

SOUTH ASIA WOMEN'S FUND

MOVING WOMEN



A STUDY
BY
GEETA RAMASESHAN

A Critical Overview of
International and Regional Normative Standards and Frameworks in
Trafficking of Women in Bangladesh, India And Nepal

About South Asia Women's Fund(SAWF):

SAWF is a Colombo based regional women's Fund, committed to supporting women-led interventions to enhance and strengthen access to women's human rights and countering violations thereof. It has worked closely with partners to support human rights in the context of conflict, identity, socio-economic deprivations and in relation to violence against women. In its present phase, it is committed to supporting the emergence of a regional human rights movement, which would address national and regional concerns. Its work is focused on developing a regional mandate that is informed by national realities, and is responsive to the rights and needs of the individual woman. The organisation, currently works in Bangladesh, Nepal, India, Pakistan and Sri Lanka.

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A critical overview of international and regional normative standards and frameworks in trafficking of women in Bangladesh, India and Nepal.

A Study by South Asia Women's Fund (SAWF)

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FOREWORD

Trafficking is a critical issue, which impacts women's abilities to access all their human rights, especially related to economic betterment. The region is home to countries that have been seen as source, transit and destination, for the women who are moved through false promises and are trafficked for the purposes of forced and coercive labour and other forms of exploitation, including commercial sexual exploitation.

The situation is compounded by the abject poverty the women struggle against, given the inequitable distribution of developmental dividends, increasing levels of human deprivation, and lack of economic opportunities. The absence/ineffectiveness of mechanisms for safe migration, control on women's agency and gender-based discrimination have been catalytic in the increase of violation of passage and movement, rendering them even more vulnerable to trafficking. The issue has emerged as a critical concern for women particularly in India, Bangladesh and Nepal, who have extensive shared borders, but very little in the name of shared support systems for the moving women.

Frequent upheavals in the political dynamics amongst these neighbouring countries have proven not only to be restrictive for free movement across the borders, but have augmented illegal, irregular, forced and unprotected movement including recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons- especially women. Also, as in case of India, other than cross-border trafficking, there has been increase in trafficking of women and children within the country for the purpose of debt bondage, forced labour, sexual exploitation and forced marriage.

However, limitation and variation in understanding and approaches taken to address trafficking is also visible amongst the groups working on the issue. Use of human rights perspective and framework to deal with trafficking is still at a nascent stage in the region. While the existing definition of trafficking is extremely broad, its limitation is in not outlining with clarity the rights of the victims and survivors. Furthermore, its understanding is limited to commercial sexual exploitation, with very little attention being paid to other forms of exploitation.

Differing understanding on approaches and perspective has also lead to tension between groups. For instance while responding to women and trafficking, as in addressing child trafficking, some groups have prioritized rescue and protection, consequences of which have rarely been explored. On the other hand, sufficient attention has not been paid to the intersection between migration for better life opportunities and trafficking for labour exploitation, and role of sending or receiving states towards ensuring protection from such exploitation. Neither is the value of such work recognized by the receiving states.

In the given context, it is imperative to pay more attention to the inter-sectionality of issues within trafficking and examine trafficking through a human rights lens. A perspective on issues such as the right to safe movement, consent, etc. must be strengthened amongst key actors at various levels. Definition of survivor is also to be understood in keeping with various contributory factors and contextual situation. Clearly she, as survivor, has to be the focus, not only while contributing her voices and experiences into discourses or discussions, but in designing policies, strategies, programmes, laws, interventions, activities, monitoring, evaluation and research so as to draw upon survivors real needs, realities, experiences, etc.

SAWF's programme on Right to mobility supports women rights organisations in Bangladesh, Nepal and India to implement the rights based approach in addressing issues related to enhancing women's right to mobility. ***Trafficking as such is not viewed as a separate issue but as a violation of women's right to movement.*** A three-pronged strategy encompassing capacity building, advocacy and promoting implementation of the rights based programmes at different levels (ranging from sub-regional and grassroots), is being implemented to ensure effective translation of right based approach on the ground. The supported interventions would contribute in identification of issues, strengths and challenges in the International normative standard as well as regional and national legal frameworks.

The programme focuses on nuanced interpretation and increased application of relevant International normative standards/instruments. As there are several measures taken by State in the three countries as well as regional level, this analytical assessment of legal and policy provisions as well as institutional and non-institutional arrangements had to be undertaken. This however would not have been possible without *Geeta Ramaseshan*, a brilliant lawyer, renowned women's rights activist and a dear friend! I would also like to thank *Florence Tercier Holst-Roness* of Oak Foundation for her constant support and guidance throughout this past year; and our wonderful advisors *Renu Rajbhandari*, *Niti Saxena* and *Jael Silliman* who constantly kept us on our toes throughout the designing and implementation of this programme. We would also like to thank Bandana Patnaik and Barbara Limanowska for their support and help in formulating the programme when the idea was in its nascent stage. And last but definitely not the least, a big thank you to our wonderful interns - *Shubhangi* and *Somesh* and *Ankita* for editing and re-editing this document! We hope it is a resource for all those who work to support women's decision-making in relation to their lives, journeys and destinations.

Tulika Srivastava

Executive Director

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EXECUTIVE SUMMARY

Trafficking in women and children is one of the worst violations of human rights. The current report commissioned by SOUTH ASIA WOMEN'S FUND is an analytical assessment of the relevant legal and policy provisions in the national legal frameworks of Bangladesh, India and Nepal.

The Human Rights Law Group defines trafficking as

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

The report examines legislations and judicial processes that have been created to provide justice for trafficking survivors, and analyses their strengths and challenges

It also critically examines some of the judgments in this area that have interpreted the laws relating to trafficking.

It identifies concerns that are common to the three countries, examines issues that have cross-border dimensions and are sensitive in nature, which makes them harder to address adequately at the country level, making them better suited for a regional analysis.

Finally it provides certain recommendations (regional and country specific) on the basis of the above work, to enable advocacy for legal and policy framework at the national level and at the regional level.

The report is divided in six chapters. The first chapter addresses the definition of trafficking according to international norms and provides an overview about commonalities in the region. The chapter also refers to the various international human rights instruments specially the Women's Convention in this regard.

The second chapter analyses the legislations and judgments of Bangladesh with reference to trafficking. It also addresses the *de jure de facto* position in this regard.

The third chapter analyses the legislations and judgments of India with reference to trafficking and the *de jure de facto* position in this regard.

The fourth chapter relates to Nepal and analyses the legislations and judgments of the country

with reference to trafficking and also addresses the *de jure de facto* position.

The fifth chapter addresses the key finding of the problem in the region.

The sixth chapter relates to recommendations in this report and is divided into two parts. The first part comprises of specific recommendation taking note of the situation in each of the country in this report while the second part deals with certain general recommendations.

There are certain general aspects of the three countries. These include legislations addressing domestic violence, dowry, regulating triple *talaq*, polygamy, kidnapping, to name a few. The report indicates that at the *de jure* level there is the existence of legislations that are not in consonance with contemporary definitions of trafficking. At the De Jure level there is the existence of legislations that are not in consonance with contemporary definitions of trafficking. An added factor is the absence of legislations in certain areas that could address this critical concern. At the *defacto* level, there is a wide gap between the guarantees of constitutional law as it exists and the standards of statutory law besides problems in implementation of laws. The capacity of law to deliver social justice remains extremely limited and women, who are trafficked, are unable to access justice. However the development of public interest litigation in areas as wide as rights of sex workers and sexual harassment at the workplace, are some examples that indicate the application of judicial precedence to address this concern. The study indicates that in the three countries in the region access to justice is very limited due to a combination of factors such as the non-existence of laws in these areas to the lack of a socio-economic capacity to approach the legal system. Other factors such as physical threats, lack of legislations that offer witness protections, delayed trials; Prosecutions under special legislations are few and often tardy, corruption and abuse of power along with bias and discrimination are other factors that affect women very adversely.

Additionally, the caste system in the region has resulted in historical discrimination against various communities as vast numbers of trafficked persons are from such communities. Child marriages are widely prevalent in the region. Social norms often reflected in the laws and its implementation enhances the vulnerability of women making them easy prey for traffickers.

The three countries do not confirm to the minimum standards for the elimination of trafficking. All the three countries have not ratified the UNTOC and protocols as a result of which many enabling provisions cannot be utilised to address the issue.

To combat cross border trafficking of persons it is essential that there are regional initiatives for a host of measures between the three countries.

METHODOLOGY

The research methodology for the report used the secondary research method. A large amount of background material had to be sifted through, to filter the essence of the subject and present it in a scientific and cohesive way. A large number of policy documents, acts, legal studies and research papers were studied and analyzed in this regard. Some of the references and sources included, the Constitutions of the various countries in the study, the legal systems of the countries, domestic laws in the area of criminal law, civil law, trafficking and policy statements. Various judgments of the region that have a bearing on the subject were a source for the report.

Other sources for the report were United Nations Convention against Transnational Organised crime, 2002, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2002, the Protocol against the Smuggling of Migrants by Land, Sea and Air 2002, the SAARC Convention of preventing and combating trafficking in women and children for prostitution 2002 and SAARC Convention on regional arrangements for the promotion of Child welfare in south Asia, the Convention on the Suppression of Immoral traffic and of the Prostitution of others, the ILO Convention 138 on Minimum age, the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child labour, the in the *Human Rights Standards for the Treatment of Trafficked Persons* (HRS) put forward by GAAT-W, the International Human Rights Law Group and the forward by GAAT-W, the International Human Rights Law Group and the Foundation Against Trafficking in Women (STV), country reports to the CEDAW Committee; the Committee's concluding comments to the country reports and general comments of the CEDAW committee.

Another valuable source has been the various studies and alternate or shadow reports prepared by NGOs in response to the Government reports that address the de facto position of status in the context of trafficking of women in their country. In addition to these, other select International Human Rights Instruments and documents such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, social and cultural Rights, ICESCR, the Convention on the rights of the Child (CRC), and the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT) were also sourced. The above are just an indication of the kind of research that was undertaken for the project.

THE DEFINITION OF TRAFFICKING

One of the greatest challenges relates to defining trafficking. Traditionally understood only within the framework of exploitation of women in sex work, trafficking includes a whole gamut of exploitation of human beings by treating them as commodities of profit. Trafficking has been defined in various ways. The International Human Rights Law Group and the Foundation Against Trafficking in Women (STV), in conjunction with many other NGOs worldwide, have formulated a definition on trafficking consistent with the approaches of international bodies and experts. As per the HRS definition:

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

The HRS definition focuses on clearly identifiable elements of the crime, in order to distinguish cases trafficking from other acts, such as undocumented migration.

According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime,

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the 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.¹

Under this definition three elements are focused. First trafficking is seen as an intentional action. Second the means of recruitment is considered to be exploitative and thirdly the

¹Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, Article 3(a)

purpose for which the person is trafficked is relevant to treat it as a crime. While the definition of the HRS is more exhaustive focusing on trafficking as a violation of human rights, the protocol is concerned in addressing trafficking as crime control.

The SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution 2002, however defines trafficking in the narrow framework of prostitution and does not address other forms of trafficking. While it includes the moving, selling, or buying of a person, it does not include their recruitment, labour, transfer or receipt that does not form a part of the buying or selling process.²

The various definitions narrated above cover different facets of trafficking some from the position of human rights and others from the narrow position of crime control. Be that as it may trafficking as defined in varied ways indicates the challenges for a legal framework and is a critical concern of states both at the national and regional level. It is important to point out that while men are also survivors of trafficking there is a gendered factor that results in women being discriminated against which needs to be factored by states. This paper focuses on this critical concern.

Under **Article 6 of the CEDAW convention**, States are required to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

An obligation is thus placed on States to take action in various areas, including, but not limited to, national legislation. In fact, State obligation extends to other areas such as law enforcement as well as underlying issues, for instance social and economic factors, which render women vulnerable to exploitation.

The CEDAW Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the CEDAW Convention, regardless of whether those provisions expressly mention violence.

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the CEDAW Convention. These rights and freedoms include:

² SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution 2002, Article 2

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of the person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

The availability of these rights in addition to existing legislations are crucial in providing an understanding of how trafficking ought to be addressed from a rights perspective.

Common aspects of the three countries

All the three countries have not ratified the UNTOC and protocols as a result of which many enabling provisions cannot be made use.

There are certain general aspects of the three countries that one has consider in the area of trafficking. Bangladesh and India share a common colonial history and there is much legislation such as the penal code, which are similar in content. Additionally at the de jure level, there are many best practices in laws in the three countries that address gender equality and access to justice. These include legislations addressing domestic violence, dowry, regulating triple *talaq*, polygamy, kidnapping, to name a few. While it is beyond the scope of this report to provide an analysis of such legislations an understanding of such laws and its impact on women would be necessary to see the intersection of trafficking and violence against women in the family. This is so because many studies have shown that women who are survivors of trafficking often are cheated, induced on promises of false marriages, employment etc as a result of which they fall prey to traffickers.

However, at the de jure level, the countries studied do not have a legislation that addresses discrimination though it is prohibited under most of the Constitutions. The Constitutions also do not define discrimination. What is sought to be prevented is sex discrimination except the constitution of Nepal that prohibits discrimination on the basis of gender. However, Judgments of the region use the term "Gender" while dealing with cases on discrimination. Further the prohibition of discrimination applies only to the State and non-state actors are exempt from the purview. The Constitutions of the three countries stress on substantive

equality as a concept in as much as it permits the states to make laws beneficial for women and children.

The report indicates that at the De Jure level there is the existence of legislations that are not in consonance with contemporary definitions of trafficking. An added factor at the De Jure is the absence of legislations in certain areas that could address this critical concern. At the *defacto* level, there is a wide gap between the guarantees of constitutional law as it exists and the standards of statutory law besides problems in implementation of laws. The capacity of law to deliver social justice remains extremely limited as women who are trafficked, are unable to access justice. However the development of public interest litigation in areas as wide as rights of sex workers and sexual harassment at the workplace, are some examples that indicate the application of judicial precedence to address this concern. The region has also witnessed a very proactive judiciary, which has interpreted laws in a very dynamic way in the area of women's human rights.

Access to justice is contingent on existence of laws that recognize the violation, information about laws and violations, education, physical proximity to courts, socio-economic capacity to engage a lawyer, economic capacity to pursue litigation and mobility in the public sphere.³ The study indicates that in the three countries in the region access to justice is very limited due to a combination of factors such as the non-existence of laws in these areas to the lack of a socio-economic capacity to approach the legal system. Other factors such as physical threats, lack of legislations that offer witness protections, delayed trials; corruption and abuse of power along with bias and discrimination are other factors that affect women very adversely.

Additionally the caste system in the region has resulted in historical discrimination against various communities as vast numbers of trafficked persons are from such communities. Child marriages are widely prevalent in the region. Social norms often reflected in the laws and its implementation enhances the vulnerability of women making them easy prey for traffickers.

Trafficking is done for a variety of reasons. It does not occur in a vacuum but involves a widespread net of exploitation sexual or otherwise. These include for bonded labour, child labour and for commercial sexual abuse. In the case of child labour children are tricked by the promise of lucrative jobs. Migration of persons from less developed rural areas to urban areas often become trafficking that have in recent times got aggravated by liberalization and feminization of poverty. Girls are deceived on the false promise of marriage. In the case of children, group trafficking often takes place when children from the same village are lured away by traffickers. Children are subject to exploitation and sexual abuse at the workplace.

³Partners for Law in Development, 2004, *Weaving Law into Community Action*, New Delhi, pg. 9

The following provides a view of the modus operandi of traffickers and indicates the challenges in actually preventing trafficking and prosecuting traffickers.

The players and their modes in trafficking:

The primary traffickers form a nebulous group of all those who assist the kingpin in different activities involved in trafficking. The key functionaries are the field level “purchasers,” the transporters, the master operators, the procurers, the pimps and crime syndicates involving brothel owners, brothel managers etc. Secondary or tertiary level traffickers are those who deliver human cargo to the primary traffickers. They operate at the grassroots level and mostly include the sellers and others who assist and facilitate the sale process involved in trafficking. Often this group includes relatives, friends and acquaintances of the victim, local goons as well as petty criminals. The intelligence gatherers may be at the command and under the control of the master trafficker or the primary trafficker. They visit bazaars, markets, villages, railway stations, bus stations, and other places where they can collect intelligence about vulnerable persons. These spotters give their feedback to the primary traffickers or the kingpin who in turn deals with the secondary traffickers to carry out this trade. Other supporters include financiers who fund the transactions at various levels, goons who provide security, hoteliers who provide accommodation during transit, transporters of vehicles, para-medicals or quacks who attend to the illness of the trafficked victims, officials who provide several services including immigration, clearance and security and the finalexploiters and abusers who may be also part of the network. All these persons dictate terms regarding supply and demand and modulate the trafficking process. (*Trafficking of women and children in India, commissioned by the National Human Rights Commission, Orient Longmans, 2005 pg 116-117*).

TRAFFICKING IN BANGLADESH

The Dejure Position

Bangladesh is the first state in the region to have ratified the optional protocol to CEDAW. Bangladesh is a State party to a number of International instruments relating to women, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Convention on the Political Rights of Women, the Convention on the Rights of the Child and its Optional Protocols, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is also a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

In the Third Committee and the Commission on the Status of Women, Bangladesh had sponsored all resolutions concerning the advancement of women. Bangladesh has been one of the main sponsors of the resolution "Mainstreaming a gender perspective into all policies and programs in the United Nations system", before the Commission on the Status of Women.

The Constitution of Bangladesh and Trafficking

The Constitution of Bangladesh guarantees an impressive set of rights including the right to equality and equal protection of law.⁴ Discrimination on the ground of sex, religion, race, caste, or place of birth is prohibited.⁵ The Constitution guarantees equality of opportunity in order to attain a uniform level of economic development.⁶ The Constitution also permits a positive discrimination in the context of women to ensure equal participation of women in public offices.⁷ Safeguards against arrest and detention are a constitutional right.⁸ The State is required to adopt effective measures to prevent prostitution and gambling.⁹ All forms of forced labour are prohibited and any contravention of this provision is an offence punishable in accordance with law.¹⁰

⁴Article 27 of the Constitution of Bangladesh

⁵Article 28 of the Constitution of Bangladesh

⁶Article 19 of the Constitution of Bangladesh

⁷Article 29 of the Constitution of Bangladesh

⁸Article 33 of the Constitution of Bangladesh

⁹Article 18 (2) Constitution of Bangladesh

¹⁰Article 34 (1) Constitution of Bangladesh

The concept of Public Interest Litigation¹¹ has also developed in Bangladesh with judges and human rights lawyers moving many cases to enforce constitutional guarantees for those who are socially and economically disadvantaged and are not in a position to access the justice system.

Criminal Law and Trafficking

The Bangladesh Penal Code of 1860 that is a shared colonial legacy of India and Bangladesh, also has a large number of offences such as exposure and abandonment of children by parents, wrongful restraint and confinement, criminal force, assault, kidnapping, abduction, slavery and forced labour besides sexual offences such as rape, unnatural offence on which a trafficker can be charged.¹² Other specific provisions include procurement of a minor girl, importation of a girl from a foreign country, selling minor for purposes of prostitution and buying a minor for the purposes of prostitution.¹³ Offences under the penal code are serious in nature. Additionally there are many other provisions of the penal code that addresses corruption among public servants. These include taking gratification, other than legal remuneration in respect of an official act,¹⁴ taking gratification by corrupt or illegal means, to influence public servant,¹⁵ taking gratification to exercise of personal influence with public servant,¹⁶ abetments of these offences and obtaining valuable thing, without consideration, person concerned in proceeding or business transacted by such public servant.¹⁷

The Suppression of Immoral Traffic Act 1933 is a gender specific act that addresses the issue of "prostitution." It however does not define trafficking. Offences under the Act includes living off the earnings of prostitution, procuring women for the purposes of prostitution, as well as considering brothel keepers and owners as offenders.¹⁸ The statute is more from the point of crime control. The Act while addressing the issue of prostitution considers it an offence to live off the earnings of a woman who is a sex worker. Procurement and importing a woman for prostitution are also offences. The statute does not punish women, but soliciting is an offence and landlords are prohibited from letting their premises to women who indulge in prostitution. The Suppression of Immoral Traffic Act also does not permit a woman involved in sex work and living in a brothel to keep her child with her if the child is above four years.

The legislation is ambivalent about prostitution and effectively punishes women sex workers by not permitting them any space such as the prohibitions on landlords in renting them premises even though there is no provision of penalising women who indulge in sex work. By

¹¹Described in detail under the heading relating to India

¹²Sections 317, 339, 340, 350, 351, 359, 362, 371, 374, 375, 376 of the *Bangladesh Penal Code*.

¹³Sections 366 A, 366 B, 372, 373 of the *Bangladesh Penal Code*.

¹⁴Section 161 of the *Bangladesh Penal Code*.

¹⁵Section 162 of the *Bangladesh Penal Code*.

¹⁶Section 163 of the *Bangladesh Penal Code*.

¹⁷Section 164 and 165 of the *Bangladesh Penal Code*.

¹⁸Sections 8 and 9 of the *Suppression of Immoral Traffic Act 1933*.

preventing women from keeping their children with them if they are in a brothel the Act actually does not address protection but penalises the woman and the child that would be forced out of parental care. NGOs are of the opinion that the fine amount for pledging children is too low and the quantum of punishment should be increased substantially.¹⁹

The Children Act of 1974

Consolidating all laws relating to custody, protection and treatment of children this statute considers cruelty to children, employing children for begging, drugging or intoxicating children with liquor or drugs, alluring the child to be in a brothel, and exploitation of children as offences. A girl below the age of sixteen years cannot work as prostitute and anyone who makes her do so, commits an offence under the Act.

The Children Act and the Suppression of Immoral Traffic Act are gender specific and protective towards the girl child and do not address cases of the boy child who may be forced in prostitution.

The Children (Pledging of Labour) Act 1933

The legislation penalises parents or guardians who pledge their children by any agreement and the fine is a maximum of 50 taka. (About one USD) The person who accepts the child for pledging is fined a maximum of 200 taka.

The Women and Children Repression Prevention Act, 2000 as amended in 2003

The Act makes trafficking in women, an offence and provides for death penalty or life sentence in cases of child trafficking.²⁰ Bringing women or children from abroad or sending them out of the country, dealing in the purchase and sale of women and children or hiring them out or handing them over for torture or other purposes, keeping a woman in custody for the purposes of prostitution, or for immoral or unlawful purpose, or buying or selling woman are termed as acts of trafficking. A child is defined as one below sixteen years. The Act also makes various acts of sexual harassment and abuse as offences.²¹ This statute is concerned with trafficking for prostitution. The law punishes procurers and pimps and provides for the establishment of children homes to children who are trafficked and require safe custody. The legislation however blurs the distinction between prostitution and exploitation. The statute also uses the term "sexual oppression" but does not define the same leaving it to the discretion of the court to formulate in each case. The statute formulates a separate procedure such as setting up of special tribunals, imposing time limits for expeditious disposal of cases and in-

¹⁹ *Study on analysis of the laws related to trafficking and sexual exploitation against women and children prepared by the Bangladesh National Women Lawyers Association.*

²⁰ *Section 5(1) 6(1) of the Women and Children Repression Prevention Act, 2000 as amended in 2003.*

²¹ *Section 10 of the Women and Children Repression Prevention Act, 2000 as amended in 2003.*

camera proceedings.²² The statute is the only one in the region that includes measures to protect the identity of the victim. One of the criticisms against the Women and Children Repression Prevention Act is that it is concerned only with the end result of trafficking and does not really address the process of trafficking. The statute also addresses trafficking only through the prism of prostitution neglecting other areas and in the process leaving out other actors.

Family laws of Bangladesh

The Muslim Family laws Ordinance 1961 restrict polygamy by making the husband seek the permission of the wife. The Muslim Marriages and Divorce Registration Act 1974 provides for registration of marriages performed in all forms but the minimum age is eighteen for girls and twenty one for boys as defined under the Child Marriage Restraint Act 1929. Other religious minorities are governed by their personal laws that are not codified except in the case of Christians who are governed by the Christian Marriage Act and Divorce Act of 1869. Child marriages are very prevalent in Bangladesh as a result of which many persons do not get their marriages registered or a false age is shown. This often results in making women vulnerable as they are often not able to prove their marriages. Again while theoretically polygamy is not permitted without the permission of the existing wife, she is often subjected to domestic violence and her consent forcibly obtained. The failure of the state to provide for compulsory registration of births also results in poor documentation for age and in cases of trafficking of children age becomes a crucial factor to determine the culpability of the offence.

The Bangladesh Labour Code 2006 prohibits parents and guardians from entering into a contract of employment for a child.²³ Under **the employment of Women, young persons and children Act of 1956** Children below eighteen cannot be employed in hazardous occupations.²⁴ **The Prevention of Money laundering Act 2009** treats money as a consequence of trafficking as laundered and makes it an offence.²⁵

The Emigration Ordinance 1982 and the Bangladesh Passport Order 1973

The above two interventions have put in measures to address interstate trafficking. The ordinance regulates the recruitment of persons abroad and prohibits emigration if the government is of the opinion it is not in public interest. Under the emigration ordinance only licensed agencies can be permitted to recruit women but despite this, there is poor documentation of migrant women and children.²⁶ In 1997, the Government prohibited unskilled women from migrating abroad as a protective measure on all categories of women except domestic workers but the ban was subsequently lifted after women's groups protested

²²Section 18 and 20 of the *Women and Children Repression Prevention Act, 2000 as amended in 2003*.

²³Section 34 of the *Bangladesh Labour Code 2006*.

²⁴Section 20A of the *Employment of Women, young persons and children Act of 1956*.

²⁵Section 2 of the *Prevention of Money laundering Act 2009*.

²⁶Ibid section 7(2) of the ordinance deals with licenses and permission.

In *Abdul Gafur vs. Secretary, Ministry of Foreign affairs*, the father of a fifteen year old girl who was trafficked to India moved the court for directions to rescue his daughter and to act against traffickers. The girl was rescued and found in a Government home in West Bengal, in India. An interesting argument put forth by the petitioners was that even if a person had gone on their own will, the obligation of the Government would not diminish if there were rights violations. In this way the issue of migration was addressed obliquely. The Court accepted the argument thereby recognising repatriation as a right to life opening the doors for fresh interpretation of rights. The minor child had become an adult when the case had come up for hearing but the court took the date when she was trafficked as the date of the offence. For the purposes of Bangladesh law since trafficking minors is a more serious charge, the date of the offence was crucial. The court also held that if she was trafficked a number of times; each incident would be a separate offence. The case indicates the complexity in dealing with inter border trafficking and highlights the necessity of states to promptly react in concert and have structured mechanisms in place to deal with such cases. [17 (1997) BLD 560]

recruiting agencies that are of the Bangladesh Association of International Recruiting Agencies. While they are supposed to have a scale of fees and charge not more than 1235\$ legally many agencies charge very heavy amounts of 6000\$ and place workers in low skilled jobs. This results in transnational migrant workers falling into a debt trap as well as in recruitment frauds such as fraudulent representations of terms of employment. Women work as domestic maids under long hours and face non payment of wages, threats, physical and sexual abuse, and some of them are

about such a discriminatory measure. The Passport Order prohibits trafficking and makes it a very serious offence. Binding persons to emigrate and withholding travel documents are an offence.²⁷ Other offences include fraudulently inducing persons to emigrate and receiving money for providing foreign employment.

The Bangladesh system is based on the common law and judicial pronouncements have the force of law as precedents. The following judgments indicate the positive response of higher courts in addressing the rights of victims of trafficking.²⁸

Defacto Position

Bangladesh is a source and transit country for trafficking of persons. A large number of men and women migrate to various countries for employment. Overseas employment can be sought only through

Bangladesh Society for the Enforcement of Human Rights vs. Government of Bangladesh and others, a Public Interest litigation was filed on behalf of women and children when a brothel was raided and women were assaulted and forcibly sent to Government homes. Upholding their right to life and liberty as citizens the court held that while the constitution obliged the state to take measures to prevent prostitution it could not be done by violating their rights and “prostitution” itself was not illegal. The judgment reflects on “prostitution” and draws by implication a difference between trafficking and prostitution. [DLR 2003, 53]

²⁷Section 20 of the *Bangladesh Passport Order 1973*.

²⁸Sections 20, 21 and 23 of the *Bangladesh Passport Order 1973*.

also trafficked into commercial sexual exploitation. The country also has a long porous border of 4156 KM with India that makes it very easy for traffickers to smuggle persons into India often with the connivance of government officials on either side.

In the context of interstate trafficking NGOs allege that law enforcement officials do not register cases under the passport order for trafficking, but charge the offenders for not being in possession of a passport which is a much lesser offence. They also allege that there is a nexus among corrupt government officials, village level brokers, politicians and regional gangs that operate on the other side of the border.

While the Government has appointed 42 special tribunals with special judges and special prosecutors, in 33 districts till 2009, the inherent delays of the legal systems with procedural loopholes cause a stumbling block in access to justice to victims of trafficking. Bangladesh developed a 'one stop crisis centre,' for women and children in Dhaka Hospital that provide legal, medical, psychological and psychiatric services at the first instance for victims of rape acid attacks and sexual violence. This centre works in conjunction with NGO's and is a unique partnership between state and civil society working towards protecting women against violence.

**Shadow Report to the 5th Periodic Report to the CEDAW Committee submitted by
*Ain O Sailashkendra, (ASK), Bangladesh Mahila Kendra, Steps towards Development, 2004***

This case indicates the challenges in a PIL relating to the right to reside and livelihood. Sex workers in Bangladesh have often been evicted by law enforcement agencies from their place of residence despite being lease holders and tenants. In some cases they were forcibly removed to government established vagrant homes. In a public interest petition filed in 2000, charging forcible evictions of sex workers, the Dacca High Court, reiterated their fundamental right to equal protection of law and protection of life and personal liberty enshrined in Articles 31 and 32 of the Constitution and unequivocally censured such eviction, "since they were citizens of Bangladesh, enrolled as voters and exercised the right to franchise." The Government appealed against this ruling and subsequently evicted other sex workers from places outside Dhaka. Many of the homeless sex workers became street workers and faced greater threats to their safety.

One critical factor in Bangladesh is the concept of protective custody. Victims of violence who do not have a support system are often kept in government run shelter homes in custody for their own protection. There are many instances where the perpetrator of the offence is on bail when the victim continues to be detained. If the shelter homes are not sufficient such women are also kept in prisons.

²⁹The Committee considered the *fifth periodic report of the People's Republic of Bangladesh* (CEDAW/C/BGD/5) at its 653rd and 654th meetings, on 9 July 2004 (see CEDAW/C/SR.653 and 654).

The CEDAW committee in its concluding comments on the periodic report of Bangladesh²⁹ expressed concern about the continuing prevalence of trafficking in women and girls in the country. It is also expressed a concern that, despite the fact that many persons have been accused or are on trial for trafficking-related crimes, only a few have been convicted. The Committee recommended the formulation of a comprehensive strategy to combat trafficking in women and girls that should include the prosecution and punishment of offenders. The Committee also encouraged the State party to pursue increased international, regional and bilateral cooperation with other countries of origin, transit and destination for trafficked women and girls and recommended the stepping up of measures aimed at improving the economic situation of women so as to eliminate their vulnerability to traffickers, the introduction of education and employment initiatives for vulnerable groups, including teenage girls, and to provide support, rehabilitation and reintegration measures for women and girls who have been victims of trafficking. It called on the State party to ensure that trafficked women have the support they need to enable them to provide testimony against traffickers. It urged the training of border police and law enforcement officials in order to provide them with the requisite skills to recognize and provide support for victims of trafficking.

TRAFFICKING IN INDIA

Trafficking of human beings and forced labour is prohibited under the Constitution.³⁰ A slew of legislations also exist that prohibit different forms of bonded labour and trafficking. Since India has a federal structure states can also make special laws to address the issue. The Indian Constitution lists out various castes and tribes that are discriminated called Scheduled castes and Scheduled tribes. The practice of untouchability is prohibited under the Constitution³¹ and special legislations such as the Protection of Civil Rights Act, 1955 and the Schedule Caste and the Schedule Tribe Prevention of Atrocities Act of 1989 defines various atrocities against Dalits providing for strict punishment.

The Indian Constitution also lays down Directive principles of State Policy which are principles that are fundamental in the governance of the country and cast an obligation on the State to apply these in making laws. Though not justifiable by themselves, they have been held to supplement fundamental rights. Thus the State is required to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political shall inform all the institutions of national life. The state is also required to secure that the operation of the legal system promotes justice, on a basis of equal opportunity and in particular, provide free legal aid, by suitable legislation or scheme and ensure that opportunities for securing justice are not denied to any citizen.³²

By the development of PILs, the Indian Supreme Court has in a plethora of decisions expanded its scope including under it a host of socio economic rights including the right to livelihood, education, health, privacy, environment and a right to protection from sexual harassment.³³ The Indian Supreme Court has also in a series of judgments read the provisions of International Human Rights treaties to which India is a party into domestic law. The court framed guidelines on sexual harassment citing Article 11 of the CEDAW Convention, which directs the State to take appropriate measures to eliminate discrimination against women in

³⁰ Article 23 of the *Constitution of India*.

³¹ Article 17 of the *Constitution of India*.

³² Article 38, 39 and 39A of the *Constitution of India*.

³³ *Olga Tellis vs. Bombay Municipal Corporation* AIR 1986 SC, 109, *PUCL vs. Union of India* AIR 1997 SC, 1225, *DK Basu vs. State of West Bengal*, AIR 1997 SC 610, *SP Gupta vs. Union of India* AIR 1982 SC 149, *Bandhua Mukti Morcha vs. Union of India* AIR 1984 SC 802, *MC Mehta vs. Union of India* AIR 1987 SC 1086, AIR 1999 SC 2583, AIR 1997 SC 699, *Common Cause laws vs. Union of India* AIR 1996 SC 1619

the field of employment.³⁴ This includes the prevention of sexual harassment in the workplace.³⁵

The Indian Penal Code

As stated with regards to Bangladesh, the shared colonial penal code lists a number of offences that could be used to address trafficking. These include kidnapping, abducting or inducing a woman to compel marriage, procuring a minor girl, importing a girl below 21 for sexual exploitation, kidnapping or abducting a person to grievous hurt, buying or disposing of person as slave, habitually dealing in slaves, selling minor for prostitution or compelling a person to forced labour.³⁶ Other offences³⁷, relevant to the prosecution of trafficking include rape, sexual offences categorised as unnatural³⁸ and the gender specific outraging the modesty.

The Bonded Labour System (Abolition) Act, 1976

In many parts of India there is a system of usury and forced labour. Under this system, the debtor or his descendants or dependents have to work for the creditor without reasonable wages or with no wages in order to extinguish the debt. At times several generations work under bondage for the repayment of the paltry sum which had been taken by some remote ancestor. The interest rates are exorbitant and such bondage cannot be interpreted as the result of any legitimate contract or agreement.³⁹ Persons who migrate internally often do so under this practice. Children are often pledged by their parents for the repayment of debts.

The system of bonded labour has different names in different parts of India. The Act provides for a comprehensive mechanism to deal with the practice of bonded labour such as stringent punishments and redemption of bonded labour. A vigilance committee constituted under the Act has varied functions including looking at economic and social rehabilitative measures for the bonded labour. The committee is also empowered to defend any litigation that may be instituted by a creditor against a bonded labour for repayment of the loan. Under the Act no bonded labourer is liable to repay a bonded debt.

³⁴ Vishaka and others vs. State of Rajasthan and others (AIR 1997SC 3011)

³⁵ For a detailed analysis of Public Interest Litigation see Sangeeta Ahuja, *People, Law and Justice casebook on Public Interest Litigation*, Orient Longman, 1997.

³⁶ Sections 366, 366A, 366B, 367, 370, 371, 372, 373 and 374 of the *Indian Penal Code, 1860*.

³⁷ Sections 376, 377, 354, of the *Indian Penal Code, 1860*.

³⁸ The section 377 of the IPC has been challenged as discriminatory to alternative sexual identities by human rights groups, which was accepted by the Delhi High Court, and is presently pending before the Supreme Court of India.

³⁹ Statement of objects and reasons.

The Bonded Labour System (abolition) Act has an overriding effect over **The Children (Pledging of Labour) Act, of 1933** and hence a passing reference is made to this statute. The Act prohibits the pledge of labour of children. An agreement to pledge the labour of a child is defined as written or oral express or implied whereby the parent or guardian of the child in return for any payment or benefit received or to be received by him undertakes to cause or allow the services of the child to be utilized in any employment. Child under this law is defined as below 15 years. The legislation only provides for penal sanction against the parent or guardian and the person who accepts the child as a pledge. However the maximum sentence is a fine of 50 Rupees in the case of a parent and 200 hundred rupees in the case of an employer similar to the statute in Bangladesh which is another shared colonial law. The legislation came in response to the recommendations of the royal commission that noticed this practice in many parts of India in carpet and beedi factories. But no amendments have been made increasing the fine amount.

The Child Labour (Prohibition and Regulation) Act, 1986 (CLARA)

CLARA bans the employment of children below 14 years in specified occupation and processes, regulates the conditions of work of children in employments where they are not prohibited from working and lays down enhanced penalties for employment of children in violation of the Act. This act is discussed here only in the context of trafficking as a detailed study on this is outside the scope of the report. The Act does not address trafficking but could be used in cases where employers employ children obtaining them from traffickers.

As regards prosecution of offenders, CLARA permits any person, police officer or inspector to file a complaint before the magistrate court. The Act provides for imprisonment and fine but in most cases the employers have only been fined and there have not been many convictions under this. Despite CLARA child labour in prohibited occupations and services is highly prevalent and as in bonded labour is intrinsically linked to poverty and other social factors such as the absence of basic full time primary education. The Act exposes the limitations of the legislation and unless it is backed up with prompt executive action violations will continue to persist. Authorities under the Act namely inspectors are authorities for the implementation and there have been many instances of their being responsible for the tardy implementation.

The Juvenile Justice (Care and Protection of Children) Act 2000 (JJC&P) Act⁴⁰

This Act consolidates two issues namely the law relating to children in conflict with law and children in need of care and protection. A child is one who has not completed eighteen years of

⁴⁰ For a detailed critique of the statute and the juvenile justice system in India see VedKumari, *The juvenile system in India from welfare to rights*, OUP 2004.

age and includes both male and female.⁴¹ Children who are found homeless without any means of subsistence are considered as being in need of care and protection. Children who are physically and mentally challenged, sick children or children suffering from terminal or incurable illness having no one to support or look after them, children who are abused or tortured or who are likely to be abused or tortured, children likely to be inducted in drug abuse, and children victimized by armed conflict or natural calamity.⁴² Additionally for the purpose of trafficking, children who are vulnerable and likely to be trafficked are also considered requiring care and protection.⁴³ Employment of children for begging, procuring children for hazardous employment or bonded labour is also an offence.⁴⁴

The Prohibition of Child Marriage Act 2006

The Act defines a child as one who has not completed the age of twenty one in the case of a male and eighteen in the case of a female. It applies to all persons irrespective of their religion and punishes those who perform or participate in such a marriage. Courts can issue an injunction order to prevent a child marriage and such complaints can be made by the child marriage prohibition officer or an NGO.⁴⁵ The Act requires the officers to also create awareness and sensitize the community on such issues. In order to provide a deterrent the Act permits the imposition of a fine of Rs one Lakh or imprisonment of two years.⁴⁶ Marriages of minor children by force, enticement or deceit and marriages for the purpose of sale or where the minor is made to go through a form of marriage after which the minor is sold or trafficked or used for immoral purposes are absolutely null and void.⁴⁷

The Immoral Traffic Prevention Act, 1956

While not defining the term trafficking, the Act deals exclusively with trafficking and child sexual abuse. A child is termed to be below sixteen years while a minor is defined as between sixteen to eighteen years and higher degree of criminality is attached to sexual exploiters of children.⁴⁸ The sexual exploitation and abuse of children for commercial purposes become an offence under this statute.⁴⁹ The degree of presumption in the case of offences against children shifts on the defence. If a child is found in a brothel under suspicious circumstances in the custody of a person other than a parent or a guardian the person is presumed to have procured

⁴¹Section 2 k of the *Juvenile Justice (Care and Protection of Children) Act 2000 (JJ&P) Act*.

⁴²Section 2 (d iii) of the *Juvenile Justice (Care and Protection of Children) Act 2000 (JJ&P) Act*.

⁴³Section 2(viii) of the *Juvenile Justice (Care and Protection of Children) Act 2000 (JJ&P) Act*.

⁴⁴Sections 24 and 26 of the *Juvenile Justice (Care and Protection of Children) Act 2000 (JJ&P) Act*.

⁴⁵Section 13 of the *Prohibition of Child Marriage Act of 2006*.

⁴⁶Section 9 of the *Prohibition of Child Marriage Act of 2006*.

⁴⁷Section 12 of the *Prohibition of Child Marriage Act of 2006*.

⁴⁸Section 2 (cb) sentences of a trafficker can be life imprisonment if the victim is a child. Section 5

⁴⁹Section 2 (f) of the *Immoral Traffic Prevention Act 1956*.

the child unless the child's presence can be explained.⁵⁰ Examples of suspicious circumstances would include where the child talks a different language from that of the person in whose custody s/he is, or where the child is married to a foreigner.

Information from the police or persons authorized by the Government can set the law in motion by moving a magistrate court that can authorize a raid in any dwelling. A child rescued under the Act has to be produced before the juvenile welfare board under the Juvenile Justice Act which will place the child in a shelter home or corrective institutions.⁵¹

Under the Act running or keeping a brothel is an offence.⁵² However since living off the earnings of prostitution by others is an offence there are instances of the trafficked woman living with another person being charged under this proviso. Moreover the age of majority is eighteen in India and a child of eighteen years who would have completed her secondary education if living with her mother, a sex worker, could be charged under this section.⁵³ Procuring, inducing or taking a person for prostitution, detaining a person in premises where prostitution is carried on and soliciting are offences under this law.⁵⁴ Soliciting as an offence is very problematic as it is used only against the woman even though the object of the statute is not to punish the victim.

The Act completely conflates trafficking with commercial sexual exploitation, thereby limiting its usability for those whose rights have been violated due to domestic slavery, exploitative labour practises and servitude. Currently there are various moves to amend this law.

The Karnataka Devadasi (Prohibition of Dedication) Act 1982 and The Andhra Pradesh Devadasi (Prohibition of Dedication) Act 1989

These two statutes were created in the two states of Karnataka and Andhra Pradesh to address the practice of dedicating young girls and women to temple goddesses and then making them sex workers. This was in response to the cultural practice of the *Yellamma* tradition in some of the regions of the country, where there is a customary practice of dedicating pre puberty girls to the deity of a temple in an area bordering the two states. Most young girls are then trafficked and sent to the brothels of large cities. Women and children dedicated through this practice are generally of the marginalised caste. The Karnataka statute makes the consent of the woman immaterial for such dedication while the Andhra Pradesh statute also makes those who perform, promote, abet or takes part in a dedication ceremony as offenders. The punishment is for a period of three years. However despite special legislations the practice continues with impunity.

⁵⁰Section 6(2) of the *Immoral Traffic Prevention Act 1956*.

⁵¹Vishal Jain vs. Union of India AIR 1990 SC 1412 is a PIL relating to children of sex workers

⁵²Section 3 of the *Immoral Traffic Prevention Act 1956*.

⁵³Section 4 of the *Immoral Traffic Prevention Act 1956*.

⁵⁴Section 5 of the *Immoral Traffic Prevention Act 1956*.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

This statute makes a special class of offences that discriminate against persons belonging to the marginalised communities and who are very vulnerable to violence. In addition to various classes of offences, for the purpose of trafficking enticing a member of a Scheduled Caste or Tribe or using a position of dominance to sexually exploit a woman of these communities are offences.

The Foreigners Act 1946

The Statute regulates the entry and exit of foreigners in India and empowers authorities under the Act to arrest, detain or confine persons who do not have proper documentation.⁵⁶

Since trafficked victims are often forced into the country illegally on preparation of false papers or just cross the border with the facilitation of trafficker, they often find themselves double victimised by being detained on violation of the law if they are found without valid documentation. There have also been instances of foreign victims without proper documentation being pushed across the border without any protection services on the other side making them extremely vulnerable to further trafficking. There have also been instances of many women languishing in protective custody or jails because they do not have proper documentation.⁵⁷

The Goa Children's Act 2003

The state of Goa in order to address sexual offences against children is the only state in India to have passed a special legislation to address child rights concerns in an integrated way. While the Act does not address trafficking measures under it can go a long way in preventing child trafficking. Under the statute, an onus is cast on owners of hotels or other establishment for the safety of children on their premises as well as in public spaces such as parks etc. Adults staying with unrelated children are required to register with the government. Photo studios are required

Vishal Jeet vs. Union of India

A public interest litigation was filed by an advocate seeking investigations into trafficking. the Supreme Court directed the Central and state governments to set up separate advisory committees to suggest measures to eradicate child prostitution, formulate social welfare programmes for the care, protection, treatment, development and rehabilitation of young women and children, take steps to provide adequate shelters and prosecution of offenders who are involved in trafficking children. However the court observed that despite many statutes a remarkable degree of ignorance, callousness and culpable indifference is manifest in not obtaining the desired result under the laws. [1990 (3) SCC 3118]

⁵⁵Section 3(vi) and (xii) of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*.

⁵⁶Section 3 of the *Foreigners Act 1946*.

⁵⁷In Chennai seven women rescued in trafficking of Bangladesh have remained for more than a year.

to report to the police in case they find photos or films developed by them to contain objectionable material. This is the only statute that casts an obligation on the larger community towards the safety of children. Other areas include preventing children below the age of 14 to enter cyber cafes without being accompanied by an adult, authorizing all

The Chairman Railways vs. Chandrima Das

In this case, a Bangladeshi national was gang raped in the railway station. A Public Interest Litigation was filed seeking compensation for her. The railway board argued that they cannot be held responsible for third party acts. This argument was not accepted by the Court that held that she was entitled to compensation. The Court developed the concept of constitutional tort casting an obligation on agencies to protect women's rights as against private actors and on their failure to do so, provide for a compensational remedy. This right was made available to all and not restricted to citizens alone. [AIR 200 SC 988]

government authorities to report suspicious circumstances. Pro active measures includes the setting up of a victim assistance unit, sensitization of the police and law enforcement authorities, better investigation techniques evolving a child friendly tourism code and setting up of child friendly courts. The concept of child friendly courts is unique to the Goa Act. These courts would try adult offenders but the ambience of the courts are expected to be less formal so that the child that is a witness finds the atmosphere less intimidating.

Defacto Position

Bonded labour continues to exist and has interstate ramifications. Since families are in bondage, children also become a part of this obnoxious practice. Persons who are bonded labours are

mainly drawn from the marginalized sections of the community and generally belong to the Dalit and other backward classes. The Supreme Court has observed that one major handicap which impedes the identification of bonded labour is the reluctance of the administration to admit the existence of bonded labour even where it is prevalent.⁵⁸ Stressing on rehabilitation the court has held that this is an obligation of states and that rehabilitation must follow certain features. According to the court, psychological rehabilitation must go hand in hand with physical and economic rehabilitation and in the case of children of bonded labourers, education is of prime importance.⁵⁹

However the numbers of prosecutions under them are very few. Habeas Corpus petitions as PILs have been filed to release bonded labour various High Courts. These have resulted in the release of children and adults from such bondage and in their rehabilitation. But they have had very limited success as bonded labour is intrinsically linked to poverty which forces the

⁵⁸BandhuaMuktiMorcha vs. Union of India AIR 1984 SC 802

⁵⁹These features quoted by the court are from the directive of the *Secretary of Labour* to the various governments.

workers to go back to their earlier place of employment. Prosecutions are not successful since there is a lack of implementation. The problem has become compounded with internal displacements and interstate migration of bonded labour is closely linked to trafficking.

Legislations such as **The National Rural Employment Guarantee Act 2005** that provides a minimum guarantee of hundred days of paid work to persons in poor rural households should be available in regions from where there are trafficking.

The CEDAW Committee⁶⁰ in its recommendations wanted the Government to enforce laws preventing discrimination against Dalit women and prohibiting the devadasi system. It urged the Government to introduce affirmative action programmes in such areas as education, employment and health so as to provide life chances to Dalit women and girls and create an environment conducive to their progress. The Committee also called upon the Government to set a time-frame for those interventions. The committee also expressed Concern that women and girls were exploited in prostitution and inter-state and cross-border trafficking and also their increased vulnerability to HIV/AIDS and health risks. It called upon the Government to review existing legislation on trafficking and forced prostitution and to strengthen law enforcement and recommended the development of bilateral and inter-state controls and reintegration and advocacy programmes to prevent the exploitation of women and girls in forced prostitution and trafficking.

⁶⁰ The committee considered the initial report of India (CEDAW/C/IND/1) at its 452nd, 453rd and 462nd meetings, on 24 and 31 January 2000 (CEDAW/C/SR.452, 453 and 462).

TRAFFICKING IN NEPAL

Dejure Position

As in Bangladesh and India the Nepal Constitution also has similar provisions relating to non discrimination and temporary special measures with reference to women, children, the aged or those who belong to a class that is economically, socially or educationally backward.⁶¹ Nepal also has an impressive array of fundamental rights akin to other countries in the region. The Interim Constitution is the only one in the study covered that addresses women's concerns including the right to reproductive health, prohibition against violence and equal rights to inheritance and making these a constitutional protection is guaranteed under the Constitution. The Nepal Constitution is the only one in the region that prohibits gender discrimination while the other constitutions prohibit sex discrimination.

Trafficking of human beings, slavery and bonded labour are prohibited under the interim constitution.⁶²

The current legislations in Nepal are fairly progressive.

The Trafficking in Persons and Transportation (Control) Act, 2007

This legislation seeks to prevent cross border trafficking and lays down procedures for protection and prosecution. Transportation as defined under the statute covers features of trafficking. These include taking a person to a foreign country with a view to sell or buy the person, taking a person away from their home within Nepal or another country by controlling that person, or handing over the person by enticing, alluring, or abduction or by misrepresentation, fraud, deception, force or coercion, or by taking hostage, or taking advantage of the vulnerability of the person, or by making the person unconscious, abusing post or power, or causing fear, threats to the parent or guardian in order to cause such person to be engaged in prostitution or exploitation.⁶³ The definition is very exhaustive as it not only covers prostitution but is gender neutral covering all forms of trafficking. The statute has made the issue of discharge of burden of proof easier without compromising on fair trial standards. This makes it easier especially in cases where witnesses are difficult to come by or where they are from other countries.⁶⁴ The Act protects the identity of not just the victims but

⁶¹ Article 21 of the *Nepal Constitution*.

⁶² Article 29 of the *Interim constitution*.

⁶³ Responses in human trafficking in Bangladesh, India, Nepal and Sri Lanka legal and policy review 2011, UNODC pg 49

⁶⁴ Section 9 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

also of informers and whistleblowers.⁶⁵ Statements of victims recorded by courts are sufficient by themselves and do not need to be subjected to gruelling cross examination. This also facilitates in preventing persons from turning hostile after they have given their statements.⁶⁶ Making a departure from general criminal jurisprudence that permits only the accused to have a lawyer, the statute permits the victim to be represented by a counsel in addition to the public prosecutor.⁶⁷ The victim also has a right to have a translator.⁶⁸ This is of immense benefit to women who do not know the language and would be unable to follow proceedings. The right of a translator is generally given only to the accused but in this statute the victim not only would have a translator for the transmission of her evidence but also to make her understand the proceedings. Trials have to be conducted *in camera*.⁶⁹

The statute casts a positive obligation (duty) on the state to rescue victims of cross border trafficking and to rehabilitate them.⁷⁰ The statute also permits the court to grant police protection and accommodation to the victim if she so desires.⁷¹ The statute also provides for payment of compensation to victims of trafficking whether the trafficker is punished or not and the State has to provide a fund in this regard.⁷²

Children's Act 1991

The Act prohibits and punishes persons who involve a child in immoral profession or those works that may have an adverse impact on the life of the child.⁷³

The Foreign Employment Act 2064(2007) and the Foreign Employment Regulation, 2064 (2008)

The Act and the rules have been framed to support foreign employment for Nepali citizens. The Act identifies the state having a role to enter into bi-lateral agreements which would enable foreign employment for Nepali citizens; and provides for a clear process for intermediary agents/bodies to facilitate foreign employment and outlines their obligations towards potential employees. It also ensures state knowledge and oversight of those being employed as well as the nature of their contracts; which presumably would allow for proactive protection of the rights of those engaging in foreign employment.

⁶⁵Section 5, 20 and 25 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁶⁶Section 6 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁶⁷Section 10 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁶⁸Section 11 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁶⁹Section 27 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁷⁰Section 13 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁷¹Section 26 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁷²Section 14 and 17 of the *Trafficking in Persons and Transportation (Control) Act 2007*.

⁷³Section 18 of the *Children's Act 1991*.

The Regulations provide for criteria of those who can be employed, as well as the criteria for intermediary bodies; and redress processes. However, more work on implementation has to take place at the ground level, before the gains of such a law can be realised for the common population.

Child Labour (Prohibition and Regulation) Act 2000

The Act prohibits the employment of children below 14 years as well as from hazardous work. Additionally work that is forced on children or has an adverse impact on its life and health is prohibited.⁷⁵

Mulki Ain or Country Code

The country code is a compilation of all laws civil and criminal that dates back to the days of monarchy. The code is still relevant except where provisions are amended or repealed. Under the country code sale of persons outside the country is prohibited.⁷⁶ Bonded labour, serfs and slavery is prohibited and a right to compensation is available to the aggrieved person.⁷⁷

In *Urmila Thapa Magar vs. Krishna Prasad Pudasaini*, the question before the court was whether there was cross border trafficking even though the victim was not taken out of Nepal. The intention of the trafficker was to take her to India. However she was rescued within the territories of Nepal due to a timely police intervention. The issue became important as cross border trafficking involved a greater punishment. The court held that if it was shown that trafficking was for the purpose of taking a person to another country that is sufficient for conviction under cross border trafficking and there was no necessity to take that person out of Nepal. Thus attempts of cross border trafficking even thwarted would come under the definition. [Criminal appeal No 1610/05]

In *Permanent Resident vs. HMG on the FIR of Tara Devi Dahal*, the question for consideration under the Human Right Trafficking Activities (control Act) was whether there was an offence of trafficking before the victim was sold abroad as she was rescued by then. The victim was taken away from Nepal to Patna in India on the promise of marriage. The court found the statement of the victim trustworthy and as the law requires the defence to rebut the same, the trafficker was convicted. [Criminal case no 1042 of 2051 BS]

The prevention of corruption Act 2002 addresses bribes and graft taken by public servants and makes these an offence.⁷⁸

The Legal Aid Act provides for free legal aid in cases of abortion, trafficking, sexual exploitation and domestic violence.

Defacto Position

Legislative intervention has been impressive. However implementation of laws is tardy. Nepal is rated a source country for men, women and children

⁷⁴Section 3 (1 and 2) of the *Child Labour (Prohibition and Regulation) Act 2000*.

⁷⁵Section 4 of the *Child Labour (Prohibition and Regulation) Act 2000*.

⁷⁶Chapter 11 sub clause 1 of *Mulki Ain or Country Code*.

⁷⁷Chapter 11 sub clause 3 of *Mulki Ain or Country Code*.

⁷⁸Section 3 from footnote 53 of the *Prevention of Corruption Act 2002*.

specifically for commercial sexual exploitation and forced labour abroad. Though persons reeling under bonded labour were freed the rehabilitation of such persons by providing land has yet to fructify. Traffickers often give money to the victims as advance and then the victims and family members fall into a debt trap which cannot be redeemed unless the person is trafficked. This cycle is difficult to break despite a very progressive legislation in the region, especially when trafficking is family based. Since trafficking is targeted at those who lack education or are illiterate education one of the key components that need to be focused. According to the Central Child Welfare Committee only 40 percent of children have certificates of birth. This was in 2008. Migration from Nepal to India is easy and persons need only identification documents in view of the historical relationship between the countries. A large number of persons from Nepal migrate in search of employment to India and other countries both through regular and irregular channels. In India their migration is generally towards domestic work, or other low skilled jobs. Studies have shown that Nepal women are sold for 25,000 to 50,000 Rupees and employed as sex workers in India and the Middle east.⁷⁹ The problem is tremendous and it would require a sustained change in many areas of law including family law that affect impact trafficking. In the context of Nepal it is very essential that there are coordinated interventions with the other countries to combat cross border trafficking as Nepal is considered to be a source country where there is a cross border movements of people in search of jobs and other opportunities elsewhere.

The CEDAW Committee in its concluding comments about Nepal's country report⁸⁰ while recognizing the efforts made by the State party to address the issue of trafficking in women and girls, remained concerned about the continuing prevalence of this problem in Nepal. It was also concerned about the large discrepancy between reported instances of trafficking and the actual number of cases brought to court and over the delays in enacting the amendments to Human Trafficking (Control) Act.

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

⁷⁹ The trafficking of women and girls, a comparative study of two VDCs. Gothenburg University, Sweden as quoted in FWLD legal study

⁸⁰ CEDAW/C/NPL/2-3) at its 630th and 631st meetings, on 13 January 2004 (see CEDAW/C/SR.630 and 631)

KEY FINDINGS OF THE REPORT

- Most persons who are trafficked belong to the marginalised and socially discriminated communities and castes.
- The Constitutions of the three countries prohibit discrimination but does not define the term.
- The Constitutions of the three countries provide equality as a fundamental right and also stress substantive equality in as much as the states can make laws for the welfare of women and children.
- There is much legislation that is not in consonance with contemporary definitions of trafficking.
- There is the absence of legislations in certain areas that could address this critical concern.
- There is a wide gap between the guarantees of constitutional law as it exists and the standards of statutory law besides problems in implementation of laws.
- The capacity of law to deliver social justice remains extremely limited as women who are trafficked, are unable to access justice.
- The development of public interest litigation in areas as wide as rights of sex workers and sexual harassment at the workplace, are some examples that indicate the application of judicial precedence to address this concern.
- The region has a very pro active judiciary which has interpreted laws in a very dynamic way in the area of trafficking.
- The practice of bonded labour and child labour is widely prevalent that results in greater trafficking.
- There is a lack of coordinated investigation between the countries to address cross border trafficking.
- The concept of preventive custody where the victim is detained by the state while the perpetrators are free is prevalent in all the three countries and violates the liberty and freedom of movement of the victim.
- The lack of proper policies and laws that address the right of a victim of cross border trafficking when it comes to repatriation to their country results in such persons languishing in prisons.

- Trials take a long duration.
- There is an absence of witness protection procedure resulting in victims being extremely frightened of deposing before courts.
- Though legal aid is a constitutional right it is not easily available to the victim.
- All the three countries have not ratified the UNTOC and protocols as a result of which many enabling provisions cannot be made used.
- There is lacks of shelters for women who are rescued or flee from trafficking.
- There are not sufficient schemes to facilitate empowerment of women who are rescued from trafficking.
- The trafficked woman is only treated as a witness and not as a person whose rights have been violated as a result of which she is not entitled to legal aid as a constitutional right.
- There are no protections offered to those who are informers.
- Courts take a long time in disposing of cases.

COMMON RECOMMENDATIONS

- There has to be a clear understanding among enforcement officials and judiciary about human rights as very often trafficking is only seen as crime control.
- There must be greater awareness and training among such persons of all stages of source, demand and transit in trafficking.
- Training modules in cases of trafficking must be from a rights and gender perspective.
- Persons who are informers must be protected under the law.
- A comprehensive definition of trafficking is lacking in India and Bangladesh which needs to be addressed by the countries.
- There can be joint investigations of cases where criminal syndicates are involved on either side of the borders.
- The one stop crisis centre for women and children in Bangladesh is an innovative step that could be replicated in other countries.
- The concept of protective custody violates women's human rights and should not be encouraged by law enforcement officials unless the woman expresses her willingness to stay in them.
- In case the woman exercises her choice to stay in protective custody there must be opportunities available for her to be effectively rehabilitated and reintegrated by vocational training and other skills after she is free.
- In no case should women who are victims be lodged in prisons.
- There is an overall necessity of systematic and focused trainings on trafficking with all branches of the criminal justice system that would include, police, public prosecutors and the judicial officers.
- There is a need to extradite offenders so that they do not take advantage of the various legal systems and the three countries must take necessary steps in this regard.
- The three countries must pursue increased international, regional and bilateral cooperation each other in order to address trafficking.
- There must be joint training between officials of the three countries at the mid and lower levels so that a better understanding of concerns emerges in this area.
- There must be greater cooperation between the three countries through government, border authorities and courts.

- There must be legislative interventions that address the issue of repatriation.
- There must be overall systematic and focused trainings of all wings of the criminal justice system.
- Rescue and rehabilitation should go with a gender sensitive approach.
- Legal aid clinics could be created near border areas as well in to facilitate the rehabilitation and repatriation of persons trafficked.
- Data sharing between NGO's and Governments of the three countries should be encouraged.
- A network could be created that would provide legal services in this regard.
- The three countries must have a witness protection in place to protect the victim as well as for effective prosecution.
- There have been instances of foreign victims who do not have proper documentation being pushed across the border without any protection services on the other side. There must be increased coordination between the countries to offer protective services near the border.
- There is a necessity to offer foreign trafficking victims temporary immigration or residency status. This would be required especially so as the women may require it or the cases may take a long time.
- In the case of trafficked young persons and children a multi sectoral integrated approach that addresses education, health and safe environment is necessary.
- There could be regional groups of Non Government Organisations working in the area of trafficking that are linked to each other and could work in conjunction across the borders.
- Trafficking must be seen as an organised crime.
- There must be sufficient shelters for women who are rescued or flee from trafficking.
- There is a necessity to address legislative interventions that do not treat the trafficked victim as only a witness but grants her right to legal representation. There must be a greater sensitivity towards the trafficked woman.
- The statements in SAARC should become part of domestic laws.

The common recommendations would cover many aspects that can form subject of law and policy with reference to each country. In addition to these the following specific recommendations have been made but they should be in read together with the common recommendations.

Recommendations For Bangladesh

- There is a need for a comprehensive definition of trafficking that is not restricted to trafficking for sexual purposes. The current definition under the Women and Children Repression Prevention Act 2000 is not exhaustive as it focuses only on trafficking for commercial sex.
- The definition of a child varies from 16 to 18 under different statutes and there is a need to have a comprehensive definition in conformity with the UN child rights convention.
- A legislation that criminalises the forced labour of persons for employment could be considered.
- The pledging Act of 1933 needs to be amended at least with reference to the quantum of punishment.
- It is necessary that effective prosecution and conviction of traffickers take place in a specific time frame.
- The introduction of education and employment initiatives for vulnerable groups, including teenage girls, and support, rehabilitation and reintegration measures for women and girls who have been victims of trafficking ought to be should be a priority.

Recommendations For India

- Necessity to address access of special legislations such as National Rural Employment Guarantee Act to communities vulnerable to trafficking.
- Necessity to address the right to education to communities vulnerable to trafficking.
- The anti human trafficking unit needs to be increased in the country.
- Quality Legal services must be provided for victims of trafficking.
- There is necessity of a uniform definition of age as different statutes have different cut off age for the definition of children.

Recommendation For Nepal

- There is no uniform definition of child in terms of age and different statutes have different ages. There is a need to conform to the UN CRC.
- Proceeds from trafficking must be considered as proceeds from organised crimes and strict penalties must be provided.
- A stronger availability of legal services that would also focus on civil remedies is necessary especially in cases where labour law is violated.

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APPENDIX A: DETAILS ON SOME ARTICLES REFERRED TO IN THE STUDY

Foot Note 2

SAARC CONVENTION ON PREVENTING AND COMBATING TRAFFICKING IN WOMEN AND CHILDREN FOR PROSTITUTION ARTICLE II SCOPE OF THE CONVENTION

The purpose of this Convention is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of prevention, interdiction 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.

Foot Note 4

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ARTICLE 27 EQUALITY BEFORE LAW

All citizens are equal before law and are entitled to equal protection of law.

Foot Note 5

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ARTICLE 28 DISCRIMINATION ON GROUNDS OF RELIGION, ETC

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
- (2) Women shall have equal rights with men in all spheres of the State and of public life.
- (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

Foot Note 6

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

ARTICLE 19

EQUALITY OF OPPORTUNITY

- (1) The State shall endeavour to ensure equality of opportunity to all citizens.
- (2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Foot Note 7

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

ARTICLE 29

EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

- (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.
- (2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.
- (3) Nothing in this article shall prevent the State from -
 - (a) Making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;
 - (b) Giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination; reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

Foot Note 8

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

ARTICLE 33

SAFEGUARDS AS TO ARREST AND DETENTION

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to

consult and be defended by a legal practitioner of his choice.

- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- (3) Nothing in clauses (1) and (2) shall apply to any person-
 - (a) Who for the time being is an enemy alien; or
 - (b) Who is arrested or detained under any law providing for preventive detention.
- (4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.
- (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order.
- (6) Parliament may be law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).

Foot Note 9

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

ARTICLE 18

PUBLIC HEALTH AND MORALITY

- (2) The State shall adopt effective measures to prevent prostitution and gambling.

Foot Note 10

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

ARTICLE 34

PROHIBITION OF FORCED LABOUR

- (1) All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Foot Note 12

BANGLADESH PENALCODE, 1860

Chapter	Section	Details
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, <i>Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.</i>	317: Exposure and abandonment of child under twelve years by parent or person having care of it	Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. <i>Explanation.</i> This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, <i>of wrongful restraint and wrongful confinement</i>	339: Wrongful restraint	Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person. <i>Exception.</i> The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, <i>of wrongful restraint and wrongful confinement</i>	340: Wrongful confinement	Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of criminal force and assault</p>	<p>350: Criminal Force</p>	<p>Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.</p>
<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of Kidnapping, Abduction, Slavery & Forced Labour</p>	<p>359: Kidnapping</p>	<p>Kidnapping is of two kinds: kidnapping from Bangladesh, and kidnapping from lawful guardianship.</p>
<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of Kidnapping, Abduction, Slavery & Forced Labour</p>	<p>362: Abduction</p>	<p>Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person</p>
<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of Kidnapping, Abduction, Slavery and Forced Labour</p>	<p>371: Habitual dealing in slaves</p>	<p>Buying or disposing of any person as a slave Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.</p>
<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of Kidnapping, Abduction, Slavery and Forced Labour</p>	<p>374: Unlawful compulsory labour</p>	<p>374. (1) Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. (2) Whoever compels a prisoner of war or a protected person to serve in the armed forces of Bangladesh shall be</p>

		<p>punished with imprisonment of either description for a term which may extend to one year.</p> <p><i>Explanation.</i> In this section the expressions "prisoner of war" and "protected person" shall have the same meaning as have been assigned to them respectively by Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949,</p>
<p>CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of rape</p>	<p>375: Rape</p>	<p>A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:</p> <p><i>Firstly.</i> Against her will.</p> <p><i>Secondly.</i> Without her consent.</p> <p><i>Thirdly.</i> With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.</p> <p><i>Fourthly.</i> With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.</p> <p><i>Fifthly.</i> With or without her consent, when she is under fourteen years of age.</p> <p><i>Explanation.</i> Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.</p>

		<i>Exception.</i> Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of rape	376: Punishment for Rape	Whoever commits rape shall be punished with [imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Foot Note 13

BANGLADESH PENALCODE, 1860

Chapter	Section	Details
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, Of Kidnapping, Abduction, Slavery and Forced Labour	366A: Procuration of a Minor girl	Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.
CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, ofKidnapping, Abduction, Slavery and Forced Labour	366B: Importation of a girl from a foreign country	Whoever imports into Bangladesh from any country outside Bangladesh any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

**CHAPTER XVI, OF
OFFENCES AFFECTING
THE HUMAN BODY, of
*Kidnapping, Abduction,
Slavery and Forced
Labour***

372: Selling minor
for purposes of
prostitution, etc

Habitual dealing in slaves

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or for illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Selling minor for purposes on prostitution, etc.

Explanation I.- When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.- For the purposes of this section "illicit intercourse" means sexual intercourse between person not united by marriage or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

CHAPTER XVI, OF OFFENCES AFFECTING THE HUMAN BODY, of Kidnapping, Abduction, Slavery and Forced Labour

373:Buying minor for purposes of prostitution, etc

Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.-Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.-'Illicit intercourse' has the same meaning as in section 372.

Foot Note 14

BANGLADESH PENALCODE, 1860

SECTION 161, *Public servant taking gratification other than legal remuneration in respect of an official act* [**CHAPTER IX, OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS**]: Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations:

"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating but he is not guilty of the offence defined in this section. *"Gratification."* The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money. *"Legal remuneration."* The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which is permitted by the authority by which he is employed, to accept. *"A motive or reward for doing."* A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Foot Note 15

BANGLADESH PENALCODE, 1860

SECTION 162, *Taking gratification, in order, by corrupt or illegal means, to influence public servant* [CHAPTER IX, OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS]: Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Foot Note 16

BANGLADESH PENALCODE, 1860

SECTION 163, *Taking gratification, for exercise of personal influence with public servant* [CHAPTER IX, OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS]: Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Foot Note 17

BANGLADESH PENALCODE, 1860

SECTION 164, *Punishment for abetment by public servant of offences defined in section 162 or 163* [CHAPTER IX, OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS]: Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

SECTION 165, *Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant* [CHAPTER IX, OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS]: Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Foot Note 18

THE SUPPRESSION OF IMMORAL TRAFFIC ACT, 1933

SECTION 8, *Punishment for living on the earnings of prostitution:*

- (1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of another person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine which may extend to one thousand Taka, or with both, and, if a male person, shall also be liable to whipping.
- (2) Where a person is proved to be living with, or to be habitually in the company of a prostitute, or to have exercised control, direction or influence over the movements of a prostitute, in such a manner as to show that he is aiding abetting or compelling her prostitution, it shall be presumed until the contrary is proved, that he is living on the earnings of prostitution: Provided that the mother, or a son or daughter, of a prostitute, shall not be punished under this section for living on the earnings of such prostitute unless the Court is satisfied that such mother, son or daughter is aiding, abetting or compelling her prostitution.

SECTION 9, Procuration:

- (1) Any person who induces a female to go from any place with intent that she may, for the purposes of prostitution, become the inmate of, or frequent a brothel, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine which may extend to one thousand Taka, or with both, and, if a male person, shall also be liable to whipping.
- (2) An offence under this section shall be triable in the place from which the female was induced to go, or in any place to which she may have gone as a result of such inducement.

Foot Note 33

**CONSTITUTION OF INDIA
ARTICLE 17
ABOLITION OF UNTOUCHABILITY**

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Foot Note 34

**CONSTITUTION OF INDIA
PART IV
DIRECTIVE PRINCIPLES OF STATE POLICY**

**ARTICLE 38
STATE TO SECURE A SOCIAL ORDER FOR THE PROMOTION OF WELFARE OF
THE PEOPLE**

- (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
- (2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

**ARTICLE 39
CERTAIN PRINCIPLES OF POLICY TO BE FOLLOWED BY THE STATE**

The State shall, in particular, direct its policy towards securing-

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

**ARTICLE 39A
EQUAL JUSTICE AND FREE LEGAL AID.**

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Foot Note 38

**THE INDIAN PENAL CODE, 1860
*Of kidnapping, abduction, slavery and forced***

**SECTION 366
KIDNAPPING, ABDUCTING OR INDUCING WOMAN TO COMPEL HER MARRIAGE, ETC.**

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 3*[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

SECTION 366A
PROCREATION OF MINOR GIRL

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

SECTION 366B
IMPORTATION OF GIRL FROM FOREIGN COUNTRY

Whoever imports into 2*[India] from any country outside India 7*[or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, 5 * * * * * shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

SECTION 367
**KIDNAPPING OR ABDUCTING IN ORDER TO SUBJECT PERSON
TO GRIEVOUS HURT, SLAVERY, ETC.**

Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

SECTION 370
BUYING OR DISPOSING OF ANY PERSON AS A SLAVE

Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

SECTION 371
HABITUAL DEALING IN SLAVES

Whoever habitually imports, exports, removes, buys, sells traffics or deals in slaves, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

SECTION 372
SELLING MINOR FOR PURPOSES OF PROSTITUTION, ETC.

Whoever sells, lets to hire, or otherwise disposes of any 2*[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. 3*[Explanation I.-When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution. Explanation II.-For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage, or by any union or tie which though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]

Buying minor for purposes of prostitution, etc.

SECTION 373
BUYING MINOR FOR PURPOSES OF PROSTITUTION, ETC.

Whoever buys, hires or otherwise obtains possession of any 2*[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

1*[**Explanation I.**-Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.- "Illicit intercourse" has the same meaning as in section 372.]

SECTION 374
UNLAWFUL COMPULSORY LABOUR

Whoever unlawfully compels any person to labour against the will of that person, shall be

punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Foot Note 39

THE INDIAN PENAL CODE, 1860

Punishment for rape

SECTION 376

PUNISHMENT FOR RAPE

- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
- (2) Whoever -
- (a) being a police officer commits rape -
 - (i) within the limits of the police station to which he is appointed; or
 - (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
 - (iii) on a woman in his custody or in the custody of a police officer subordinate to him;
or
 - (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
 - (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
 - (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

- (e) commits rape on a woman knowing her to be pregnant; or
- (f) commits rape on a woman when she is under twelve years of age; or
- (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.-Where a women's is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.-"women's or children's institution" means an institution, whether called and orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.-"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

Assault

SECTION 354

ASSAULT OR CRIMINAL FORCE TO WOMAN WITH INTENT TO OUTRAGE HER MODESTY

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Foot Note 64

CONSTITUTION OF NEPAL

ARTICLE 21

RIGHT AGAINST EXILE

No citizen shall be exiled.

Foot Note 65

**INTERIM CONSTITUTION OF NEPAL
ARTICLE 29
RIGHT AGAINST EXPLOITATION**

- (1) Every person shall have the right against exploitation.
- (2) No person shall be exploited in the name of custom, tradition and practice, or in any other way
- (3) No person shall be subjected to human trafficking, slavery or bonded labour.
- (4) No person shall be subject to forced labour. Provided that nothing in this clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes.

SOUTH ASIA
WOMEN'S FUND

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for their support and solidarity!

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