr>
<tr>
<td>2002/03 (2058/59)</td>
<td>136</td>
<td>29</td>
<td>17</td>
<td>26</td>
<td>72</td>
<td>64</td>
</tr>
<tr>
<td>2003/04 (2059/60)</td>
<td>133</td>
<td>22</td>
<td>10</td>
<td>18</td>
<td>50</td>
<td>83*</td>
</tr>
</tbody>
</table>

Source: Annual Reports of the Attorney General of the Kingdom of Nepal, 2047 to 2060.
* Unpublished data received from the Attorney General Office (March 19th, 2004).
Kathmandu, Rupandehi and Makwanpur consistently have the highest number of trafficking cases, while the numbers in Chitwan, Nawalparasi, Nuwakot and Morang fluctuate. The high number of trafficking cases in Kathmandu is due to migration to the capital and the subsequent trafficking of these women from Kathmandu, and also cases initiated mostly from Kathmandu.
5.2.10 Victims denied right to appeal

Because criminal prosecutions are brought on behalf of the state, the victim of trafficking is merely a government witness and not a party to the case. Consequently, the victim is not entitled to ask for an appeal even if she is not satisfied with the judgment. Only the government attorney pursue an appeal.

<table>
<thead>
<tr>
<th>Case Study No. 4</th>
<th>Denial of Right to Appeal is Denial of Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>In 1981, Mr. Bal Krishna Danuwar fraudulently took a young woman named Gita Danuwar from her home in Sindhupalchok District and sold her to a brothel in Bombay, India. Ms. Simla Tamang bought Gita for IC Rs. 25,000 and later sold her again for IC Rs. 30,000 to Ranjit Lama. Gita was forced to remain in India for eight years as a sex worker in various brothels. She was finally released when the brothel owner learned that Gita was HIV positive. Gita returned to Nepal and lodged an FIR against both Simla Tamang and Ranjit Lama for trafficking and selling her. Both defendants were tried, convicted and sentenced to eleven years imprisonment by the Sindhupalchok District Court. Unfortunately, eight months later the Appellate Court in Patan overturned the convictions. The Court ruled that since the offence occurred in 1981, and the Traffic in Human Beings (Control) Act was enacted in 1986, the law could not be applied retroactively to convict the defendants. On February 28, 1997, the Office of Attorney General concurred with the government attorney’s decision not to file an appeal although the conflicting decisions of the trial court and the appellate court provided a basis for appeal. Gita believed that if the government attorney had appealed to the Supreme Court, she might have received justice.</td>
<td></td>
</tr>
</tbody>
</table>

Source: Gender Equality and Justice, Pro-Public, 2001.

This case is a striking example of the government’s failure to follow through with a case in which there is public support and a willing victim.

5.2.11 Ineffective monitoring measures

Continuous monitoring of the implementation of laws and policies is critically important to achieve their objectives. The current mechanisms for monitoring police and government attorneys and the courts include: a complaint procedure when an FIR is not accepted, monitoring by line agencies and Annual report to Parliament from the
Attorney General. An order to rectify irregularities during court proceedings; Supreme and appellate court inspection of lower court records and decisions and disciplinary action by the Judicial Council for delays in court decisions and judicial impropriety. However, existing monitoring mechanisms do not effectively correct and control rampant irregularities in the Government Attorney’s Office.¹³

Some of the human rights instruments ratified by Nepal that address trafficking contain mechanisms to monitor compliance with the instrument. These mechanisms, which include an international rapporteur on violence against women and committees to monitor the state’s reporting obligation, could be applied to monitor government attorneys and other criminal justice agencies. However, many monitoring committees are informal.

5.2.12 Poor public image

These figures show that a large majority of those polled in this survey do not believe government attorneys are effective.¹⁴

¹³ A study by Malla found that mechanisms monitoring the implementation of laws and policies were inadequate, suggesting a need for both structural and procedural improvements. Although monitoring indicators are essential for effective monitoring, no indicators have been developed. “Monitoring Mechanisms of National Laws, Policies and International Human Rights Instruments Relating to Trafficking and Its Nexus with Migration and HIV/AIDS,” Sapana Pradhan Malla for JIT, October 2001.

¹⁴ Interviews with the key stakeholders.
5.3 Adjudication: The Court System

Court involvement in trafficking cases begins when the charge sheet is filed with the court. The court records the defendant’s statement and either remands the defendant to judicial custody or grants bail. At this point, the victim appears before the court and reconfirms her statement to the police. During the trial, government and defense attorneys present witnesses and the court delivers a verdict. The bailiff (Tahasildar) executes the verdict although either side has the right to appeal.

The problems associated with the judicial system are largely procedural. Procedural problems create challenges for effective law enforcement and impede execution of judgments. Poor investigations result in a lack of evidence and hurried prosecutions produce flawed results. These problems are discussed below.

5.3.1 Insufficient evidence

The failure of the courts to execute justice is partly due to poor investigations that produce insufficient evidence. Police and government attorneys must improve evidence collection and case preparation before bringing a case to court. There is lack of system for collecting evidences in the country of destination through cross border police collaboration.

Most respondents believe government attorneys are not effective because they lack motivation. With the exception of corruption, the other problems identified by the respondents have been discussed above.
Case Study No. 5: Inadequate Investigation

Maya dreamed of a future with a loving groom. Dilip, a man with many ties to India, and his parents promised Maya that Dilip would marry her. They took her to India on the pretense of meeting Dilip there. Instead, they sold her to a brothel and returned to Chitwan. Maya’s dream became a nightmare.

Meanwhile, Maya’s father lodged a FIR against Dilip for trafficking his daughter. Although there was sufficient evidence against Dilip, without Maya’s testimony, the Chitwan District Court found him not guilty and released him because the victim failed to appear in court.

After working about six weeks in the brothel, Maya managed to escape. Afraid of being rejected by her family and stigmatized by the community, Maya stayed with relatives in Kathmandu. A few months later, she learned about the decision in her case. She rushed home and filed a petition against Dilip for trafficking her. The court refused her petition based upon the principle of res judicata that bars re-litigating the same cause of action between the same parties where there is a prior judgment.

Source: Case Study from the Special Court, Kathmandu.

Note: Pseudonym used

The victim could not access justice because of the principle of res judicata. Such principles need to be avoided in cases like trafficking, where victims are unable to be present during their case.

5.3.2 Minimum sentences

The sentence for trafficking is ten to twenty years, allowing judges to exercise broad discretion in sentencing. Such discretionary power is internationally accepted. However, if defendants suspect this discretion is used arbitrarily, the opportunity for bribery increases. According to a recent study conducted by Attorney General’s Office, prosecutors requested a maximum punishment of twenty years in ninety percent of trafficking cases. However, the judgment analysis conducted for this study indicates that trial judges administered the maximum sentence in only 38.5 percent of cases. Appellate courts affirmed the maximum sentence of the lower court in only ten percent of trafficking cases and never enhanced the trial court sentence. This trend shows that the objective of severely punishing traffickers remains unmet.

15 See Judgment Analysis, Chapter 6.
16 Ibid.
5.3.3 Inadequate training

The participants in a focus group discussion pointed out that court personnel use out-of-date techniques to try trafficking.\(^\text{17}\) Court personnel is not updated on the current scope of the crime and the international instruments ratified by Nepal that relate to human rights and trafficking. Even though judges now receive some training, the administrative staff directly involved in adjudication receives no training.

5.3.4 Inadequate resources

Many focus group participants noted that the Nepalese judiciary is crippled by a shortage of adequate, efficient and capable human resources. Reference materials, logistical support and infrastructure are also inadequate to support a well-functioning judiciary. Maximum budget allocated for judiciary doesn't go beyond 59 crore which is 0.58 percent of the total national budget.

5.3.5 No mechanism to deliver foreign summons

In most human trafficking cases, the accused and the witnesses live in a foreign country. A summons, issued by a Nepalese court, must be properly served in a timely manner before the prosecution can proceed. However, there is no mechanism to deliver a summons outside of Nepal. The country code provides that foreign delivery of the summons, notice and closed questions should be made according to rules framed by His Majesty's Government.\(^\text{18}\) These rules have not been promulgated and there is no judicial precedent on this critical procedural issue.

Trafficking is an organized crime and a trans-border problem that requires coordination and support on an international level. The Traffic in Human Beings (Control) Act provides for extraterritorial jurisdiction. However, the Act does not provide a specific procedure for issuing and serving a foreign summons. Because of these legislative and administrative gaps, trafficking defendants cannot be properly brought within the jurisdiction of Nepali courts.

<table>
<thead>
<tr>
<th>Case Study No. 6</th>
<th>Extra Territorial Jurisdiction is Illusory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chiuri, a young unmarried girl worked in a garment factory in Kathmandu. A co-worker named Laxmi, lured Chiuri to India with promises of good salaries and the opportunity to marry a</td>
<td></td>
</tr>
</tbody>
</table>

---

\(^{17}\) Focus group discussion with judges, government attorneys, lawyers and police, July 1, 2001.

Lali, another woman from Chitwan, had already lodged an FIR against Laxmi, accusing her of trafficking women to India for prostitution. The police caught Laxmi in Chitwan while she was on her way back to Kathmandu. During the investigation, Laxmi told the police about Chiuri and Rajesh and the government attorney filed another charge sheet. Although Laxmi was apprehended in Nepal and subject to the jurisdiction of Nepali courts, she was not convicted of trafficking Chiuri. Despite the extra-territorial jurisdiction of the Traffic in Human Beings (Control) Act, the court held that it lacked jurisdiction to summon the other defendant (Rajesh) in India.

Source: Interview with a government official.

Note: Pseudonym used

5.3.6 Trial delays

Trial delays are commonplace in the Nepalese judicial system. Except for writs of *habeas corpus* and high profile cases, a case may take years to reach trial.¹⁹ Although the Country Code provides for trial within one year of submission of the defense statement, this does not happen in most cases.²⁰ It often takes years to decide a case, even at the trial level. The bill on the Special Court attempts to correct the problem of trial delays by requiring the Special Court to decide cases within six months of the filing date. Problems associated with the Special Court are discussed fully in section 5.3.12 below.

Long delays make it more difficult to try a case because evidence may be lost or tainted, witnesses disappear and the victim may forget important details, change her statement or even fail to appear. The Special Court heard trafficking using special procedures set out in the Special Courts Act. This Act does not provide summary procedures and the Traffic in Human Beings (Control) Act does not protect against unwarranted delay.²¹ These delays violate the victim’s right to a speedy trial.

---

¹⁹ See Judgment Analysis, infra at Chapter 6.
²¹ Special Courts Act, Sec. 9 (1) (c) (1974) reads, “The special courts shall decide cases within the time limit prescribed by Nepal laws in force for the time-being.” See also supra: Section 5.3.8.
Figure 15  Cases Decided and Pending in the Courts [2002/03 (2059/060)]*

![Bar chart showing cases decided and pending in the courts.](chart)

* Attorney General Office Report 2059/060

Figure 16  Duration of Time Taken for Final Decision (N = 23)

![Bar chart showing duration of time taken for final decision.](chart)

*As per data of 1999-2000 (2056-2057)

Considering the duration of a case at the time the FIR is filed until a final decision by the Supreme Court, we analyzed the duration of twenty-three Supreme Court Cases. Most trafficking cases required four to five years for final resolution.

5.3.7 Repeated confirmation of statements

Current law requires a victim to reconfirm her statement to the police at the nearest district court. In trafficking cases victims and witnesses must repeat their statement
many times after lodging the FIR, a requirement that deters many victims and witnesses from proceeding. Failure to reconfirm the statement will jeopardize the outcome of the case.\textsuperscript{22}

<table>
<thead>
<tr>
<th>Case Study No. 7</th>
<th>Failure to Reconfirm Statement Leads to Acquittal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jyoti Maya worked as a waitress in Birgunj. One day, Siva Ram, a cook from the same restaurant, brought some of his Indian friends to the restaurant. Jyoti and one of her friends helped Siva serve food to his friends. After his friends returned to India, Siva Ram lured Jyoti and her friend into going to India with him. Siva promised Jyoti and her friend that his friends would marry them. Fortunately, while they were trying to enter India, the Nepalese border police intervened before Siva could sell the women to his friends who were waiting across the border. Jyoti filed a FIR against Siva Ram and his Indian friends for attempting to traffic her and her friend. The government attorney initiated a case against Siva Ram in the Special Court, Kathmandu. As required, Jyoti reconfirmed her FIR statement before the court. However, Jyoti did not appear at the final hearing to confirm her statement again and the defendants were acquitted.</td>
<td></td>
</tr>
</tbody>
</table>

\textit{Source: Court Observation}

\textit{Note: Pseudonyms used}

### 5.3.8 Investigators not involved in adjudication

In the current criminal system, the investigating officer, the person most familiar with the details of the case, is not involved once the government attorney files the case with the court. Further, although the charge sheet is based on the investigator’s report, the written opinion of the police investigator is not included with the charge sheet. As a result, many important facts and findings are never presented to the court and the results often depend solely upon the understanding and presentation of the government attorney.

\textsuperscript{22} Focus Group Discussion with judges, government attorneys, lawyers and police, Kathmandu, July 1, 2001.
5.3.9 Judgments not executed

Timely execution or non-execution of judgments is another challenge. After the trial, a defendant free on bail may flee, often aided by an organized network, before the judgment can be executed. Lack of court police and no system of monitoring and follow-up with the offenders, open border with India, false name and address are some of the cases of non-execution of judgment.

Figure 17 summarizes respondents' perceptions of why the courts are unable to effectively control trafficking.

![Figure 17 Why Courts are unable to control Trafficking? (N = 47)](image)

Respondents believe that corruption is one reason the courts cannot control trafficking. Respondents believe traffickers bribe judges to influence the verdict and bribe the administrative staff managing the case at the court.

5.3.10 Multiple problems with the Special Court

The Special Court was created to expedite particular types of cases requiring specific expertise. However, the special court is plagued with a number of problems.

**Jurisdiction is too broad:** The Special Court hears cases involving foreign exchange, narcotics, trafficking and offences against the state. If the Special Court is to meet

---

23 On the 10 Poush, 2057 (Dec. 25, 2000), pursuant to Articles 3 and 5 of the Special Courts Act (1974), His Majesty’s Government created a three-member special court. Article 3 of the Special Court Act reads, “In case His Majesty’s Government considers it necessary to form a Special Court in order to expedite the disposal of any particular case, or in cases of any particular category, which may be filed, or which may arise from time to time, it may form a Special Court through a notified order consisting of one or three members in order to dispose of such cases.”
its objectives, its jurisdiction must be limited to very specific cases. Nepal is obligated to combating trafficking under multiple international conventions, and domestic law. These obligations require highly specialized knowledge and training. The new Special Court legislation focuses on speedy resolution of cases and does not address the issue of special expertise.\textsuperscript{24}

\textbf{One Special Court is insufficient:} The government notice that formed the Special Court allows the court to sit anywhere in Nepal. Despite this latitude, the only Special Court is in Kathmandu. It is expensive and time-consuming to bring defendants, victims and witnesses from every part of the country to a court in Kathmandu. Police do not have adequate human and financial resources to provide security for every defendant who must travel to Kathmandu.\textsuperscript{25} As poverty leaves women vulnerable to trafficking, most victims are poor and unable to afford to travel to Kathmandu to pursue their cases.\textsuperscript{26}

Recent reports suggest that police are circumventing these problems by trying trafficking offenders in local courts for public offences. However, public offenses carry light sentences. Therefore, while police avoid the difficult Special Court procedures, many traffickers are not prosecuted for the more serious crime of trafficking.\textsuperscript{27}

The table below shows that only forty-six trafficking cases have been filed in the Special Court during the last ten months, a very low figure.\textsuperscript{28} There are seventy-five districts in Nepal and perhaps there should be a Special Court in each district. However, key informants believe that even if Special Courts were formed in other locations they would still lack the special expertise necessary to hear trafficking cases. Thus, trafficking cases would continue to be handled by the same untrained personnel handling the cases in the district courts.

\textbf{Confusion over jurisdiction:} The Human Trafficking (Control) Act requires prior approval by a local district court before the police can initiate a trafficking investigation. District courts are reluctant to give prior approval because they believe the Special

\textsuperscript{24} Special Court Bill (2057) was registered as a finance bill to expedite trials by the Special Court.
\textsuperscript{25} A recent case brought to the Special Court from an urban part of Nepal cost NRS 35,000. However, the court declined to register the case because of insufficient evidence. This decision has discouraged police and government prosecutors from bringing trafficking cases to the Special Court.
\textsuperscript{26} State Cases Regulation 2055 (1999) contains a provision for payment of travel and daily allowances for the victims and witness. In practice, the government is not providing any allowance.
\textsuperscript{27} Based on data collected during a field visit to Bhairawa. Records show that forty-six trafficking cases were filed in the Kathmandu District Court in the year 2000. After the Special Court was established, the number of reported trafficking cases decreased to fifteen in 2001.
\textsuperscript{28} See the Appendix for the table of districts with the highest number of trafficking cases.
Court should have jurisdiction over all aspects of a trafficking case. It is now more
difficult to ask for an extension of judicial custody, as police must now go to the
Special Court rather than the local district court. It is likely these requests will
decrease as it is costly for police bring the defendant from the respective district to
Kathmandu just for this purpose, as strict security is required for each defendant.

**Figure 18  Special Court Trafficking Cases**

<table>
<thead>
<tr>
<th>Year</th>
<th>Carried forward</th>
<th>New Regis</th>
<th>Total Case</th>
<th>Success</th>
<th>Partial Success</th>
<th>Unsuccessful</th>
<th>Total Decided</th>
<th>Balance</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>2057/58</td>
<td>37</td>
<td>9</td>
<td>45</td>
<td>3</td>
<td>3</td>
<td>5</td>
<td>11</td>
<td>37</td>
<td>Two cases disposed of in the last year are not included in the balance</td>
</tr>
<tr>
<td>2058/59</td>
<td>37</td>
<td>20</td>
<td>57</td>
<td>6</td>
<td>2</td>
<td>8</td>
<td>16</td>
<td>41</td>
<td>32 cases forwarded to related District Courts from 22/06/2002.</td>
</tr>
<tr>
<td>2059/60</td>
<td>9</td>
<td></td>
<td>7</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Source: Special Court (Paush 2057-2058 to Ashwin, 10 months ) (December 25, 2000 to October 31, 2000)*

**Reallocation of Jurisdiction of Trafficking Cases**

The Special Court has stopped looking into Trafficking cases since July 22, 2002 (6 Bhadra 2059). Now the trafficking are trialed under the jurisdiction of the District Courts. The table above shows that only forty-six trafficking cases had been filed in the Special Court during the last ten months from December 25, 2000 to October 31, 2000 ((Poush 2057 - Aswin 2058) which is a very low figure. As this study indicated problem in case handling by Special Court Jurisdiction, FWLD advocated for reallocation of Jurisdiction to the original court and finally Jurisdiction has been handed over from July 22, 2002 to District Court.

---

29 See the Appendix for the table of districts with the highest number of trafficking cases.
5.4 Common Concerns of Law Enforcement Agencies

It is apparent that all three branches of law enforcement share several problems. These problems must be addressed systematically if law enforcement is to effectively control and eliminate trafficking.

5.4.1 Scarce resources

Inadequate physical and human resources, logistical support and reference materials are common problems in all the three law enforcement agencies. These agencies depend completely on the annual government budget for all of their operating expenses. Sadly, the government allocation does not even provide for basic necessities like office space, separate toilets for men and women, drinking water and electricity.

5.4.2 Lack of training

No law enforcement agency is equipped with personnel trained to handle trafficking cases. Police are not trained to investigate effectively; government attorneys are not trained to prosecute trafficking cases using Supreme Court precedents and international human rights instruments. Even judges are not formally trained or adequately aware of the human right perspective necessary to render fair and just decisions. Specifically, judges, judicial staff and government attorneys must be knowledgeable about domestic application of international instruments and national laws against trafficking. Proper training also provides motivation and supports national efforts against trafficking.

5.4.3 Ineffective monitoring mechanisms

The existing monitoring provisions are inadequate to control and correct pervasive and systemic improprieties. Despite these improprieties, not a single complaint has been reported against police, government attorneys or judges under the existing system.  

---

30 During court observation in the Bardiya District Court, the study team noticed that the government attorneys did not invoke precedents to support their arguments.
31 For detail see “Monitoring Mechanism Relating to Trafficking in Woman and the Nexus with Migration and HIV/AIDS,” FWLD for JIT, (October 2001).
CHAPTER 6

JUDGEMENT ANALYSIS

This chapter presents a quantitative and qualitative analysis of Supreme Court judgments on trafficking offences as an evaluation of the effectiveness of institutional mechanisms in combating human trafficking. Basically quantitative analysis is used to determine judicial trend and patterns whereas qualitative analysis is used to evaluate substantial issue of judicial pronouncements.

6.1 Judgment Trends and Patterns

Quantitative analysis considers all judgments on trafficking offences reported in the Nepal Kanoon Patrika (Nepal Law Journal), hereinafter referred to as “NKP” between 1987 and 2003. These dates coincide with the 1986 implementation of the Traffic in Human Beings (Control) Act, 1986 and should reflect the effectiveness of that law. The court rendered twenty-three trafficking judgments out of 180 NKP issues published during the years examined by this study.

Though, it is observed that generally the Supreme Court decided thirty cases relating to human trafficking annually1, the reported cases relating to human trafficking is less than two annually. The analysis is more indicative than representative as number of cases taken for this analysis is quite low because it is limited within cases published in NKP.

6.1.1 Convictions in case relating to human trafficking

The conviction rate of trafficking cases is 61 percent in Supreme Court out of twenty-three reported cases in NKP (Fig. 1). However, average success ratio of trafficking

cases is 23\textsuperscript{2}, which is lower than overall prosecution success ratio of Nepal i.e. 47. 75 percent.\textsuperscript{3}

**Figure 1** Supreme Court Trafficking Decision (N = 23)

6.1.2 Reversal rate of lower court decisions

We examined whether the Supreme Court upheld or reversed the lower court decisions in trafficking cases. The Court reversed convictions in 26 percent of the cases, but reversed acquittals in only 9 percent of cases. Conversely, the Court upheld 52 percent of lower court convictions and 13 percent of acquittals. (Fig. 2)

**Fig. 2** Supreme Court Review of Trafficking Decisions (N = 23)

The Supreme Court conviction rate in trafficking cases is seventeen percent lower than the conviction rate of the lower courts.

---

\[\text{See Chapter 4 for detail data.}\]

\[\text{ACPF Annual Report (1998/1999).}\]
Combined with a tendency to reduce the sentences of trafficking defendants, these figures (Fig. 2 & 3) are quite troubling. The appellate courts reviewed most of the convictions for procedural error and upheld the trial court decisions. In most cases the Supreme Court failed to cite any reason for reducing the sentence imposed by the lower court. Given the disadvantaged status of women and children in Nepali society, one would expect the courts to punish traffickers more severely.

One explanation for the relatively high acquittal rate is the Supreme Court’s seemingly lenient attitude towards defendants. There are several reasons for this attitude. The most significant reason is the absence of scientific and systematic investigation procedures. Inadequate investigation leads to errors that ultimately affect the credibility of the prosecution. The lower courts may be more tolerant of flawed investigations because they are more familiar with the local situation and the practical problems of evidence collection, while the Supreme Court holds investigators to a strict standard. However, this attitude should be balanced by consideration of the serious nature of the crime and the particularly vulnerable victims.

In the judicial system, the role of the trial court is to assess the demeanor and credibility of witnesses. The Supreme Court should not enter into the trial court’s factual determination unless such factual findings are clearly inaccurate. The Supreme Court’s incursions into the trial court’s province of fact-finding may undermine efforts to curb trafficking. It discourages the prosecutors, the police, victims and the entire society. When deciding trafficking cases, the Court should develop consistent, objective criteria for reversing convictions based upon legal error only and should clearly set out its reasoning in every decision.
6.1.3 Defendants disown confessions

The analysis shows that defendants often change their statements at trial. While 65 percent of defendants confessed during the police investigation (Fig. 4), 96 percent of all defendants maintained their innocence at trial. (Fig. 5) These inconsistencies make it difficult to effectively prosecute trafficking cases and result in acquittals at trial and on appeal.

Figure 4 Confession during Police Custody (N = 23)

Figure 5 Confession in Court (N = 23)

6.1.4 Inconsistent statement from victims contribute to acquittals

As discussed in Chapter 5, victims often change their statement out of fear or intimidation, making it difficult to prosecute trafficking cases. Based upon analysis, only 8.7 percent of victims changed statements made prior to an investigation after filing a FIR. (Fig. 6) However, at trial more than twenty-six percent of victims either
changed their statement or failed to appear to reconfirm their statement. (Fig. 7)

**Figure 6** Victim’s Statement to Police (N = 23)

**Figure 7** Reconfirmation of Victim’s Statement in Court (N = 23)

Inconsistent statements is ground for acquittal

In *Kamal Prasad Shrestha vs. H.M.G.* (1993), the Supreme Court reviewed the conviction of a man who confessed his crime to the police and was convicted for trafficking. The victim gave a statement as well to the police. However after many months
passed, her statement at trial was inconsistent with the earlier statement given to the police. The defendant appealed the conviction and the Appellate Court affirmed his guilt. When the case arrived at the Supreme Court, the Court found that the defendant's confession was not sufficient because the victim's statements were inconsistent. The principle that the Court used to support freeing this self-confessed trafficker was that a conviction would be "against the interests of criminal justice."


6.1.5 Minimum sentences imposed

The law provides a sentence of ten to twenty years for human trafficking offences and up to five years for attempting, abetting or conspiring to commit the same offence. Given the broad judicial discretion in sentencing, the analysis attempts to determine the length of the sentence imposed on convicted traffickers as an indicator of the Court's view of the severity of the crime. The analysis shows that in 36 percent of cases sentenced to more than ten years in prison whereas in significant majority cases i.e. 64 percent sentenced to ten years or less. (Fig. 8)

Figure 8 Degree of Punishment Imposed (N = 23)

<table>
<thead>
<tr>
<th>Sentence Duration</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than ten years</td>
<td>36%</td>
</tr>
<tr>
<td>Ten years or less</td>
<td>64%</td>
</tr>
</tbody>
</table>

6.1.6 Sentences enhanced

Of the trafficking convictions upheld by the Supreme Court, the Court maintained the sentence in 50 percent of the cases and in the remaining 50 percent of the cases, the Court increased the sentence while no sentence was reduced.
6.1.7 International human rights instruments ignored

As has been emphasized several times in this study, Nepal is obligated to comply with several international treaties and conventions. Our analysis shows that, despite their applicability, the justices failed to rely on any of these instruments as authority when deciding a trafficking case. In addition, none of the legal representatives for the victim or the accused brought international human rights instruments to the attention of the court in representing their clients.

6.1.8 Precedent ignored

Every Supreme Court decision contains a section indicating whether the Court relied on a previous decision in deciding the current case. Despite earlier cases on point, in twenty-three decisions, the Court did not cited its own precedent. In only one judgment, the Court cited its precedent applied in decision. This failure to build upon precedent produces inconsistent and contradictory decisions that rob the law of the predictability required ensuring compliance with the law.

6.1.9 Government attorneys fail to appear

One of the most shocking discoveries of the analysis is that the Supreme Court delivered a verdict without a government attorney present in twenty-two percent of the trafficking cases it heard. Because the government attorney is the victim’s attorney, both the victim and the state were without legal representation. On the other hand, a defendant may select an attorney who will be experienced and highly paid. Inevitably, without an attorney to prosecute the case, the defendant is acquitted.

---

6.2 Substantive Judicial Approach

All trafficking judgments reported in the NKP since 1987 to 2003 and the Supreme Court Bulletin since 1987 to 2003 has been used for the qualitative analysis.\(^5\) The Supreme Court often contradicts itself in approaching trafficking cases. The conceptual confusion and problems in the Supreme Court trafficking decisions are dealt in this analysis.

6.2.1 Inconsistent standard of proof

The Supreme Court has not established a consistent standard of proof in trafficking cases. In several instances, the Court held it is not necessary to prove the victim was taken abroad and sold to establish guilt.\(^6\) Rather, the Court held that it is sufficient to show that a victim was taken from one place to another to establish the offence under No. 1 of the Country Code Chapter on Trafficking in Human Beings.\(^7\)

However, in a contradictory ruling, the Court has held that the prosecution must prove the defendant took the victim abroad with the intent to sell her.\(^8\) In *HMG vs. Om Prasad Bishwakarma*, the Court applied this standard but failed to clarify how much evidence is needed to establish foreign transport and intent.\(^9\) In *Bishwakarma*, a man took a woman to India, promising to marry her. He returned to Nepal and left the woman in India. The Court ruled that, although the defendant transported the victim abroad, the evidence was insufficient to establish the intent to traffic. Thus, the defendant was convicted only of attempt to traffic.

6.2.2 Corroboration required despite shift in burden of proof

As discussed earlier, a large problem to effective implementation of anti-trafficking law is minimal report of cases to the police. A number of Supreme Court decisions suggest that the Court is trying create pleasant atmosphere making easier for a victim to come forward for reporting and prove her case. In one case, the Court ruled that the victim in a trafficking case should be given the benefit of the doubt.\(^10\) For example, if the defendant’s testimony contradicts the victim’s statement, the burden

---

\(^5\) See the List of Cases for details. A total of seventy-one relevant judgments, twenty-three from the NKP and different forty-seven judgments from the Supreme Court Bulletin has been analyzed.


is on the defendant to prove the claim. \textsuperscript{11} The Court extended this principle when it held that a defense of “false complaint” must be logical and reasonable. \textsuperscript{12}

Unfortunately, the Court undermined its own decisions in several contradictory rulings. For example, although victims of trafficking “should be given the benefit of the doubt,” a defendant cannot be convicted on the basis of an uncorroborated statement from the victim. \textsuperscript{13} In another case, the Court failed to accept a confession corroborated by the co-defendant as sufficient evidence for a conviction. \textsuperscript{14} The Supreme Court has further contradicted this principle by holding that although victims of trafficking are intended to be given the benefit of doubt; however, one cannot be convicted merely on the basis of doubt. \textsuperscript{15}

However, in most recent reported judgement, the Court held that Traffic in Human Beings (Control) Act, 1986 is special Act so special provision of burden of proof i.e. burden of proof lies on accused, made by the Act was attracted in trafficking case rather than general provision of Evidence Act. \textsuperscript{16}

6.2.3 Delaying in lodging FIR is ground to avoid justice

Considering the specific nature of crime, law does not limit time or \textit{locus standi} for filing a FIR of the incident of trafficking. In the context of low reporting of crime, it is quite essential for the law enforcement agencies to encourage lodging the FIR of the trafficking. However, contrary to legislative motive, the Court has very miserable approach in this regard. For example, the Court has declared accused innocent on the ground that victim took years for lodging complaint against accused after coming back to Nepal and she has no reliable justification to taking that long time for reporting. \textsuperscript{17}

6.2.4 Evidentiary value of victim’s original statement depends on confirmation

The reasons victims frequently change their testimony when they appear in open court have been discussed previously. \textsuperscript{18} Some of these reasons include long delays


\textsuperscript{13} HMG v. Indra Prasad Mainali, SCB 1998 (2055), Vol. 7, No. 20, p.2

\textsuperscript{14} Shyam Pariyar v. HMG, SCB 2000 (2057), Vol. 9, No. 10, pp. 15-16.

\textsuperscript{15} Gopal Tamang v. HMG, SCB 2000 (2057), Vol. 9, No. 10, pp. 11-12.

\textsuperscript{16} Pasang Dawa Tamang v. HMG, NKP 2000 (2057), Vol 3,4, pp. 188-196.

\textsuperscript{17} Ganga bahadur Tamang v. HMG, SCB 2001 (2058), Vol. 18, p. 7.

\textsuperscript{18} Recent amendment in court regulations made hearing of trafficking cases in camera bench.
before trial, threats from the trafficker and family pressure. Perhaps appreciating these difficulties, the Supreme Court ruled that charges against a defendant cannot be dropped simply because the victim changed her statement. The inconsistent statement given in court must be factually supported before it will be accepted as evidence.\(^\text{19}\)

However, a significant procedural obstacle remains. In \textit{HMG v. Raju Tamang}, the Court held that unless a victim gives a statement in court, her original statement couldn't be admitted as evidence.\(^\text{20}\) By employing this requirement, the court creates procedural loophole that allows offenders to avoid penalty.

In trafficking case, the victim needs to be reconfirmed her statement herself during trial. Often because of the long delay between the FIR and the commencement of trial, inconsistencies between victim’s statement may arise; intentionally due to threat and intimidation or unintentionally due to in time being losing remembrance of detail of information. However, the Court has held that any inconsistency in the statement a victim gives during the investigation and her statement at trial is treated as false testimony and is inadmissible in court.\(^\text{21}\) This decision creates an impossible dilemma for a trafficking victim already terrified to face a potentially hostile and threatening court.

\section*{6.3 Conclusion}

Although trafficking in women and children is one of the most serious problems facing Nepal, efforts to stop these crimes have been insignificant and ineffective. The Traffic in Human Beings (Control) Act, 1986 was enacted to punish these crimes and deter future crimes. However, this judgment analysis shows poor implementation and enforcement of the Act. Further, neither the Supreme Court nor attorneys from either side refer to any of the ratified international anti-trafficking instruments to prosecute and adjudicate trafficking offenses. This reflects poorly on Nepal’s commitment to curb this offence and calls Nepal’s motivation for ratifying those Conventions into question.

Of course the police, private and government attorneys, the courts and many others institutions are responsible for obtaining justice for victims of trafficking. However,

\begin{itemize}
  \item \text{\textsuperscript{19} Nirmal Lama v. HMG, SCB 1998 (2055), Vol. 7, No. 19, p. 13.}
  \item \text{\textsuperscript{20} NKP 1989 (2046), Vol. 4, pp. 399-402.}
  \item \text{\textsuperscript{21} In Dhansingh Negi v. HMG, NKP 1996 (2053), Vol. 11, pp. 789-92, the Court held that inconsistent statements given to the police and the court were inadmissible.}
\end{itemize}
this analysis shows that the lenient approach of the Supreme Court contributes to the low number of convictions. The Supreme Court’s acquittal rate is significantly higher than that of the lower courts. It ignores its own precedents, sets unreasonable standards of proof, imposes minimum sentences, renders decisions when the victim and the state are not represented by counsel and forces victims to unnecessarily repeat painful and embarrassing testimony. Even in the rare event of a conviction, the rights of the victim are overlooked and her perspective is absent from the judgment. These problems show that the Court has not created the safe venue for victims the 1986 Act intended. All the courts of Nepal must set an example for the rest of the criminal justice system if the crime of trafficking in human beings is to be successfully eliminated in Nepal.
Controlling and combating trafficking in human beings in Nepal poses many challenges. Whatever challenges we have human Rights of the trafficked person shall be at the center of all efforts to prevent and combat trafficking and to protect, assist and provide redress to the victims. The following recommendations are based on findings made during the course of the study. These recommendations focus on: Addressing the underlying problems that allow trafficking to flourish; reforming anti-trafficking laws, creating the effective institutional mechanism; developing and refining monitoring mechanisms and creating effective rescue, support and reintegration programs for affected person.

7.1 Address the Underlying Problems

Gender discrimination pervades every element of Nepal’s patriarchal society. The subordinate position of women is part of the belief system and is repeatedly reinforced by state-made laws, policies and institutions. Changing the patriarchal structure and belief system will take time and effort; the state must lead the way. In addition to systemic discrimination, rampant poverty and illiteracy increase vulnerability to trafficking. People living in poverty are desperate and willing to accept any kind of work, regardless of the risks. Lack of education and marketable skills limit employment opportunities for women and make them easy prey for traffickers.

State laws, policies and strategies designed to combat trafficking lack focus and conceptual clarity. The tendency to treat trafficking as a moral issue rather than a human rights violation blames the victim and does not control trafficking. Any government policy designed to combat and control trafficking must recognize the
complex challenges and strategies should be aimed at preventing trafficking that address root cause of trafficking as well as demand side. The following recommendations address these underlying problems and prevent the crime.

7.1.1 Modify social and cultural patterns

Article 5 (a) of the CEDAW Convention provides measures to modify social and cultural patterns and to eliminate prejudice and practices based on assumptions of inferiority or superiority or stereotypical roles for men and women. The state must carry out its obligation under CEDAW and undertake consolidated and concerted actions to change gender-based stereotypes.

7.1.2 Make education a priority

Education must be given a high priority because it is the most powerful tool for empowering women and transforming society. Ensure education for all with free and compulsory education at least up to the secondary level eliminating gender disparities in education. Arrange hostel facilities for the girls.

7.1.3 Eliminate discriminatory laws

Discriminatory laws reinforce women’s subordinate position and increase their vulnerability to trafficking. Government intervention should address the factors that increase vulnerability to the trafficking including inequality, poverty and all forms of discrimination. There are many discriminatory laws in Nepal and eliminating them will indirectly combat trafficking. For example, a woman still does not have the right to register the birth of her own child or confer citizenship directly through her citizenship.

7.1.4 Alleviate poverty and generate employment opportunity

Any policy or program designed to combat trafficking should be integrated with programs to alleviate poverty. Girls and women from trafficking-prone areas should be targeted for skill development training that will enable them to become self-sufficient. The state should initiate special measures to accelerate de facto equality as mandated by CEDAW. These measures should include employment opportunities, income generation activities, education and skill development programs for women.

---

1 Country Code Eleventh amendment has guaranteed certain rights of women in regards to inheritance, marriage, divorce and abortion rights etc.
7.1.5 Need to distinguish migration and prostitution from trafficking

The principles of consent and choice are central to any anti-trafficking policy or program. Although migration and trafficking both involve the movement of people, migration is a voluntary activity involving the fundamental right of freedom of movement. While both prostitution and trafficking often involve sex work, prostitution may involve the right of self-determination whereas trafficking necessarily involves coercion.

7.2 International Anti-trafficking Conventions and Effective Implementation

The majority of international instruments addressing trafficking were created many years ago and either lack a rights perspective or do not have detailed provisions regarding the complex, organized and trans-border crime trafficking has become. UN Protocol on Trafficking is yet to be ratified by many countries and therefore, cannot be implemented comprehensively. The SAARC Convention need to be amended to enhance the rights-based focus and ensure accountability of the recipient countries.

7.2.1 Ratify human rights instruments designed to combat trafficking

Nepal should immediately negotiate bilateral and multilateral cooperation agreements with receiving countries that have ratified the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. The Optional Protocol to CEDAW should be ratified to ensure an effective complaint mechanism. Government should ratify International human rights instruments dealing with trafficking, particularly the UN Convention on Transnational Organized Crime and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, Optional Protocol to the CRC on Sale of children, child prostitution and child Pornography as a mater of priority along with the International Convention on the Protection on the Rights of all Migrant Workers and Members of Their Families.

7.2.2 Amend the SAARC Convention

The SAARC Convention against trafficking must expand its definition of trafficking. The Convention must also provide for a treaty body to supervise effective implementation
of the Convention. The SAARC Convention should appoint a regional rapporteur to monitor the implementation of the Convention and coordinate with other international and national rapporteurs on the issue of trafficking.

Regional governments must not use the Convention to justify unreasonable restrictions on the movement of women from one country to another. The Convention must recognize that dire economic circumstances force women to migrate to find work. Any provision to combat trafficking must not interfere with a woman’s right to mobility.

7.2.4 Comply with reporting obligations and implement recommendations

Most international instruments require a state party to report on the implementation status of the Convention. The government of Nepal need to submit its periodic reports on time and implemented the recommendations of the treaty bodies. under the CEDAW, ICCPR, ICESCR, CRC, CERD etc. specially concluding comments of these instruments.

7.2.5 Use Shadow/alternate reporting as a monitoring tool

“Shadow” or alternative reports prepared by civil society organizations should be used to document and monitor the implementation of human rights instruments. Based on these reports, concerned international bodies can require government agencies to act and recommend improvements to anti-trafficking measures. Of course, the state should implement these recommendations seriously. However, NGO should prepare shadow report giving special focus to the trafficking.

7.2.6 Complaint mechanism to hold the state accountable

Access to international complaint mechanism and inquiry process such as Optional Protocol to CEDAW needs to be ratified to handle complaints from individuals or civil society organizations if a state fails to meet its international obligations. Information about this mechanism must be widely disseminated and civil society organizations should use this mechanism to assist an individual or group whose rights have been violated. Capacity building of individuals and organizations to use sycg mechanism is also needed.

7.2.7 Amend domestic law and policy to reflect ratified conventions

Domestic laws, policies and programs must incorporate the provisions of ratified international conventions related to trafficking. For example, CEDAW General Recommendation 19 identifies new forms of sexual exploitation such as sex tourism,
importing laborers from developing countries for sexual exploitation under the pretext of employment as domestic help and forced marriages between women from developing countries and foreign nationals. Similarly, Protocol on Trafficking provides comprehensive guideline to take all necessary measures to combat trafficking of women and children.

7.2.8 Make trafficking an extraditable offence

The existing extradition treaty between Nepal and India must be reviewed to include trafficking in human beings as an extraditable offence and the treaty must be enforced. Nepal must also negotiate extradition treaties with other countries of destination to ensure extraterritorial jurisdiction.

7.3 Ensure Strong Legal Framework

Although Nepal adopted the Traffic in Human Beings (Control) Act in 1986, the law has been ineffective because of several inherent weaknesses. The Act treats trafficking as a failure of moral values rather than an egregious violation of a woman’s human rights. The law focuses on crime prevention but ignores the victim’s perspective and omits provisions for rehabilitation or reintegration. Nepal needs to enact legislation that effectively addresses the complex crime of trafficking and recognizes the impact of trafficking on the rights of women. Legal framework should ensure have comprehensive definition, adequate punishment, define aggravated circumstances and severe punishment in grave offences, in-camera hearing, witness protection policies and compensation to the victim. Major rights provided under various international human rights instruments that includes right against exploitation, right to non-discrimination (on the basis of being victim of trafficking or having worked for sex industry), right to privacy, right to information, right to be represented by lawyers, freedom of movement, right to medical, legal, psychological assistance, compensation, right to safety, right to voluntary repatriation and right to residence etc to be protected. Special need of children and women should be taken into consideration. Therefore child may need to be protected from all forms of sexual exploitation where as adult’s right to self determination need to be respected. Recommendations for amending the laws are based on gaps and weakness in human trafficking law as well as Government Bill on Human trafficking identified during the study.
7.3.1 Adopt a comprehensive definition of trafficking

The definition of trafficking in the Human Trafficking (Control) Bill, 2001, is not comprehensive. The following is a comprehensive definition of trafficking that need to be adopted:

**Trafficking in persons shall mean:**

a. “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

d. “Child” shall means any person under eighteen years of age.

7.3.2 Decriminalize prostitution

Criminalizing prostitution victimizes a trafficked woman twice; she is victimized by the trafficker and again by the state. This inevitably reduces a victim’s willingness to report a trafficking crime. Conflating prostitution and trafficking reinforces the morality approach to this crime and undermines efforts to establish trafficking as a human rights violation. Decriminalization of prostitution will focus law enforcement efforts on the real criminals. Prostitution and trafficking should be dealt separately.

---

7.3.3 Shift the burden of proof in all trafficking cases

The limited shift in the burden of proof should include relatives of trafficking victims as in many cases close relatives are involved in trafficking.

7.3.4 Compensate victims

The law should be amended to provide compensation to victims beyond the amount the perpetrator is fined, as this does not insure adequate compensation. Law should be used to freeze and confiscate the asset of traffickers to compensate the victim of trafficking. If compensation is not available from the offender, State should endeavor to provide financial compensation to the victim for physical and mental damage she/he has gone through as a result of the serious crime. Such compensation also to be provided to her/his dependent family, particularly, dependants of those who have died or become physically or mentally incapacitate.

7.3.5 Improve court procedures

Trial procedures should be implemented to ensure that cases proceed expeditiously. For example, permitting investigation without prior court approval and effective measures for domestic and international service of summons would substantially reduce the time required to investigate and try trafficking cases. All the courts should be computerized for sending the notices by email or fax and in camera hearing needs to be provided.

7.3.6 Protect due process rights during investigation

The Human Trafficking (Control) Bill confers broad investigative powers on the police including search and arrest without a warrant that violates the right to privacy guaranteed in the Constitution. Without proper safeguards, police can easily violate the due process rights of both victims and defendants. Hence during the investigation due process of law must be followed.

7.3.7 Eliminate presumed offences

The Human Trafficking (Control) Bill 2001 establishes for presumed trafficking offences but fails to clearly define what they are. This provision is not necessary if the definition of trafficking is broadened.
7.3.8 Provide assistance to victims and witnesses

The Human Trafficking (Control) Bill should include a provision for victim and witness protection to insulate victims and witnesses from the threats and intimidation that are frequently associated with an organized crime like trafficking. This protection should include non-disclosure of the victim and witness identity, a safe place to stay during the investigation, and counseling and health services. Information on victims’ rights, available protection and legal proceedings should be provided in language understandable to survivors.

7.3.9 Allow conditional right of appeal for victims

The data indicate that many government attorneys fail to effectively pursue trafficking cases. If a government attorney fails to appear in court or to properly file an appeal the victim should be allowed to appeal on her own behalf.

7.4 Improve Enforcement Mechanisms

When compared to the estimated number of women trafficked, the number of registered cases is quite low. Inadequate budgets and expertise create major challenges. Moreover, the efficiency and credibility of law enforcement agencies are questionable. Police and government attorneys fail to cooperate with one another. Poor investigation and inadequate charge sheets result in a high number of acquittals. Widespread complaints of rampant corruption in all three components of the criminal justice system are another major challenge.

Even judicial decisions do not provide a consistent approach to the definition of trafficking. There are no uniform rules of evidence to establish guilt in trafficking cases. Courts have interpreted the limited shift of the burden of proof as requiring additional independent evidence to corroborate the victims’ statements before the burden shifts. As such evidence is usually not available, victims are deprived of the benefit of this powerful tool.

---

3 Also see, Condemned to Exploitation: The Impact of Corruption in the Criminal Justice System on Women CeLRRd, 2000, pp 17-19, 25-26.
4 Focus Group Discussion conducted with judges, government attorneys, lawyers and police, Kathmandu, July 1, 2001.
The Supreme Court reversal of convictions poses yet another challenge. Minimum sentences, lengthy court proceedings, victim and witness hostility, failure to use international human rights instruments, indifference to legal procedures and inadequate legal representation undermine efforts to curb trafficking. Timely execution of judgments is yet another challenge for trafficking cases. These delays often allow the defendant to escape, aided by an organized crime network. Recommendations for improving the efficiency and strength of enforcement mechanism are as follows.

7.4.1 Facilitate reporting

Since registration of trafficking cases is a great challenge for law enforcement, the government should create an environment that encourages reporting.

a. Victims and witnesses must feel protected.
b. Those living in trafficking-prone zones should be warned about modes and kinds of persons being involved in trafficking and the legal mechanisms available to victims.
c. Community members should be informed that trafficking is a violation of human rights and not a reason for shame and social stigma.
d. Police must cooperate with victims and demonstrate gender sensitivity.
e. Encourage *suo moto* (self initiated) investigation by the police.
f. Maintain the confidentiality of third parties who report trafficking.
g. Trafficked person should not be stigmatized.

7.4.2 Liberalize the standard of acceptable evidence

The majority of the respondents believe that the most important evidence against trafficking is the victim’s statement. Other forms of evidence including a medical evaluation of the victim’s physical and mental condition, observations of the victim’s physical condition and statements of the co-defendant, close friends and relatives.
7.4.3 Improve access to information

The Constitution guarantees the right to information and provides for public scrutiny of the activities of law enforcement agencies. The following measures will enhance public access to information:

a. Provide public access to information (except the identity of the victim) from the time the FIR is filed to the execution of the judgment.

b. Prepare the deed of public inquiry (Sarjamin Muchulka) in consultation with the people living in the area where the offence was committed.

c. Establish information center on trafficking/modes/presentation/prone area/potential traffickers/victims situation/law/ access to justice/support system etc.

7.4.4 Improve evidence collection

Insufficient evidence and poor preparation result in low conviction rates. Police and government attorneys must increase cooperation to improve investigation, evidence collection and case preparation before bringing the case to court. Physical and mental health reports should be collected as evidence of trauma and sexual exploitation associated with trafficking. Documents from foreign countries, such as an official letter from a foreign embassy verifying that a woman was trafficked, should be admissible.
7.4.5 Frame clear charge sheets

An ambiguous charge sheet makes the case weak. Government attorneys should be trained to frame the charge in clear, specific language. The existing approach of prosecuting multiple defendants based upon a single charge sheet should be changed so that a clear specific charge sheet is prepared for each defendant.

7.4.6 Give changed statement the benefit of doubt

If a victim or witness in a trafficking case is unwilling to testify, the court should accept other forms of corroborating evidence. The court should ascertain whether the defendant has threatened the victim or witness. If so, the court should accept such threats as evidence of guilt. Further, a victim’s initial statement should not be dismissed merely because she recants it or fails to reconfirm it with the court.

7.4.7 Establish women’s cells in every district

Nepal Police should establish women’s cells in every district to encourage reporting of trafficking offenses and ensure effective investigation of trafficking cases. These cells should have adequate authority and structure to initiate trafficking investigations.

7.4.8 Ensure easy and prompt access to justice

Until women have access to inexpensive, easy and prompt delivery of justice, effective legislation will be useless. Therefore, trafficking legislation must provide women wider access to de facto justice by making sure they are well informed about the legal systems, protected throughout the legal process and have access to effective representation.

Many trafficking cases fail to result in a conviction because government attorneys fail to appear in court. Attorneys who fail to appear or to adequately consult with the victim should be followed departmental action.

7.4.9 Reconsider reconfirmation requirement

Many cases are dismissed because the victim fails to appear in court to reconfirm her statement. If a witness reports trafficking and the victim is held by her traffickers, it is impossible for the victim to appear in the court. Therefore, a victim’s failure to reconfirm the original statement of a third party should not be grounds for dismissal of the case.
Minor inconsistencies in the victim’s statements to the police and the court are quite natural given the length of time from the commission of offence to the beginning of the trial. These inconsistencies should not be used to vitiate the charge.

7.4.10 Develop a consistent judicial approach

Courts decisions should be based on established precedent to guarantee a consistent approach in deciding trafficking cases that are heinous crime against women and children.

In almost all cases, perpetrators received minimal sentence of ten years of imprisonment, although the law provides for a sentence of ten to twenty years. Minimum sentences mitigate the seriousness of the crime and are not effective deterrents. The court should impose the maximum penalty based on objective sentencing guidelines.

7.4.11 Provide appropriate training

Training develops skills and knowledge, improves job satisfaction and motivates employees. Law enforcement personnel must receive training on human rights and the relationship of gender-based violence to trafficking. Appropriate training must:

• Immediately develop police expertise in dealing with trafficking offences.
• Educate government attorneys and judges about the domestic application of international human rights instruments and sensitize court officials, including judges, to gender issues and established human rights norms.
• Sensitize judges to their role in deterring trafficking by imposing stiffer sentences.
• Provide joint programs for police and government attorneys to promote cooperation and coordination.

7.4.12 Allocate adequate funding

None of these recommendations can be implemented without adequate funding. Improved reporting, thorough investigation and training all require increased funding. Hence government budget should adequately allocated for law enforcement agencies with special focus on violence against women including support mechanism.
7.4.13 Enforce judgments

The law should provide for confiscation of the defendant’s property to make sure the defendant does not flee before sentencing or dispose of assets before paying the fine.

7.4.14 Establish monitoring mechanisms to evaluate enforcement

Each of the law enforcement agencies should identify indicators and implement a system to effectively monitor its programs and activities. Civil society should also be involved in the monitoring process.

The following initiatives must be taken to strengthen timely monitoring:

- Police should assign trafficking investigation a high priority and appoint an appropriate police authority to monitor the FIR process and the investigation to ensure that police personnel are functioning effectively.
- The Constitutional requirement that the Attorney General responsible for submission of an annual report to Parliament is an effective monitoring mechanism. The concerned Parliamentary Committee should review and discuss the report in detail and follow up with inquiries and recommendations to improve efforts to curb trafficking.
- Since the government attorney has the power to decide whether to initiate a case, why a trafficking case was not filed must be documented with the justification.
- A general mechanism to monitor the criminal justice system should be implemented including an inspection provision under the Administration of Justice Act, the annual report of the Supreme Court, surprise inspections and disciplinary actions under applicable legislation.
- The Judicial Council and the Judicial Service Commission should create an effective monitoring network. These two Constitutional bodies must take

---

5 Some indicators have already been developed. See: “Monitoring Mechanism of National Laws, Policies and Regional and International Instruments Relating to Trafficking in Women and It’s Nexus with Migration and HIV/AIDS conducted by FWLD for JIT, October 2001.

6 The overall functioning of judiciary is not monitored. A committee of the Supreme Court prepares an annual report of the Court’s activities and the activities of the subordinate courts. The full court reviews and approves the report. However, the report is not analyzed in depth and no questions are raised about weak enforcement of trafficking laws and pending cases. The Report does not mention trafficking cases as a separate category; they are included in the miscellaneous category.
immediate legal action in cases of judicial misconduct or misconduct of civil service employees. A strong system of inspection and inter-departmental cooperative action should be implemented.

- Members of civil society should form monitoring groups from the grassroots level to the national level. These groups should monitor trafficking case from the FIR registration process with the police, through prosecution by the government attorney to trial and sentencing. Outside monitoring will not only curb corruption but also provide critical information about issues such as negligence and/or delay in the investigation, prosecution and adjudication of cases.

7.4.15 Control corruption

Corruption is rampant, particularly in law enforcement. Concerned authorities should take prompt action to stop corruption enforce trafficking laws and redress the harm caused by corrupt officials. The Anti-corruption Act of 1960 should be rigorously enforced with a focus on presumed offences.

7.5 Provide Rescue and Rehabilitation Services

Efforts to control trafficking should include efforts to improve the lives of women who have been trafficked or are vulnerable to trafficking. Therefore, an essential part of any plan to stop trafficking should focus on rescuing trafficked girls and women, helping them return to their homes and families, and providing psychological and medical assistance, housing and skills training.

Various policies address trafficking, but they lack an integrated approach and coordination among line agencies. The National Plan of Action specifically directed to trafficking has not been implemented because the NPA is not linked to other line ministries. Further, the National Plan of Action lacks a rights perspective and conceptual clarity. In order for this national effort to work, the approach must change substantially.

7.5.1 Implement rights-focused rescue and rehabilitation programs

Although rescue, repatriation and rehabilitation are key components of anti-trafficking initiatives, they involve complex issues. Rescue, rehabilitation and reintegration must be based on informed consent or they violate certain rights such as self-determination.
The emphasis on rehabilitation is often criticized as paternalistic because not all women want or need rehabilitation. Rather than violating a woman’s rights by imposing rehabilitation, women should be empowered through psychological and financial support and skill development. Moreover, rehabilitation should not be limited to shelter, food and clothes. Victims of trafficking often need legal, psychological and medical support. As government rehabilitation programs are inadequate, new programs should be implemented immediately by governmental and non-governmental agencies. Rehabilitation center should respect dignity and freedom of trafficked person.

7.5.2 Involve diplomatic missions in rescue efforts

Countries of destination must assist in returning trafficked women at a diplomatic level. The government of Nepal must engage countries (country of destination) such as India, the United Arab Emirates and Saudi Arabia in embassy-level negotiations to rescue and repatriation of trafficking victims and effectively combat the problem of trafficking in women.

7.5.3 Strengthen the role of NGOs

The role of NGOs can be strengthened through involvement in the following activities:

a. Disseminating information on laws, policies and human rights instruments
b. Advocacy and lobbying
c. Awareness raising
d. Providing legal/medical/psychological support
e. Conducting training on the legal process
f. Preparing shadow reports
g. Cooperating with an international complaint mechanism
h. Conducting border monitoring
i. Providing rescue and rehabilitation services

7.5.4 Hold the receiving country accountable through bilateral cooperation

Many trafficking victims are detained by the receiving and transit country for violating immigration laws, laws against prostitution, or as witnesses. A trafficking victim is more vulnerable to arrest, detention and deportation because destination countries
do not recognize her as a victim of a crime. Receiving countries should

- Allow the victim to remain in the country temporarily or permanently.
- Ensure return to the country of origin is voluntarily.
- Guarantee the safety of the victim.
- Prevent further victimization by refraining from arresting or harassing the victim for engaging in sex or traveling without proper documents.
- Permit the victim to travel and re-enter the country.
- Provide legal assistance in collection of documents for evidences or legal action.

Trafficking is a regional and global phenomenon that cannot alone be dealt effectively at the national level. International, bilateral cooperation plays important role in combating crime. Lack of repartition mechanism many trafficked children and women are compelled to be in the rehabilitation center of Indian Government. Hence had to adopt bilateral agreement preventing crime, protecting right and dignity of trafficked persons. Bilateral arrangement should also include areas for sharing information, investigation mechanism, court procedures, support system/rescue repatriation mechanism, rehabilitation systems etc. Due to lack of repartition mechanism many trafficked children and women are compelled to be in the rehabilitation center of Indian Government.

7.5.6 Address the demand side

Thus far, trafficking interventions have focused on traffickers and ignored the problem of demand. Until demand side is addressed trafficking cannot be controlled, hence mechanism and strategies to address and discourage the demand side to be developed.

7.6 Assess Efforts to Curb Trafficking

Efforts to curb trafficking should be measurable in order to determine their effectiveness. However, the lack of reliable data on trafficking is major barrier to

7 Sapana Pradhan Malla, “They are waiting to come home,” The Himalayan Times, March 8, 2004
formulating effective policies and programs. Law enforcement agencies do not maintain segregated data on trafficking and available data is inconsistent, raising questions about reliability. Collecting reliable data on trafficking and migration activities is a challenge because Nepal shares a long, open, unregulated border with India. Despite these challenges, there must be a systematic evaluation of how well the state controls trafficking.

7.6.1 Research and collect data

The government has not studied the prevalence or the impact trafficking in Nepal. This should remedied immediately by developing qualitative and quantitative indicators to assess the impact of trafficking on victims, their families, society and the nation. The government should monitor and collect reliable data on trafficking and migration by training village development committees, municipalities, district development committees and border authorities in effective data collection techniques in collaboration with civil societies, UN System and donor agencies. Registration of birth, marriage/migration should effectively implemented.

7.6.2 Implement and monitor the National Plan of Action

The National Task Force on Trafficking created by the NPA should develop a comprehensive anti-trafficking program, maintain facilities for victims, secure an adequate budget and link health care services and education programs to the concerned government bodies. District task forces must be established in every district and the national task force and the district task forces need to coordinate in implementing the NPA. In addition, the VDC and municipality level task forces should be given a clear mandate to carry out their activities. The NPA should also include a specific program to rescue and reintegrate victims and a monitoring mechanism with specific indicators to verify and evaluate the performance and the status of programs and activities.

7.6.3 Develop monitoring indicators

A monitoring manual containing the substantive, structural and procedural aspects of monitoring should be compiled. Civil society organizations must be involved in monitoring and gender specific data must be maintained by law and policy enforcement agencies.

---

8 The requirement of identity cards for air travelers in Nepal and India is a counter-terrorist measure, not an effective anti-trafficking measure.
Monitoring indicators of law and law enforcement mechanism has already been developed for Joint Initiatives against Trafficking in Millennium by FWLD.9

7.6.4 Improve border monitoring

The long, unregulated open border with India poses a serious challenge to controlling trafficking. The existing Nepal-India treaty of 1950 provides for special treatment for the people of the two countries and requires no travel documents. This results in unchecked and unregulated border movement. A recording system should be developed to record the names and purpose of visit of all persons crossing the border and a powerful border monitoring and patrolling body should be created under the Act.

Border patrolling should be initiated to find, check and control informal trafficking routes. Border check posts monitored by organizations from civil society should be coordinated with police check posts to ensure that every transit point is monitored rather than establishing two check posts at a single transit point. Rescued or repatriated victims could also be employed to identify traffickers and potential victims. All border-monitoring efforts should respect the rights of trafficked women. Victims should not be criminally prosecuted for their work as prostitutes or for immigration violations.

---

BIBLIOGRAPHY

UN Conventions


5. **UN 1949** Convention for Suppression of the Traffic in Person and of the Exploitation of the Prostitution of the others.


7. **UN 1953** Slavery Convention.

8. **UN 1979** Convention on the Elimination of All forms of Discrimination against Women.

Constitution and Acts


Rules

Bill and Policy


5. HMG-N 1999 The National Plan of Action on Control of Trafficking MOWCSW/HMG/Nepal.


8. HMG-N ... National Policy on Control of HIV/AIDS and Sexual Disease, HMG/Nepal.


Reports

<table>
<thead>
<tr>
<th>No.</th>
<th>Author</th>
<th>Title</th>
<th>Source</th>
</tr>
</thead>
</table>
13. **UN**  
   **2000**  
   Special Rapprteur on Violence against Women, its causes and consequences, in accordance with the Commission on Human Rights Resolution, 2000/45; GE. 01-10865 (E).

14. **Gunasheklhara Savitri**  
   **1999**  
   High Level Intergovernmental Meeting to Review Regional Implementation of the Beijing Platform for Action, organized by ESCAP.

15. **WOREC**  
   **2000**  
   A Situational Analysis of Trafficking in Women.

16. **USAID**  
   **2004-2005**  
   Tips Report

17. **UNIFEM**  
   **2002**  
   Analysis on SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002, unpublished study report submitted by Ms. Sapana Pradhan Malla to UNIFEM

### Books

1. **HMG-N**  
   **2000-2001**  

2. **HMG-N**  
   **2000-2001**  

3. **WOREC**  
   **2000**  

4. **Bhasin, Avatarsing**  
   **1997**  

5. **UNIFEM/IIDS**  
   **2002**  
   Status and Dimension of Trafficking within Nepalese Context

### Journals

1. **HMG-N**  
   **1999**  
### Annex-I

**International Human Rights Instruments Ratified Or Acceded To By Nepal**

<table>
<thead>
<tr>
<th>S. N.</th>
<th>International Instruments</th>
<th>Ratification or Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Slavery Convention, 1926</td>
<td>Jan. 7, 1963 (A)</td>
</tr>
<tr>
<td>2.</td>
<td>Protocol Amending the Slavery Convention</td>
<td>Jan., 7 1963 (A)</td>
</tr>
<tr>
<td>3.</td>
<td>Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery, 1956</td>
<td>Jan. 7, 1963(A)</td>
</tr>
<tr>
<td>8.</td>
<td>International Convention Against Apartheid in Sports, 1985</td>
<td>March 1, 1989(R)</td>
</tr>
<tr>
<td>14.</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984</td>
<td>May 14, 1991(A)</td>
</tr>
</tbody>
</table>
### ILO Conventions Ratified or Acceded to by Nepal

<table>
<thead>
<tr>
<th>S.N.</th>
<th>International Instruments</th>
<th>Ratification or Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>The Discrimination (Employment and Occupation) Convention, 1958 (No 111)</td>
<td>September 19, 1974 (R)</td>
</tr>
<tr>
<td>2.</td>
<td>The Minimum Wage Fixing Convention, 1970 (No 131)</td>
<td>September 19, 1974</td>
</tr>
<tr>
<td>3.</td>
<td>The Equal Remuneration Convention, 1951 (No 100)</td>
<td>October 6, 1976 (R)</td>
</tr>
<tr>
<td>4.</td>
<td>The Weekly Rest Convention, 1921 (No 14)</td>
<td>December 10, 1986</td>
</tr>
<tr>
<td>5.</td>
<td>The Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144)</td>
<td>March 21, 1995 (R)</td>
</tr>
<tr>
<td>6.</td>
<td>Convention Concerning Minimum Age for Admission to Employment, (No 138)</td>
<td>October 4, 1996 (R)</td>
</tr>
<tr>
<td>7.</td>
<td>Convention concerning the application of the Principles of the right to organize and bargain collectively (No 98)</td>
<td>October 4, 1996</td>
</tr>
</tbody>
</table>

*Note: “A” refers to the conventions acceded to and “R” refers to the ratified ones.*
## Annex-III

### List of Interviewees

<table>
<thead>
<tr>
<th>S.N.</th>
<th>Name</th>
<th>Organisation</th>
<th>Designation</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Hon’ble Ms. Shanta Manavi</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Balkhu</td>
</tr>
<tr>
<td>2.</td>
<td>Hon’ble Ms. Sushila Nepal</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>3.</td>
<td>Hon’ble Ms. Ashta Lakshmi Shakya</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>4.</td>
<td>Hon’ble Ms. Bidya Devi Bhandari</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>5.</td>
<td>Hon’ble Ms. Urmila Aryal</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>6.</td>
<td>Hon’ble Mr. Bir Bahadur Lama</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Makwanpur</td>
</tr>
<tr>
<td>7.</td>
<td>Hon’ble Mr. Lila Mani Pokhrel</td>
<td>Sayukta Jan Morcha</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>8.</td>
<td>Hon’ble Mr. Chitra Bahadur K.C.</td>
<td>CPN (Masal)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>9.</td>
<td>Hon’ble Mr. Prem Bahadur Singh</td>
<td>CPN (UML)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>10.</td>
<td>Hon’ble Mr. Navraj Subedi</td>
<td>CPN (Masal)</td>
<td>MP</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>11.</td>
<td>Mr. Kosh Kumar Nemwang</td>
<td>Ministry of Home</td>
<td>Under Secretary</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>12.</td>
<td>Dr. Babu Ram Regmi</td>
<td>Ministry of Law, Justice and Parliamentary Affairs</td>
<td>Joint Secretary</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>13.</td>
<td>Mr. Deep Basnet</td>
<td>Dept of Labour</td>
<td>Director</td>
<td>Baneswor</td>
</tr>
<tr>
<td>14.</td>
<td>Mr. Pratap Kumar Pathak</td>
<td>Ministry of Women, Children and Social Welfare</td>
<td>Joint Secretary</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>15.</td>
<td>Mr. Rudra Nepal</td>
<td>Ministry of Foreign Affairs</td>
<td>Under Secretary</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>16.</td>
<td>Dr. Ganga Shakya</td>
<td>Ministry of Health</td>
<td>Program Consultant</td>
<td>Teku</td>
</tr>
<tr>
<td>17.</td>
<td>Mr. Gyanendra Karki</td>
<td>National Planning Commission</td>
<td>Under Secretary</td>
<td>Singhadarbar</td>
</tr>
<tr>
<td>19.</td>
<td>Mr. Basanta Kuwar</td>
<td>Police Headquarters</td>
<td>SSP</td>
<td>Naxal</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Position</td>
<td>Organization</td>
<td>Office</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>21</td>
<td>Mr. Damodar Regmi</td>
<td>District Public Attorney</td>
<td>Rupandehi</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Mr. Dilli Raman Acharya</td>
<td>District Public Attorney</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Mr. Narendra Bahadur Thapa</td>
<td>District Public Attorney</td>
<td>Nepalgunj</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Mr. Kumar Chudal</td>
<td>Appellate Government</td>
<td>Butwal</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Mr. Lava Kumar Mainali</td>
<td>Legal Advisors</td>
<td>Dhopidhara</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>Mr. Ratna Shrestha</td>
<td>FWLD</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>Mr. Govinda Bahadur Thapa</td>
<td>Police Headquarter</td>
<td>Naxal</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Hon'ble Ms. Indira Rana</td>
<td>NHRC</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>Ms. Kamala Parajuli</td>
<td>Apekshya Monthly</td>
<td>Singhadarbar</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Mr. Ram Hari Aryal</td>
<td>Parliament Secretariat</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Hon'ble Gyanendra Karki</td>
<td>Special Court</td>
<td>Anamnagar, Kathmandu</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Mr. Basanta Basnet</td>
<td>-</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>Hon'ble Janardan S. Poudel</td>
<td>District Court</td>
<td>Rupandehi, Bhairahawa</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Ms. Sandhya Shrestha</td>
<td>OWN</td>
<td>Rabi Bhawan</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Mr. Krishna Upadhyaya</td>
<td>INSEC</td>
<td>Kalanki</td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Ms. Durga Ghimire</td>
<td>ABC Nepal</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Ms. Indira Phuyal</td>
<td>AATWIN</td>
<td>Chabahil</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Dr. Madavi Singh</td>
<td>NNAGT</td>
<td>Suichataar</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>Mr. Ram Kumar Kamat</td>
<td>Gorkhapatra</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Mr. Khagendra Niraula</td>
<td>Mali Nepal</td>
<td>Gaushala</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Dr. Renu Raj Bhandari</td>
<td>Worek</td>
<td>Gaurighat</td>
<td></td>
</tr>
<tr>
<td>42</td>
<td>Ms. Geeta Tamang</td>
<td>Mali Nepal</td>
<td>Gaushala</td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>Ms. Kabita K.C.</td>
<td>Mali Nepal</td>
<td>Gaushala</td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>Ms. Binita Tamang</td>
<td>ABC Nepal</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>45</td>
<td>Ms. Anju Thapa</td>
<td>Mali Nepal</td>
<td>Gaushala</td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Ms. Sarita Bhujel</td>
<td>-</td>
<td>Kathmandu</td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>Ms. Sila Yogi</td>
<td>OXFAM</td>
<td>Santa Bhawan</td>
<td></td>
</tr>
</tbody>
</table>

Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal
This questionnaire is developed for the study on ‘Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal’.

<table>
<thead>
<tr>
<th>Name</th>
<th>……………………………………………………………………………………………………………………..</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designation</td>
<td>……………………………………………………………………………………………………………………..</td>
</tr>
<tr>
<td>Organization</td>
<td>……………………………………………………………………………………………………………………..</td>
</tr>
<tr>
<td>Address</td>
<td>……………………………………………………………………………………………………………………..</td>
</tr>
<tr>
<td>Date</td>
<td>……………………………………………………………………………………………………………………..</td>
</tr>
</tbody>
</table>

1. What are the main causes of trafficking of women and children?
   More than one option could be marked (√) as needed.

<table>
<thead>
<tr>
<th>Cause</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Patriarchy</td>
<td></td>
</tr>
<tr>
<td>Poverty</td>
<td></td>
</tr>
<tr>
<td>Illiteracy</td>
<td></td>
</tr>
<tr>
<td>Lack of employment opportunity</td>
<td></td>
</tr>
<tr>
<td>Denial of property rights</td>
<td></td>
</tr>
<tr>
<td>Not to take women as a family member</td>
<td></td>
</tr>
<tr>
<td>To view women as commodity</td>
<td></td>
</tr>
<tr>
<td>Racial discrimination</td>
<td></td>
</tr>
<tr>
<td>Others:</td>
<td></td>
</tr>
</tbody>
</table>
2. **What are the modes of trafficking in women and children?**
More than one option could be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Mode of Trafficking</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the pretext of marriage</td>
</tr>
<tr>
<td>In the pretext of employment</td>
</tr>
<tr>
<td>In the pretext to visit others places</td>
</tr>
<tr>
<td>Sold by family</td>
</tr>
<tr>
<td>After making the victim unconscious</td>
</tr>
<tr>
<td>Voluntarily</td>
</tr>
<tr>
<td>By police and Pimp’s nexus</td>
</tr>
<tr>
<td>Others: ......................................................................</td>
</tr>
</tbody>
</table>

3. **What are the effects of trafficking on victims?**
More than one option could be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexually transmitted diseases</td>
</tr>
<tr>
<td>Effect on health</td>
</tr>
<tr>
<td>Physiological effect</td>
</tr>
<tr>
<td>Deprivation from educational opportunity</td>
</tr>
<tr>
<td>Social stigma</td>
</tr>
<tr>
<td>Effects on married and family life</td>
</tr>
<tr>
<td>Others: ......................................................................</td>
</tr>
</tbody>
</table>

4. **What are the effects of trafficking on the victim’s family and society?**
More than one option could be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexually transmitted diseases</td>
</tr>
<tr>
<td>Socially betrayed</td>
</tr>
<tr>
<td>Physiological effect</td>
</tr>
<tr>
<td>Family disintegration</td>
</tr>
<tr>
<td>Extra financial burden</td>
</tr>
<tr>
<td>Statelessness of victim’s children</td>
</tr>
<tr>
<td>Others: ......................................................................</td>
</tr>
</tbody>
</table>
5. **What are the effects of trafficking on the state?**

More than one option could be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Negative profile of the state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase in expenditure on victim’s health care and rehabilitation</td>
</tr>
<tr>
<td>Loose human resource</td>
</tr>
<tr>
<td>Others………………………………………………………</td>
</tr>
</tbody>
</table>

6. **In your opinion, trafficking in women and children is the problem of women, children or others?**

Mark (✓) any as appropriate.

<table>
<thead>
<tr>
<th>Women</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td></td>
</tr>
<tr>
<td>Others…………………………………………</td>
<td></td>
</tr>
</tbody>
</table>

7. **What are the causes that impede control of trafficking in women and children?**

More than one option could be marked (✓) as needed.

| Lack of laws |
|----------------------|---|
| Lack of effective implementation |
| Political criminalization |
| Lack of bilateral or/and regional assistance |
| Lack of gender awareness |
| Flourishing sex market |
| Geographical reason (open border) |
| Others………………………………………… | |

8. **(a) What are the policies and programs against trafficking?**

........................................................................................................................................................................

**(b) What are the weaknesses in these policies and program?**

........................................................................................................................................................................
c) What are the inconsistencies in these policies and program?

9. Is the existing law adequate to control trafficking in women and children?

If not, how should the laws to control trafficking in women and children?

10. Have you read the Bill prepared by Ministry of Women, Children and Social Welfare (MWCSW), is there any need for further improvement in the Bill?

11. In your opinion, is the role of police to control trafficking in women and children effective? Yes/No

12. If role of the police is not effective to control trafficking in women and children; what are the causes for this?

More than one option could be marked (✓) as needed.

- Corruption
- Political pressure
- Tremendous workload
- Lack of training/awareness
- Lack of special unit
- Less number of reporting
- Lack of physical facility
- Mandatory provision of approval of the court for investigation
- Others

What are the improvements that are needed to strengthen the role of police?

- Human Resources

- Physical facility
13. In your opinion, is role of the public attorney to control trafficking in women and children, effective? Yes/No
   If yes, .................................................................

14. If no, what are the causes for this?
   More than one option could be marked (✔) as needed.

   | Corruption          | ✔ |
   | Lack of training    | ✔ |
   | Lack of motivation  |   |
   | Lack of human rights perspective |   |
   | Lack of gender awareness |   |
   | Lack of coordination with police | ✔ |
   | Others              |   |

What are the improvements needed to strengthen the role of public attorney?

   Human Resources

   Physical Facility

   Investigation/preparation of case and pleading

   Supervision
15. In your opinion, is the role of court to control trafficking of women and children, effective?
If yes,

16. If no, what are the causes for this?
More than one option could be marked (√) as needed.

- Corruption
- Lack of gender awareness
- Lack of in-camera hearing
- Lack of skilled human resource
- Too much workload
- Complex and long procedure
- Superficial investigation/collection of proofs
- Others ……………………………………………

17. Do you think it is appropriate to entrust the newly constituted special court the cases of trafficking of women and children?

- Yes
- No
- Don’t know

18. If no, what improvements are needed to strengthen the role of the court?

- Human Resources

- Physical facilities
Specialization and prioritization of cases
..............................................................................................................................
Other
..............................................................................................................................

19. What type of proof is appropriate for the case of trafficking of women and children?
More than one option can be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Proof Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting of victim</td>
</tr>
<tr>
<td>Psychological state of the victim</td>
</tr>
<tr>
<td>Physical state of the victim</td>
</tr>
<tr>
<td>Statement of close relatives/friends of the victim</td>
</tr>
<tr>
<td>Statement of the co-accused</td>
</tr>
<tr>
<td>Evaluation of Doctor and psychologists</td>
</tr>
<tr>
<td>Others</td>
</tr>
</tbody>
</table>

20. What are the causes for minimal reporting of the cases of trafficking of women and children?
More than one option can be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Cause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fear of social stigma</td>
</tr>
<tr>
<td>Lack of confidence towards implementing agencies</td>
</tr>
<tr>
<td>Harassment on the process of case</td>
</tr>
<tr>
<td>Lack of victim’s protection policy</td>
</tr>
<tr>
<td>No provision of compensation</td>
</tr>
<tr>
<td>Lack of family support</td>
</tr>
<tr>
<td>Not to be rescued from brothels</td>
</tr>
<tr>
<td>Lack of encouragement from related agencies to report the case</td>
</tr>
<tr>
<td>Frightened or scared</td>
</tr>
<tr>
<td>Lack of awareness/ ignorance</td>
</tr>
<tr>
<td>Others</td>
</tr>
</tbody>
</table>
21. **What are the causes for victims being hostile (change of statement)?**

More than one option can be marked (✓) as needed.

- Organized crime
- Lack of counseling to victim/witness
- Lack of security
- False promise
- Ordeal to repeatedly give the statement
- Lack of confidence
- Others ............................................

22. **Is it necessary to criminalize commercial sex work?**

- Yes
- No
- Don't know

23. **If yes/no why?**

More than one option can be marked (✓) as needed.

<table>
<thead>
<tr>
<th>If no</th>
<th>If yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>To protect the right to self determination</td>
<td>To sustain general and values and norms</td>
</tr>
<tr>
<td>To earn and to protect the employment right</td>
<td>To Control trafficking of women and children</td>
</tr>
<tr>
<td>To protect public health</td>
<td>To prevent sexual exploitation</td>
</tr>
<tr>
<td>To provide appropriate health care and information</td>
<td>To control crime</td>
</tr>
<tr>
<td>Demand of the changing time</td>
<td></td>
</tr>
<tr>
<td>To support the profession of tourism</td>
<td></td>
</tr>
</tbody>
</table>
| Others ............................................ | Others .................................
24. What is the cause for non-implementation of extradition treaty? How can the extradition treaty be implemented?

…………………………………………………………………………………………

25. Is the draft SAARC convention prepared to control trafficking of women and children, necessary? What are the improvements needed in this draft?

…………………………………………………………………………………………

26. Do you know about the US anti-trafficking legislation? How does this legislation affect Nepal?

…………………………………………………………………………………………

27. What are the weaknesses on the rehabilitating the rescued victims of trafficking?

More than one option can be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Lack of policies and programs</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of effective implementation</td>
<td></td>
</tr>
<tr>
<td>Lack of human rights perspective in implementation agency</td>
<td></td>
</tr>
<tr>
<td>Ill-treatment towards victims</td>
<td></td>
</tr>
<tr>
<td>Lack of resources</td>
<td></td>
</tr>
<tr>
<td>No property right for women</td>
<td></td>
</tr>
<tr>
<td>Other ....................</td>
<td></td>
</tr>
</tbody>
</table>

28. What are the aspects that need attention to rehabilitate the victims of trafficking of women and children?

More than one option can be marked (✓) as needed.

<table>
<thead>
<tr>
<th>Self employment program</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase social awareness</td>
<td></td>
</tr>
<tr>
<td>Physiological counseling and care</td>
<td></td>
</tr>
<tr>
<td>Physical counseling and care</td>
<td></td>
</tr>
<tr>
<td>Legal assistance</td>
<td></td>
</tr>
<tr>
<td>Family support</td>
<td></td>
</tr>
<tr>
<td>Others ..........................</td>
<td></td>
</tr>
</tbody>
</table>
29. What is the role of society to rehabilitate trafficking victim? How should be the role of society to rehabilitate the victims of trafficking?

30. What strategies need to be developed in the areas given below to control trafficking of women and children?
   a. On Policymaking level
   b. On Program implementation level
   c. On the role of police
   d. On the role of public attorney
   e. On the role of court
   f. On the role of media
   g. On bilateral relationship between India and Nepal
   h. On the program to rescue the victims of trafficking
   i. On rescue program to rehabilitate the victims of trafficking