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MIGRANT WOMEN WORKERS AND OVERT MIGRATION POLICIES IN NEPAL

A law and
policy baseline
study





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INTRODUCTION

The purpose of this paper is to review the laws and policies overtly intended to regulate migration of women workers from Nepal. This paper does not focus on laws, policies and practices that trigger mobility and labour migration (e.g. economic and social policies). The paper focuses on legal and policy provisions afforded to migrant domestic and garment workers based on the relevant international labour standards (see Table 1) and domestic migration and forced labour laws and practices. These provisions are described as a *system* that partially influences would-be migrants' decisions in addition to other systemic 'push' and 'pull' factors.

Table 1: Ratification of ILO and other international instruments

CONVENTION	RATIFIED?	YEAR OF RATIFICATION
Forced Labour Convention, 1930 (No. 29)	Yes	2002
Abolition of Forced Labour Convention, 1957 (No. 105)	Yes	2007
Convention on the Elimination of All Forms of Discrimination Against Women	Yes	1991
Worst Forms of Child Labour Convention, 1999 (No. 182)	Yes	2002
Protocol of 2014 to the Forced Labour Convention, 1930	No	
Migration for Employment Convention (Revised), 1949 (No. 97)	No	
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	No	
Private Employment Agencies Convention, 1997 (No. 181)	No	
Domestic Workers Convention, 2011 (No. 189)	No	
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2003	No	
International Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No	





Labour migration

While Nepal exports commodities such as textiles, fruits, agricultural products (OEC, 2016) and construction materials, labour is also a major export of Nepal. However, it is fundamental not to view labour as a commodity, but rather as workers who should enjoy the protection of their fundamental principles and rights at work (FPRW) and part of a Decent Work goal (SDG 8). Labour migrants have made a significant contribution to the extent that Nepal has developed into a largely remittance-based economy. Indeed, as a share of GDP, Nepal is currently the third-largest recipient of remittances in the world (Government of Nepal, 2016). A recent study by Nepal's Department for Foreign Employment (DoFE) indicated that in the period 2013/14, there were just under 522,000 Nepalese working abroad (GIZ and ILO, 2015). In the same period, Nepal received foreign remittances contributing up to 29.1% of the country's GDP, which has been on the rise since 2011 (Government of Nepal, 2015: 36).¹

Work in Freedom (WIF) is a DFID-funded programme to contribute to the remedy and prevention of trafficking of women and girls from South Asia into the domestic work and garment sectors of South Asia and the Middle East (Jordan and Lebanon). WIF also supports the economic empowerment of these women by increasing their access to decent jobs. Research and building better evidence is the programme's component to reinforce activities through increasing the knowledge base on a variety of topics linked to forced labour and trafficking, from, for example, laws and policies to the root causes of forced migration.

It is important to take into account that these figures are published on the basis of formal migration records, i.e. migration undertaken having obtained a government-issued permit. Indeed, the increase of 120% of female migrants in 2010/11 has been attributed to the lifting of the ban on Nepali women migrating as domestic workers to the Middle East (Government of Nepal, 2015).

The most frequent destinations for Nepali foreign labour migrants are Middle Eastern countries and Malaysia. These destinations have received 85 per cent of all labour migrants since 2009 (Government of Nepal, 2016). Of these foreign labour migrants, a significant proportion constituted women of whom almost 47 per cent headed for the Middle East, mainly to the UAE (19.88 per cent) and Kuwait (13.56 per cent) (*ibid.*, Figure 1). This migration dynamic

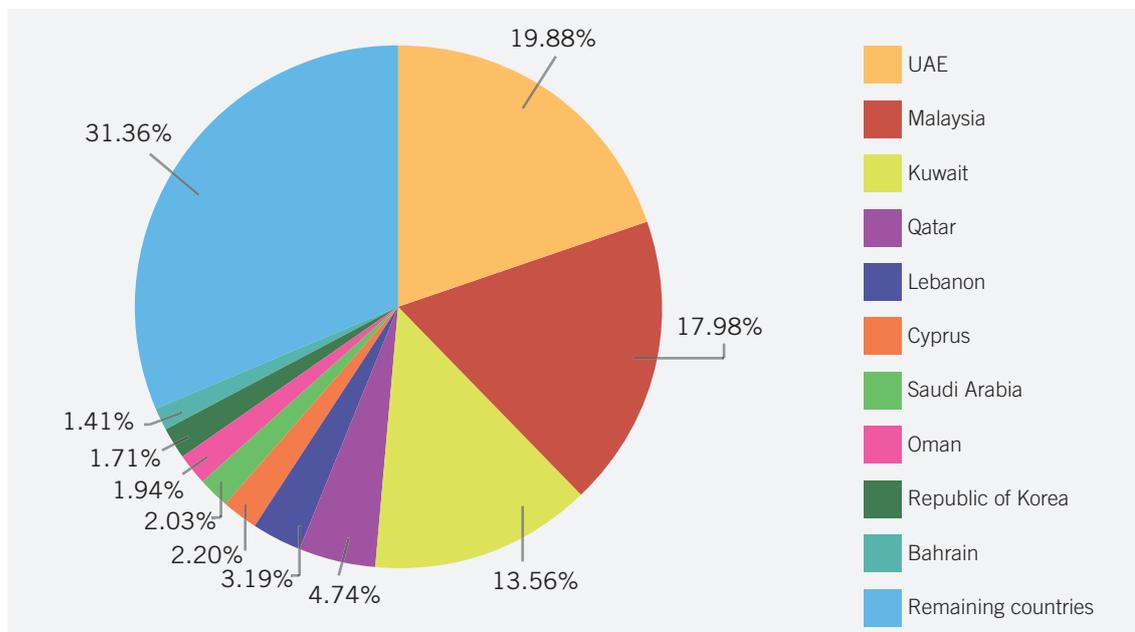
¹ NB. This data is not disaggregated in terms of migrant workers and other sources of remittances.





has been encouraged by the high demand for low and semi-skilled migrant workers in several sectors, including construction, domestic work, services and manufacturing.

Figure 1: Top ten destination countries for female labour migrants, 2008/9-2014/5



Source: Department of Foreign Employment - Government of Nepal, 2016

1.1 General provisions for migrant workers

Migration for many is the opportunity to reduce *inter alia* household poverty, refuge from conflict and natural disasters. For women, gender based violence and fleeing patriarchal norms are a key motive to migrate. Although restrictive socio-cultural roles imposed on women through patriarchal norms have been seen to decrease the likelihood of women (officially) migrating (Zachariah et al., 2001), they have been strongly linked to the exacerbation of the unrecorded and illegal migration and trafficking of women (Murphy, 2008; Black, 2004).

Increasing numbers of foreign employment seekers are being recruited through one of the 750 registered recruitment agencies throughout Nepal. The year 2014/5 saw the highest and lowest proportions since 2008/9 of migrants recruited respectively through recruitment agencies (89.88 per cent) and individually (10.12 per cent) (Government of Nepal, 2016). This also represented the highest number of female migrants seeking work permits through recruitment agencies: almost 78 percent (*ibid.*)





Forced labour

2.1 Policy and legal framework for internal migrant workers in Nepal

The policy and legal framework governing forced labour, including bonded labour and human trafficking, is made up of a number of acts. The most prominent of these instruments are described below. As a basis of the policy and legal framework in Nepal, the country's constitution states the following with relation to forced labour:



29. Right against exploitation:

1. Every person shall have the right against exploitation.
2. No person shall be subjected to any kind of exploitation on the basis of religion, custom, tradition, culture, practices or any other bases.
3. No person shall be subjected to human trafficking or bonded labor, and such an act shall be punishable by law.
4. No person shall be subjected to forced labor. Provided that nothing in this clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes.
5. Any act contrary to clause (3) and (4) shall be punishable by law and the victim of such an act shall have the right to compensation from the perpetrator.



Source: Nepal Research, 2015





On this basis, the Government of Nepal passed the Bonded Labour (Prohibition) Act (2002), which includes the following definition of bonded labour:



Definition : Unless the subject or context otherwise requires; in this Act-

1. "Bonded labour (Kamaya shram)" means the labour or service to be rendered for a creditor for the following reasons without wages or with nominal wages.
2. To pay back the debt obtained by him/ her or family and to pay the interest thereof.
3. To pay back the debt obtained by his/her ascendant and to pay back the interest thereof.
4. To pay back the bonded debt of bonded labourer by a person who has given a guarantee before the creditor on behalf of a bonded labourer.



Source: ILO, 2016c

The definition of bonded labour in the Bonded Labour (Prohibition) Act (2002) was developed from the viewpoint of repaying debt, as can be seen in each of the three sub-articles. A noteworthy shortcoming of this starting point is its misalignment with the definition in Article 2 of the ILO Convention concerning Forced or Compulsory Labour, 1930 (No. 29): "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." (ILO, 2016d). Though the definition in the ILO Convention goes on to exclude types of work carried out in *inter alia* states of emergency and periods of military service, the voluntary element of undertaking labour is an important consideration in the promotion of decent work.

The Human Trafficking Control Act, 1986 represented an initial attempt to address issues of human trafficking. It was superseded by the Human Trafficking and Transportation (Control) Act, 2007, which was lauded for not only bringing the victim to the forefront of the provisions made in this act (including provisions for victim/witness protection and the supply of an interpreter) but also broadening the focus of the act to include other forms of trafficking beyond prostitution, including organ transplantation (FWLD, 2014). Obstacles arise in the misinterpretation of the focus of the act during the implementation and enforcement process, where prostitution is often conflated with trafficking. This has led to concerns of imposing restrictions on the freedom of movement of women and girls.





Foreign employment

Policies and legal frameworks in Nepal aim to promote employment abroad as a safe and decent prospect for potential migrants. The *National Labour Policy*, 1999 highlighted the need for mechanisms facilitating foreign employment after a more than seven-fold increase in migration during the period 1994-1999 (Government of Nepal, 2015). Among its most prominent provisions, the *Foreign Employment Act 2007* sought *inter alia*

- i) to prevent the migration of children (Article 7);
- ii) to ensure the equal and fair treatment of potential migrants, regardless of gender (Article 8);
- iii) to regulate the confiscation of foreign employment seekers' passports (Article 18); and
- iv) to regulate migration for the purposes of employment on an individual basis (Article 21).²

Further to recent scrutiny of the Foreign Employment Act by the International Labour Organisation, a number of shortcomings of the Act have been highlighted. Most prominently, the current draft of the Act would still permit fee-charging to workers, including domestic workers. The general principle contained in the Private Employment Agencies Convention, 1997 (No. 181) prohibits charging fees and costs to workers, although some exceptions are permitted. In this context, the ILO highlighted the particular vulnerability of migrant domestic workers (MDWs) to specific forms of abuse, which can include undue dependence on the employer due to migration-related debt.

Building on the *Foreign Employment Act 2007*, the *Foreign Employment Policy* was introduced in 2012, primarily in response to ever-increasing numbers of young, economic migrants and pledged to “ensure safe, organized, respectable and reliable foreign employment to contribute to poverty reduction along with sustainable economic and social development through economic and non-economic benefits of foreign employment” (Government of Nepal, 2015: 11). Ways in which the Policy aims to achieve this include:

- making each step of the foreign employment process simple, transparent, organized and safe;
- addressing concerns of female migrant workers and ensure their rights in the overall migration cycle; and
- marshalling local, national and international resources for managing foreign employment and promote collaborative efforts by increasing sector partnerships. (Government of Nepal, 2015)

² Government of Nepal, Ministry of Labour and Employment, 2007.





An important perspective included in the *Foreign Employment Policy* was that of women and girl migrants and the challenges they face in migrating, such as through irregular channels, lack of information, and lack of protection from rights' violations, particularly for domestic workers. Beyond legislation, of course, other important factors influencing the decision of female would-be MDWs centre upon patriarchal socio-cultural norms and expectations (Murphy, 2008).

Memoranda of Understanding between Nepal and many Nepalese workers' destination countries have been established to address the protection deficits of migrant workers (Migrant Forum Asia, 2015). Associated bilateral agreements have included negotiations on the protection of migrants' minimum pay and, whilst framed as negotiations that support these memoranda, they can lead to situations where labour is treated as a commodity and where agreements are made on subpar minimum wage levels and working conditions (*ibid.*).

One such bilateral agreement affecting Nepali migrant workers is the Peace and Friendship Treaty, established in 1950 between India and Nepal. With its roots in the recruitment of Nepalese 'gorkhas' into the British Indian army during the early 1800s, the agreement makes provisions for both Nepalese and Indian workers to cross the border, work and be treated as a citizen of the host country. It states, in Article 7, that "The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement that privileges of a similar nature." (United Nations, 1951). While the transnational labour market has generated job opportunities and better livelihoods for nationals of both countries, Nepali workers in India are also subject to economic and social disadvantages (Bhattraï, 2007). These have included a range of rights infringements, from monetary extortion at the Indo-Nepalese border (taking advantage of the migrants' ignorance of their rights) to poor working and living conditions.

3.1 Migrant domestic workers

Nepal has not enshrined into national law any provision governing the recruitment or activity of informal sector workers, including domestic workers (Swatantrata Abhiyan, 2015).³ This is reflected in the Civil Code Bill that notably omits the worker status of domestic workers (*ibid.*). The non-recognition of domestic workers in this way affects the protection afforded to them not only by the law but also by the labour inspectorate. As seen in Table 1, the Government of Nepal has not yet ratified ILO Convention 189 on domestic workers. Ratifying and reporting on progress made towards fulfilling the obligations under this ILO Convention will serve to improve the legal protection and working conditions of domestic workers.

The past decade has seen a significant increase in women's participation in foreign employment. That the majority are female, however, has brought to the fore policies governing the movement specifically of this demographic. An example of governing women's movement at the outset of Nepalese foreign employment legislation is making her guardian's consent a requirement to obtain an exit visa (Foreign Employment Act, 1985). This requirement was

³ As of November 2016, a new labour code has been tabled in Parliament that contains a provision on domestic work but it has not been endorsed or enacted as yet. There is also a provision that directs the development of separate guidelines on setting minimum wage for domestic workers and other entitlements within the country.





supplemented in 1998 by the additional prerequisite to obtain the Government's permission (Sijapati and Limbu, 2012).

While labour migration is an important livelihood option for women and has empowered many migrant households, there are various reports of verbal, physical and sexual abuse of female migrant domestic workers. Cases have included mental health issues, suicide cases, forced pregnancy and returnees with a child born in the destination country (Krishna, 2015). This has led at times to Government-initiated restrictions of the movement of would-be MDWs. Examples include banning travel to Lebanon for domestic work in 2009-2010 due to the number of reported suicides; banning MDWs under 30 years of age from working in Gulf countries (Krishna, 2015) and subsequently below 24 years of age (Migrant Domestic Worker Guidelines, 2015). The Migrant Domestic Worker Guidelines, adopted in 2015, are given authority under sub-rule (1), Rule 52(a) of the Foreign Employment Regulations, 2008 (ILO, 2015). The guidelines provide detailed guidance on making the process of migrating for the purpose of foreign employment as domestic workers transparent and systematic. The guidelines also aim to make foreign employment safe after arrival in the destination country, well-managed and dignified by protecting the workers' and their families' rights and privileges.

Whilst such bans have been implemented with a view to protecting female MDWs, they undermine a central provision in the *Foreign Employment Act 2007* (FEA) to end discrimination between men and women in the context of searching for, engaging in and returning from foreign employment (Krishna, 2015). An ILO/WIF study in 2015 found that bans prompted more circuitous and costly routes as women from Nepal travel to India in order to circumvent the ban.

The FEA has also been subject to numerous other criticisms, particularly the complex legal provisions that do not make it easy for recruitment agencies to act within the law (NIDS, 2008). Other pertinent criticisms include the absence of provisions to protect the rights of workers who suffered from violence in the workplace, which is a significant concern among MDWs.

3.2 Migrant garment workers

Jordan is the principal destination of migrant garment workers from Nepal. In Jordan, a number of steps⁴ have been taken recently to improve the working conditions of migrant workers in the garment industry. From January 2016 onwards, the recruitment and employment of migrant workers in the garment sector was harmonised by the replacement of multiple contracts being signed in the source/destination and the introduction of one contract unifying workers from all countries. The collective bargaining agreement of 2013 has been extended until 2017, aiming to make further improvements in the sector's working conditions.

Despite these advancements, the Better Work programme also found cases of discrimination limiting freedom of movement of women, especially in and out of their dormitories. Workers from Nepal may face further discrimination in their destination factory, as 51 factories (out

4 The joint ILO-IFC programme, Better Work, aims to improve the working conditions for garment factory workers across the globe, in countries including Haiti, Cambodia, Indonesia and two countries of interest to the Work in Freedom programme: Bangladesh and Jordan. Activities in Bangladesh are in the first stages.





of the 64 in the study) were found to use “race, colour, and origin/citizenship as a factor in decisions regarding pay.” (Better Work, 2015: 16).

3.3 Sponsorship system

Further limitations to MDWs’ basic rights and freedoms are also found in destination countries. The kafala (‘sponsorship’) system, whereby migrant domestic workers’ visas and legal status are tied to their employer, is implemented in several destination countries to varying degrees. The power asymmetry between employers and workers makes workers particularly vulnerable to forced labour with little chance of legal recourse.

3.4 Memoranda of Understanding and Bilateral Agreements

The development at the macro level of memoranda of understanding between Nepal and destination countries in support of general migrant workers’ rights has been met by various grassroots initiatives targeting the promotion and respect for the rights of MDWs in particular. One example of these initiatives is the support group founded in 2013 by the General Federation of Nepalese Trade Unions for women MDWs in Lebanon (ILO, 2016a). The primary aim of this particular initiative was to inform Nepalese MDWs about their rights in Lebanon through tasking an organised group of Nepalese women MDWs to disseminate the information in their communities; to provide support to Nepalese domestic workers who face labour and human rights violations; and to collaborate with other migrant community leaders. These various aspects to the initiative have been shown to provide a space for migrant workers to participate more in advocacy efforts and also to help communities to bridge cultural divides (*ibid.*).

The Memorandum of Understanding between the National Human Rights Commissions of Nepal and Qatar was signed in November 2015 and will remain effective until November 2019. The principal aim of the agreement is to foster closer collaboration between the two commissions and to facilitate information exchange relating to the complaints concerning infringements on the migrant workers’ rights. Other goals include building the capacity of ministries to address issues related to labour migration, forced labour and human trafficking.

3.5 Programmes

In the same vein as initiatives targeting MDWs in destination countries, pre-departure programmes have been established to target migrants, including MDWs, *before* leaving Nepal. There are currently two types of mandatory training. The first is comprised of two days’ training as pre-departure orientation delivered to all migrant workers, including domestic workers. The pre-departure orientation training is delivered by more than 110 Government-authorized private orientation centres. The second type of mandatory training is comprised of 30-35 days (or 210 hours) of domestic work skills training. This training is mandatory for all workers applying for a domestic work permit valid in the Middle East. This training is delivered by 17 Government-authorized private training institutes located in Kathmandu. The government is currently evaluating the possibility of establishing a domestic work skills





training centre at the government training centre in the Eastern region of Nepal through the Work in Freedom programme.

Despite their limitations (e.g. ‘one-size-fits-all’ design), these pre-departure orientations include *inter alia* an introduction to the country of destination (incl. language, laws, repatriation and financial literacy), foreign employment law, OSH and travelling safely. Certificates awarded as a result of this training are required to obtain the exit visa (ILO, 2016).

Beyond migration controls, human trafficking is purported to be addressed through the implementation of the Human Trafficking and Transportation (Control) Act, 2007. The issue of trafficking in persons, in implementation, seems to be continued to be conflated with prostitution, whether voluntary or not, rather than a form of exploitation (mainly affecting women and girls) despite the broader approach of the most recent act (FWLD, 2014). The concern with the general punitive approach to trafficking, which was an important characteristic of the previous legislation, is that it could potentially result in the restriction of free movement for both women and girls – an important parameter to access jobs in an already gender unequal labour market.

The structure established to enforce the legislation relies on a system of ‘committees for controlling human trafficking’ at national (NCCHT; created in 2011 within the Ministry of Women, Children and Social Welfare), district (DCCHT) and village (VCCHT) level. In reality, the resources allocated to these institutions is very limited. For example, DCCHTs across Nepal receive an *annual* lump sum; 40 of them receive NPR 57,000 (USD 535.00) and 35 receive NPR 42,000 (USD 395.00) (*ibid.*). A key challenge with these committees is that their staff, without proper composition, funds and training, tends to promote patriarchal and social stigma against migrating women rather than support them (GAATW, 2007).

3.6 International mechanisms

At the international level, the ILO’s supervisory mechanism, which includes the Committee of Experts on the Application of Conventions and Recommendations (CEACR), recently highlighted to the Government of Nepal the importance of increasing the capacity of its law enforcement and grievance mechanisms. According to the CEACR, it is important in the context of Nepal “*to ensure that migrant workers are fully protected from abusive practices and conditions that amount to the exaction of forced labour, including through the effective application of the Foreign Employment Act.*” and that measures are adopted and “*specifically tailored to the difficult circumstances faced by migrant workers, including measures to prevent and respond to cases of abuse of migrant workers and to grant them access to justice*” (ILO, 2016b).

The supervisory mechanism of the United Nations Human Rights Council, the Universal Periodic Review (UPR), provides direction to the Government of Nepal on, *inter alia*, the issue of migrant workers. The Working Group on the UPR (2015) recently reported not only Nepal’s agreement to establish a mechanism in order to “collaborate with civil society, regional and global organizations to protect the rights of migrant workers” (*ibid.*: paragraph 116) but also growing pressure from other States (such as Timor Leste, Sierra Leone, Indonesia, the Philippines and Egypt) to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (see Table 1; *ibid.*: paragraphs 123.7 and 123.8).





3.7 Conclusion

The importance of taking action to protect and respect the rights of Nepali migrant women workers rests both on the large numbers of individuals involved as well as on the prevalence (and frequency) of infringements on those rights. Over half a million migrant workers are estimated to be working abroad (GIZ and ILO, 2015), whose remittances account for nearly 30% of the country's GDP (Government of Nepal, 2015). In this light, improving the enforcement of policies governing the labour provided by Nepalese migrant (domestic) workers in other countries will become increasingly important.

Policies and legal frameworks aim to promote employment abroad as a safe and decent option for potential migrants. The implementation of these policies seems to be lacking however, particularly in light of the number of undocumented/trafficked migrant workers (Vérité, 2012) and of social partners and civil society filling the gaps in the government's obligation in the pre-departure process to inform migrant workers of their rights (ILO, 2016a). The Government of Nepal and its law enforcement efforts should be supported in fulfilling these obligations by bringing current legal provisions in line with international law.

It also emerged that the protection of domestic workers in Nepal could be made more systematic, were ILO Convention 189 on Domestic Workers to be ratified. Recognising work carried out in the informal economy, including domestic work, is an important step not only in recognising the value of this work but also in providing adequate protection from law enforcement authorities, including the labour inspectorate. The provision of protection for (migrant) domestic workers could also be included in the Foreign Employment Act 2007, which currently contains no reference to these workers.





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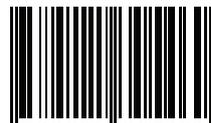
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