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Trafficking and Migration in India - Vulnerable Workers

Tamil Nadu Law School

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Introduction

Around the world, there has been an increase in women migrant workers, who now constitute more than half of the world's migrant workforce¹. A significant portion of the women are engaged in low-skilled, low paid and informal sectors, including traditionally undervalued care work. Due to their increased susceptibility to gender based discrimination (including trafficking for sexual exploitation), women and migration for work is often referenced through trafficking and human rights abuses centred around particular categories of work such as domestic work and care work. While this is consistent with the statistics around labour exploitation among migrant workers, it is important to also to be mindful that women and migration constitute a complex and layered matrix of processes that go beyond this somewhat limited narrative.

One of the major issues in conceptualizing policy around migration and gender is the tendency to overlook women's agency when it comes to making decisions regarding travel, relocation and work. The focus on prosecution of traffickers and 'rescue' and returning of women to their country of origin is often at odds with what migrant women workers perceive as important for their interests. Reliance on the criminal justice system is at odds with normal remedies used by the labour law which largely consist of 'civil' remedies and which recognises that the contract of employment pre-supposes freedom and agency while entering such work relationships. In general migrant workers engage with the legal system when directed more at those measures which result in greater freedom of choice and just desserts.

A broadening of this perspective is crucial in the global context where there is increasing feminization of migration, of women migrating out of a quest for economic and social opportunities in situations where it is difficult to pinpoint or identify elements of coercion.

At the same time, it cannot be ignored that women migrant workers are one of the most vulnerable groups in their destination countries. They often face abuse and exploitation and in most countries lack of sufficient labour laws and protections or facilities for healthcare and education.

¹ United Nations, Department of Economic and Social Affairs, Population Division (2017). International Migration Report 2017: Highlights

Sex-based discrimination of migrant workers operates at multiple levels, and attempts to eliminate must be conscious of this. While ensuring protective legislative mechanism which is gender-sensitive and prevents exploitation of women's labour, policymakers and legislators should also take care not to compromise on equality of opportunity. As such, in addition to ensuring adequate labour standards, assistance and support before and after migration, and efficient grievance mechanisms², it is important to steer clear of policies that are detrimental to voluntary migration of women workers such as preventing or restricting women's migration on the basis of age, marital status, pregnancy or maternity status³.

Many of the labour laws in India turn on 'threshold levels of employment': either on the basis of number of workers, or days of employment⁴. Chapter V-B of the Industrial Disputes Act, which lays down procedure for layoff and retrenchment, applies to factories with more than a 100 workers. The Factories Act, 1948, which governs working conditions and health and safety, applies to units with more than 20 workers (more than 10 workers if the unit uses power). The Industrial Employment Standing Orders, a crucial legislation which governs disciplinary action in factories is also applicable for units employing more than a hundred workers. Even laws on social security, such as the Employees State Insurance Act, 1948 applies to units (non-seasonal) employing more than 10 workers. Further, a significant part of labour legislations in India are premised on a tripartite collective bargaining process, depending on worker's organizations to bring balance to industrial relations through different kinds of negotiating processes. Unsurprisingly, laws based on threshold levels and the traditional collective bargaining mechanisms leave a great number of workers outside the coverage of labour laws. This is particularly true for inter-state and intra-state migrants who depend on circular or seasonal migration, and are often distress migrants who do not have circumstances conducive to the formation of strong workers collectives.

In India, there is no domestic legislation that can cater to the needs of women workers both in cases of international and inter-state migration. Migrant women workers move seasonally, sometimes without support from families in search of work which is acquired through agents/contractors⁵. A significant issue in the case of women migrant workers is their dependence on these largely unregulated contractor/agencies and the payment of dues and repayment of advance amounts. However, legislations on migrant workers which focus on 'rescue' and 'shelter homes' lack the mechanisms to resolve these issues. There is also little

² The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, signed in 1990 and in force since 2003, is a useful framework in this regards. As of 2018, only 51 states have ratified the convention. India is not a signatory. A majority of ratifying countries are countries of origin of migrant workers.

³ This would include restrictions that ask for approval or verification of a spouse or a male relative when it comes to women migrant workers.

⁴ Gupta, Dipankar. "Against Thresholds: Raising Capacity and Formalizing the Economy." *The Indian Journal of Labour Economics* (2019): pp. 1-16.

⁵ Nalini Nayak, Anti-Trafficking Bill 2018 Fails to Address Changing Forms of Labour Exploitation, *Economic and Political Weekly*, (2018, Vol. 53, Issue no: 29).

discussion on the different reasons for migration and whether returning the women to their initial location is either beneficial or in line with the aspirations of women workers.

A potential candidate is the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1978. However, the Act also presupposed a relatively stable employer-employee relationship and only applies when five or more workers are placed with a single employer by a contractor. In addition, it also does not have provisions for intra-state migrants, which may include migrant women who have left their homes for work but have not crossed the state borders.

The case of women's migrant work being an outlier in labour legislations directed towards even migrant workers can be illustrated by the how the laws have looked at domestic work, one of the significant occupations women migrant workers are engaged in. According to the ILO, 53 million women and girls around the world are employed as domestic workers in private households⁶. They are ranked among the worst in terms of abused workers on a global scale. There are several instances where domestic workers are confined to their workplace and subjected to physical and sexual abuse. Domestic workers face problems also because their work is not categorised as 'work' and often fall out of labour protections. Often working hours for domestic workers are 14 to 18 hours a day, seven days a week. The lack of quantification of women's domestic work in economic or financial terms complicates the issue further: domestic workers are often paid much less than minimum wage.

However, due to the reliance on a single, stable employment relationship in the ISMWA, in the case of domestic work, where it is more likely that single workers are hired per household/employer, the workers would fall outside the ambit of the Act⁷. Some State Governments have attempted to bring in some amount of formalization into the working of recruitment agencies working in engaging domestic work, asking them to register under the Shops and Commercial Establishment Act. The utility of this measure is limited to identification and provides little in terms of protective labour regulations⁸. It is also significant that domestic work in India is also characterised by the employment of children. The Government of India (GOI) has listed domestic work in the list of 'hazardous' child labour. Under the Child Labour Act has domestic work is prohibited only for children under the age of 14.

Trafficking in India: Patterns

India is a source, destination and a transit/conduit country for labour and sex trafficking.

⁶ ILO: Domestic workers across the world: global and regional statistics and the extent of legal protection (Geneva, 2013)

⁷ ILO: Indispensable yet unprotected: Working conditions of Indian Domestic Workers at Home and Abroad / International Labour Office, Fundamental Principles and Rights at Work Branch (FUNDAMENTALS) – (Geneva, 2015)

⁸ Ibid.

Trafficking patterns in India indicate that a very significant majority of trafficking in persons in India is domestic/intra/inter-state (around 90%)⁹. 10% of trafficking occurs across international borders.

Forced labour is the predominant reason for the trafficking of men, women and children in India¹⁰. Labour trafficking occurs when persons are defrauded, coerced or forced under duress to perform labour or services or slavery or practices similar to slavery, including involuntary servitude, peonage and debt bondage.

Another factor that contributes to trafficking in India is sex trafficking. Sex trafficking is trafficking for the purposes of sexual exploitation or for the performance of involuntary sexual acts, prostitution etc. Statistically, there is a greater proportion of women and girls (as compared to men) affected by sex trafficking in India¹¹.

Whereas poverty has been identified as the primary cause of vulnerability that drives human trafficking in India, it is also further aggravated by caste. “Lower caste” women are more vulnerable to trafficking, often attributed to a traditional lack of access to education and employment¹².

Trafficking studies have disproportionately focussed on sex trafficking, or specifically, Indian women being trafficked for sexual purposes. As a result, several resources of data do not accurately reflect patterns of exploitation due to human trafficking¹³.

International Trafficking Patterns

The United Nations

The United Nations Office on Drugs and Crime has published a “Global Report on Trafficking in Persons” which traced patterns of trafficking and the responses of the criminal justice system and domestic legislation to tackle human trafficking. It contains information from over 155 countries, including India, and provides an insight into detection of trafficking and enforcement patterns across the world.

According to the report, there is an increase in both the amount of domestic legislations and convictions on the offence of human trafficking globally (with the proportion of countries with domestic legislation to tackle trafficking increasing to almost twice as much as it was before the UN Protocol against trafficking in Persons was enacted)¹⁴. The report identifies sexual trafficking as the most commonly identified form of human trafficking, at around 79%, followed by forced labour at 18¹⁵. However, the report admits that there could be a statistical

⁹U.S. State Department, Trafficking in Persons Report (2013)

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ This has been attributed to greater visibility for trafficking for sex trade, and the difficulty in distinguishing between voluntary migrations and trafficking for work.

¹⁴ UNODC, *Global Report on Trafficking in Persons* 2016. (United Nations publication, Sales No. E.16.IV.6).

¹⁵ Ibid.

bias in these numbers as victims of sexual exploitation tend to be more visible. There is a greater possibility of victims of sexual exploitation coming within the radar of law enforcement.

The document, however, acknowledges that in India, forced labour cases were ‘more frequently detected’ than sexual exploitation. Forced marriage and organ removal were also found to be causes for trafficking, particularly in India¹⁶. The report also mentions India as one of the countries where domestic trafficking is a prominent issue, although it accepts that there is a lack of detailed information in this regard.

The report also identifies ‘intra-regional’ trafficking, where India was marked out as a destination state and Nepal and Bangladesh as countries of origin¹⁷.

The ILO

The ILO and the Walk Free Foundation, in partnership with the International Organization for Migration (IOM) has published a document: “Global Estimates of Modern Slavery” with a focus on forced labour and marriage.

The document defines Modern Slavery as an “Umbrella Term” that covers not just forced labour but also debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking¹⁸. It categorises “Modern Slavery” as a non-legal concept that covers situations where person “cannot refuse or leave because of “threats, violence, coercion, deception, and/or abuse of power”.

According to ILO estimates, 40.3 million people were victims of modern slavery in the year 2016. Around 60% of these people (24.9 million) were engaged in a form of forced labour (for the purposes of this document, forced labour includes those engaged in the sex industry, along with other sectors such as construction, agriculture and fishing).

The data also indicated a prominent gender bias: women and children constituted the majority of people affected by modern slavery. In the sex industry, the percentage of women and girls are estimated to make up 99% of the population affected by modern slavery. Women are also disproportionately affected by other forms of forced labour as identified by the ILO, making up to 58% of the people affected by it.

In the case of forced sexual exploitation, there were also significant differences in the regional distribution of instances: particularly, the Asia and the Pacific region (which includes India), constituted more than 70% of the victims¹⁹. Europe and Central Asia accounted for 14 per cent, followed by Africa at 8 per cent and North and South America making up 4% of the total data. The Arab States recorded the lowest at 1%.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ ILO: Global estimates of modern slavery: Forced labour and forced marriage, (@017, Geneva).

¹⁹ Ibid.

In the case of forced marriages, the data indicated that a considerable portion of those affected were children, constituting 37 per cent (5.7 million) of the total data. Among those subjected to forced labour, children constituted 18%, and 21% of the total victims in commercial sexual exploitation²⁰.

According to the statistics, forced labour seems to be globally linked to debt bondage, especially in the agricultural sector, domestic work and manufacturing. Of the 16 million people engaged in forced labour, more than half were in debt bondage.

Where identifiable, it was found that domestic work and construction were the major sectors where people were engaged in forced labour, followed by construction, manufacturing and fishing.

The most common form of coercion as identified by the ILO is non-payment or withholding of wages (24%), followed by threats of violence and acts of violence (at 17% and 16% respectively)²¹.

The UN Protocol on Trafficking

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000

The major trafficking specific international instrument is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex II), adopted in November 2000. It is also known as the Palermo Protocol.

Article 3, subparagraph (a), of the Protocol offers a definition of trafficking: “‘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.”

India officially ratified the Convention and its three Protocols, including the UN Trafficking Protocol, on May 5, 2011. As a ratifying state, India is required to enact domestic laws to support victims of trafficking, in the absence of such laws.

²⁰ Ibid.

²¹ Ibid.

An overview of the debates around the Palermo Protocol

The discussions around the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000 was characterised by a significant amount of lobbying by feminists, for over the course of two years prior to its adoption. India is a signatory to the Protocol and the Criminal Law amendment Act, 2013 has been referred to as having ‘downloaded’ the Protocol definitions of trafficking in the Protocol²², although with significant differences. As such, it is relevant to look broadly at the various aspects of the debate surrounding the characterisation of sex work, trafficking and forced labour under the Protocol.

The predominant contrasting positions on trafficking are represented by the Human Rights Caucus and the Coalition against Trafficking in Women (CATW) respectively. The primary point of difference between these two actors in the negotiation was their stance towards sex work/prostitution: the Human Rights Caucus consisted of groups who considered sex work as a legitimate form of work, whereas the Coalition considered all forms of prostitution as a violation of women’s human rights, and took what has been referred to as a ‘neo-abolitionist’ stance²³ with respect to sex work/prostitution.

The theoretical underpinnings of the stance taken by the Coalition are marked out by the presentation made to the UN by the Coalition’s co-director, Dorchen Leidholdt:

With regard to the regulation of commercial sexual exploitation, the Coalition takes the stance that the model underlying regulation should be based on ‘violence against women’ and not the labour model²⁴. The Coalition views sex industry as a space where men exert domination over women and children, and draw parallels between the “dynamics of tactics of power” in the sex industry to that of women in abusive relationships characterised by domestic violence. Consent in these situations, it is argued, does not necessarily preclude a human rights claim. The Coalition questions the ‘voluntariness’ of the act of entering into “sex-work” given factors such as poverty, violence and inequality.

Leidholdt views sex trafficking as a form of ‘globalised prostitution’. She points out that those women and children targeted for trafficking for sexual purposes and locally prostituted women have similar backgrounds: characterised often by poverty, youth, minority status and lack of support from families²⁵. The power and control exerted over trafficked women is thus similar to that of prostitution, but exacerbated by isolation of victims, greater level of dependency on traffickers, lack of access to criminal justice and social service systems and fear of exposure to the authorities.

²² Kotiswaran, Prabha. "A battle half-won: India’s new anti-trafficking law." *Interdisciplinary Project on Human Trafficking* (2013).

²³ Doezeema, Jo. "Now you see her, now you don’t: Sex workers at the UN trafficking protocol negotiation." *Social & Legal Studies* (2005, vol. 15 No. 1), pp. 61-89.

²⁴ Leidholdt, Dorchen, and Co-Executive Director. "Presentation to UN Special Seminar on Trafficking, Prostitution and the Global Sex Industry-Position Paper for CATW: Part Two." (2000).

²⁵ Leidholdt, Dorchen A. Demand and the Debate. Coalition against trafficking in women, 2003.

Those who take an abolitionist view towards prostitution/trafficking for the purpose of sexual exploitation draw from radical feminist theory which differentiates “sex work” from other forms of work, or, to be more precise, refuses to recognise prostitution as a form of work at all. Sex work is different, due to the nature of work, that involves the “sale of sex”, which is different from other forms of intimate labour as these do not involve “selling an aspect of themselves”. The argument is that the services and labour power that are supplied in prostitution/sex work are “inseparably” linked to the body, and the body, in turn is connected to the sense of self²⁶. But surely, all forms of labour involve the body, and the commodification of the body in some form²⁷? The counter to this seems to be that in “sex work”, the sense of self-identity is compromised particularly because sexuality and the body are also connected to femininity and masculinity, which are an integral part of a human being’s individuality and self-identity. It is not possible to separate the sexual services provided from the body itself, as the capitalist market commodifies both the body and the self in its objectification/commodification of sex.

Within the United Nations and in the language of the Protocol, there seems to be a greater degree of acceptance for the conceptualization of trafficking as described above. For instance, the Palermo Protocol specifically mentions, and therefore acknowledges the different nature of ‘sexual exploitation, and significantly ‘prostitution’ (as opposed to the term ‘sex work’)

Article 3 (a)

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;

The other side of this debate consists of opposing positions to what has been characterised as “the Western radical feminist view of sex work”²⁸, particularly prominent among sex workers’ groups associated with the HIV/AIDS prevention projects. At the UN negotiations, they are represented by the Human Rights Caucus.

The underlying difference of the Human Rights Caucus and the CATW seems to be centred on the approach towards women’s agency, where anti-abolitionist reject the false-consciousness²⁹ model of agency, and believe in respecting the capability of women to make choices even within the context of sex work/prostitution and trafficking.

As a response to the exceptionalisation of sex work, the anti-abolitionists point out that the framework of the abolitionist conceptualisation of sex work is predominantly western, and perhaps more importantly, that of individuals who are not involved in sex work. Particularly, anti-abolitionists refuse to accept the dichotomy between commercial and non-commercial

²⁶ Pateman, Carole. "Defending prostitution: charges against ericsson." *Ethics* (1983, vol. 93 No: 3) pp. 561-565.

²⁷ Nussbaum, Martha C: *Sex and social justice* (Oxford University Press, 1999).

²⁸ Kotiswaran, Prabha. *Dangerous sex, invisible labor: Sex work and the law in India*. (Princeton University Press, 2011.)

²⁹ MacKinnon, Catharine A. "Prostitution and civil rights." *MICH. j. gender & L.* 1 (1993): 13.

sexual relationships, which seems to be essential point for the abolitionist conception of sex work. Reliance is placed on the observation that to a great extent, heterosexual relationships also have economic aspects, and prostitution/sex work itself is a complex activity characterised by the intersection of economics, power relations, gender, age, class, and "choice"³⁰.

Similarly, anti-abolitionists also do not accept that sex work should be treated as inherently distinct from other forms of work. Not only does all labour involve "selling of the body" in the sense that the body is used in return for wages³¹, there is nothing significantly distinct about sex work that makes it less possible for workers to delineate their sense of self from their labour³². Emotional aspect of labour is also not unique to sex work and is not necessarily harmful and destructive³³.

Within the UN Protocol, the Human Rights Caucus also has significant contributions, particularly the inclusion of force and coercion the definition of trafficking, which resists the assumption that all forms of trafficking and inherently involuntary, and recognises that sometimes migration and trafficking are conflated. However, it should be noted that the definition also includes 'abuse of a person's vulnerability, which may extend to situations without force or coercion as well. The phrase 'abuse of a person's vulnerability' has been criticised for being "ambiguous concept with no precedent in international or domestic law".³⁴

At this juncture, it is also relevant to mention the 'demand' article, or Article 9. 5, the formulation of which also has seen a considerable amount of conversation:

Article 9.5. State Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

The language of this article is significant, and has been seen as the recognition of the 'demand' for sexual exploitation as a significant factor in anti-trafficking discourse³⁵.

Significantly, the Article also refers to exploitation *that leads to trafficking*, rather than the other way round. It has been pointed out that logically, it is more in line with the abolitionist perspective of prostitution as exploitation, and has been shown to have influenced 'end-demand' campaigns³⁶, that focus on policies that look to criminalize the 'demand' side of sex work/prostitution. To put it more simply, this would include policies similar to the

³⁰ O'Connell Davidson, Julia. *Prostitution*. (John Wiley & Sons, Ltd, 2007)

³¹ Kempadoo, Kamala. "From moral panic to global justice: Changing perspectives on trafficking." *Trafficking and prostitution reconsidered: New perspectives on migration, sex work, and human rights* (2005): 3-24.

³² Ibid.

³³ Ibid at 27.

³⁴ Kotiswaran, Prabha. "A battle half-won: India's new anti-trafficking law." *Interdisciplinary Project on Human Trafficking* (2013).

³⁵ Wylie, Gillian. *The International Politics of Human Trafficking*. (Springer, 2016)

³⁶ Wijers, Marjan. "Purity, victimhood and agency: Fifteen years of the UN trafficking protocol." *Anti-Trafficking Review* (No. 4, 2015): pp. 56-79.

much discussed ‘Swedish model’ for combatting trafficking which makes it legal to sell sex but illegal to buy³⁷.

Domestic Laws

Immoral Traffic Prevention Act, 1955

India has enacted the Immoral Traffic Prevention Act, 1955 which criminalizes sex trafficking. However, it does not have provisions for trafficking for purposes other than sexual exploitation.

The Immoral Traffic Prevention Act, 1955, criminalizes “*procuring, inducing, or taking person for the sake of prostitution*”:

5. Procuring, inducing or taking person for the sake of prostitution.—(1) Any person who—
(a) procures or attempts to procure a person whether with or without his/her consent, for the purpose of prostitution; or

(b) induces a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel; or

(c) takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution ; or

(d) causes or induces a person to carry on prostitution; shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees, and if any offence under this subsection is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years:

The Act also provides for life imprisonment for child trafficking and for repeat offenders, which has been retained in the proposed Anti-Trafficking Bill, 2018.

The Act also criminalizes the receiving persons for the purpose of prostitution:

5A. Whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of,— (a) threat or use of force or coercion, abduction, fraud, deception; or (b) abuse of power or a position of vulnerability; or (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.

³⁷ Conery, Benjamin, Prostitution: The Role of Trafficking and the Swedish Model, Cornell International Law Journal (Vol11. No. 5, 2013), Online.

Explanation.—Where any person recruits, transports, transfers, harbours or receives a person for the purposes of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.

It is relevant to note that the above provision also includes a presumption of guilt where recruitment, transport and harbouring for the purposes of prostitution.

Bonded Labour System Abolition Act, 1976

Several forms of forced labour are penalised under the Bonded Labour System Abolition Act, 1976.

S. 16. Punishment for enforcement of bonded labour. – Whoever, after the commencement of this Act, compels any person to render any bonded labour shall be punishable with imprisonment for a term, which may extend to three years and also with fine, which may extend to two thousand rupees.

However, the language of the Act focuses primarily on instances where forced labour can be related to a creditor-debtor relationship:

S. 2 (g) "bonded labour system" means the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that, - (i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, due on such advance, or (ii) in pursuance of any customary or social obligation, or (iii) in pursuance of an obligation devolving on him by succession, or (iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or (v) by reason of his birth in any particular caste or community,-

he would- (1) render, by himself or through any member of his family, or any person dependent on him, labour or service to the creditor, or for the benefit of the creditor, for a specified period or for an unspecified period, either without wages or for nominal wages, or (2) for the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or (3) forfeit the right to move freely throughout the territory of India, or (4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent on him, and includes the system of forced, or partly forced, labour under which a surety for a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that in the event of the failure of the debtor to repay the debt, he would render the bonded labour on behalf of the debtor;

However, the scope of the Act has been expanded by the insertion of amendment, which acknowledged the overlap of bonded labour, contract labour and migrant labour³⁸:

[Explanation.-For the removal of doubts, it is hereby declared that any system of force or partly forced labour under which any workman being contract labour as defined in clause (b) of subsection (1) of section 2 of the Contract Labour (Regulation and Abolition) Act, 1970 (73 of 1970), or an inter-State migrant workman as defined in clause (e) of sub-section (1) of section 2 of the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (30 of 1979), is required to render labour or service in circumstances of the nature mentioned in sub-clause (1) of this clause or is subjected to all or any of the disabilities referred to in sub-clauses (2) to (4), is "bonded labour system" within the meaning of this clause].

Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979³⁹ has been enacted to provide protection to inter-state migrant workers. The Act is sensitive to the fact that migrant workers operate through contractors or agents and is premised on a licensing system for such contractors, and the registration of establishments employing inter-state workmen.

The Act defines Inter-State Migrant Workman as:

“any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment;”

The Act makes registration of the establishment compulsory for the employment of an Inter-State Workman. Further, according to the Act, any contractor who is recruiting any person in one state for the purpose of employment in another state is required to obtain a license from licensing officer appointed by the appropriate government.

The rights and entitlements under the ISMWA are directed to ensure that the migrant workers are treated at least on par with regular workers in the establishment. In addition, the migrant worker is also entitled to a displacement allowance, journey allowance and suitable residential accommodation. The Act also directs that in the case of the failure of the contractor to fulfil his duties towards the inter-state worker, it shall be the obligation of the principal employer to do so.

³⁸ However the enforcement of this amendment by the Courts has not recognized the significance of this amendment. See Sankaran, Kamala. "Bonded labour and the courts." India's unfree workforce of bondage old and new, ed. Jan Breman, Isabelle Guérin, and Aseem Prakash (2009): pp. 335-351.

³⁹ The Act was proposed to be renamed as Inter-State Migrant Workers Act, 1979, in order to make the nomenclature of the Act gender-neutral, by the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Amendment Bill, 2011.

The Act is also mindful of the possibility of forced/bonded labour situations in migrant work and provides that no loans given to the worker shall be outstanding at the completion of the period of employment. If any, they will be treated as extinguished and no suit shall lie in this matter against such worker.

Despite these provisions, the ISMWA remains one of the least accessed domestic labour legislations in India. The licensing and registration system remains ineffective as there is decreasing rates of compliance. Licensing Officers/Inspectors under the Act are either not appointed or given additional burdens other than the implementation of the Act.

The Act has also been criticised for being focussed on the establishment or the contractor for regulation rather than making the individual worker the unit for targeted welfare measures.

The Act limits its applicability to individual interstate workers as it applies only to:

(a) to every establishment in which five or more inter-State migrant workmen (whether or not in addition to other workmen) are employed or who were employed on any day of the preceding twelve months;

(b) to every contractor who employs or who employed five or more interState migrant workmen (whether or not in addition to other workmen) on any day of the preceding twelve months.

Due to the seasonal, circular nature of migration, it is rare that a stable employment relationship as envisaged by the provisions above exist within the realities of interstate migrant workers in India.

Criminal Law Amendment Act, 2013 (CLA, 2013)

The Indian Constitution and the Indian Penal Code have around 20 provisions making trafficking illegal. The most relevant of these is now the amended Section 370 of the Indian Penal Code.

The Criminal Law (Amendment) Act of 2013, which amended Section 370 of the Indian Penal Code defines trafficking more or less in consonance with the definition of the UN Trafficking Protocol. However, the amendment omits ‘forced labour’ as used in the protocol and uses the term ‘physical exploitation’.

Of course, it can be argued that forced labour can be understood to be included within the term “physical exploitation”. However, the UN Trafficking Protocol has does not have a definition for the term “physical exploitation”, or for that matter “sexual exploitation”. Therefore, there is a clear lack of definitional clarity: for one thing, the term ‘forced labour’ has been left out to include physical exploitation, but at the same time, distinguishes between physical and sexual exploitation.

Significantly, the Act also leaves out the phrase, “abuse of a person’s vulnerability” which can arguably be extended to situations without force or coercion as well. The phrase ‘abuse of a

person's vulnerability' has been criticised for being "ambiguous concept with no precedent in international or domestic law". The Act instead, uses the term "abuse of power".

"Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by First.—using threats, or Secondly.—using force, or any other form of coercion, or Thirdly.—by abduction, or Fourthly.—by practising fraud, or deception, or Fifthly.—by abuse of power, or Sixthly.—by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

The Amendment defines exploitation as "any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs".

The Amendment Act similarly falls short in penalizing persons who utilize victims of trafficking for purposes of labour. Section 370A of the Indian Penal Code, as amended by the CLA, states who "knowingly or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished" with rigorous imprisonment for a term of three to five years and also a fine. At the same time, there is no corresponding punishment for 'physical exploitation'. This reflects an attitude in trafficking law which focuses on sexual exploitation particularly, whereas as indicated by the data on trafficking, forced labour forms the majority of trafficking in India.

Significantly, the Criminal Law Amendment Act criminalises anyone who engages trafficked persons or minors for sexual exploitation but does not do so in labour sectors such as domestic work, agriculture and the construction industry⁴⁰.

Immoral Trafficking Bill, 2018

Definitional clarity:

The Anti-Trafficking Bill adopts the definition of 'trafficking' under the amended S. 370 of the Indian Penal Code. Given that S. 370 was amended in consonance with the UN Protocol, this means that the definition under the Anti-trafficking Bill also inherits the same assumptions and ideological positions regarding the nature and types of trafficking.

Although the adoption of the S. 370 brings in some uniformity and definitional clarity to the Bill, it seems like several related concepts which are crucial to the regulation of trafficking have been left quite open-ended. A case in point is the provision for authorizing the closure of the "place of trafficking" as defined under the Bill which could include a wide range of 'premises'. It has been pointed out that this could mean a home, factory or even a vehicle (such as public transport, for example, or the home of the trafficked victim) The Bill also penalises "promoting or facilitating trafficking of persons", which again, lends itself to wide

⁴⁰ Kotiswaran, Prabha. "A battle half-won: India's new anti-trafficking law." *Interdisciplinary Project on Human Trafficking* (2013).

interpretations. The Bill also seeks to provide provisions for confiscation of property provided that they are “likely to be used” for the commission of an offence under the Bill. The language of the bill places no further restrictions or explanations on this particular provision.

The bill also contains provisions for “presumption of guilt” under Section 24 of the Bill:

S. 24. Presumption of certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 16 and 17 of this Act or offences under section 370-373 of Indian Penal Code, 1860, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

Presumption of guilt has certain advantages especially in the context of a special legislation on trafficking, however, the over-breadth of the definitions as illustrated above raises considerable questions about possibilities of misuse.

‘New’ Offences

The Bill also introduces a new category of trafficking referred to as “aggravated forms of trafficking, which the Bill describes as “trafficking for the purposes of forced labour, begging, marriage and child-bearing”. The current version of the Bill also penalises aggravated forms of trafficking with 10 years of imprisonment and a fine of not less than 1 lakh. When certain offences are characterised as “aggravated”, and therefore meriting greater penalties or punishment, the rationale usually is that they are more severe or grave acts than what is covered under existing legislations. However, in the present case there is little indication of why these offences have been particularly identified as meriting a separate category of “trafficking”. Interestingly, this distinction has been made despite the fact that trafficking for the purpose of forced labour, begging, marriage and child bearing are already criminalised under existing laws.

Given that law and policymakers often struggle with making a distinction between trafficking and voluntary migration of workers, assigning the status of an ‘aggravated offence’ to trafficking for marriage and child-bearing could have problematic effects, and have the potential to further delimit women’s agency in these decisions.

Some reports have emphasized on the provision regarding repeat offenders who are liable for life imprisonment under the Bill. However, the enhanced punishment for repeat offenders is already available under S. 370 of the IPC.

It has also been pointed out that provisions in the Bill that presumably have been inserted to recognise and address different forms in which trafficking takes place—such as trafficking by administering of drugs and/or alcohol—are presently a criminal offence under other sections of the IPC, such as:

Section 328: “administers to, or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to commit or facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

It is also interesting to note that trafficking for sexual exploitation has not been characterised as ‘aggravated’ forms of trafficking under the Bill. This is despite the fact that human trafficking involving sexual exploitation has been the predominant concern in anti-trafficking measures and policy discussions⁴¹.

Rescue and Rehabilitation

The rescue and rehabilitation model under existing laws in India which deal with forced labour and trafficking have been criticised on the basis of lack of respect for the agency of trafficked women and poor implementation/facilities on the ground⁴². The Anti-Trafficking Bill does not contain provisions that provide any alternatives to this model and retains provisions for rehabilitation largely similar to the approach of existing legislations. Section 8 and Section 9 refer to protection homes and special homes for the purpose of rescue and rehabilitation of trafficked women:

8. Protection Homes

(1) The appropriate Government shall maintain either directly or through voluntary organisations, protection homes selected and managed in the manner, as may be prescribed for the immediate care and protection of the victims.

(2) Protection Homes shall provide for shelter, food, clothing, counselling and medical care that is necessary for the rescued victims and such other services in the manner, as may be prescribed.

9. Special Homes

The appropriate Government shall maintain either directly or through voluntary organisations or use the existing shelter homes, as the case may be, one or more Special Homes in each district for the purpose of providing long-term institutional support for the rehabilitation of victims, in the manner as may be prescribed.

Further, under Section 11, the Bill requires the State to frame schemes for the rehabilitation and ‘after care’ services:

Section 11(1) The appropriate Government shall frame schemes and programmes, in such manner as maybe prescribed, for the purpose of providing rehabilitation, support and after

⁴¹ Lawyers Collective, Critique of Anti-Trafficking Bill, 2018, available online at www.lawyerscollective.org/wp.../07/Critique-of-the-Anti-Trafficking-Bill-2018.pdf.

⁴² Forbes, Geraldine. "Politics of Rescue, Voices of the Trafficked." Review of Women's Studies, Economic and Political Weekly (Special Issue). (Vol. 51, Issue No. 44-45, 2016).

care services necessary for the social integration into mainstream society of the victims and to prevent re-trafficking.

(2) The State Government shall create specialised schemes for victims, especially for women engaged in prostitution or any other form of commercial sexual exploitation, to enable them to come forward and reintegrate into mainstream society, in a manner as may be prescribed.

However, the bill still seems to place women who have not been placed in a special home, or have chosen to not stay in a special home after ‘rescue’ at a disadvantage when it comes to availing aftercare by restricting aftercare to only those victims who “*have left the Special Home and in the opinion of the District Anti- Trafficking Committee ready to reintegrate to join mainstream society*”⁴³.

Draft Versions of the Bill and previous Attempts at legislation

The current draft of the legislation has not been made available to the general public. It is unclear whether the Ministry of Women and Child Development has based the legislation on any existing data or studies undertaken by the Government. To illustrate, the Criminal Law Amendment Act, which brought in S. 370 and 370 A to the IPC, were based on the recommendations of the Justice Verma Committee, which had a special focus on crimes involving sexual violence. The most recent study undertaken by the NHRC on trafficking was concluded in 2002-2003, and resulted in a report on “*Trafficking in Women and Children in India*”⁴⁴. This study was the basis of the Immoral Traffic (Prevention) (Amendment) Bill, 2006.

The Bill also does not seem to have accounted for the recommendations of a panel constituted in 2011 by the Supreme Court⁴⁵ to look into, among other issues, prevention of human trafficking. This panel had recommended that section 7 of the Immoral Trafficking Prevention Act be amended to include the clause that sex work will not be illegal if conducted near a public place like a temple, hospital, educational institution, etc., in cases where these public places have “*come into existence subsequent to the prostitution has started.*”⁴⁶ This can be read in connection with a previous attempt to amend the ITPA, in 2006, which criminalized practicing prostitution in a brothel or within 200 m of any public place (although it did not make prostitution an offence and deleted provisions that penalized sex workers from soliciting clients).

Going by the draft available under the Ministry Website, the Bill does not really mention sexual exploitation as a separate category of trafficking expect to say that the Government shall create specialised schemes ‘especially’ for women engaged in prostitution or any other form of commercial sexual exploitation⁴⁷. The lack of the mention of sexual exploitation of women and

⁴³ Section 2 (a), Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016.

⁴⁴ "A report on trafficking in women and children in India 2002-2003." NHRC (2004).

⁴⁵ “*Give legal recognition to sex workers: Supreme Court panel*”, DNA India, available online at <http://www.dnaindia.com/india/report-give-legal-recognition-to-sex-workers-supreme-court-2271497>

⁴⁶ Ibid.

⁴⁷ Section 11, Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016.

children in any provision (other than by adoption through the definition in S. 370 of the IPC) seems to suggest that the Bill stays away from debates on the legitimacy of sex work and the right of women to choose to be ‘rehabilitated’ by the State. However, these are issues around which a considerable discussion has taken place and are often centre-stage when it comes to law-making and policy decisions both in the domestic and international arena. It seems unclear why a legislation whose mandate is to be ‘comprehensive’ regarding the issue of human trafficking steers clear from these debates.

Immoral Trafficking Bill, 2006

The Immoral Traffic (Prevention) Amendment Bill, 2006 sought to amend the Immoral Traffic Prevention Act, 1956. The Bill proposed the deletion of the provisions that penalised solicitation of clients by prostitutes, and focuses on the criminalization of clients, i.e. any person visiting a brothel for the purpose of sexual exploitation for commercial purposes.

Although the Bill seems to move towards a non-stigmatization of sex work as evidenced by the removal of the provision on criminalizing soliciting, it also prohibits practicing prostitution in a brothel or within 200m of a public place. As such, there is no identifiable stance that the Bill takes with respect to the status of sex work as a legitimate kind of labour. As exemplified by the discussion on the UN Protocol above, this is a crucial distinction on which policy discussions are usually centred around.

In addition to retaining the word ‘immoral’ which attributes moral connotations to trafficking and sex work, the Bill also does not tackle trafficking for other purposes and other labour sectors, including bonded labour and domestic work.

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