

Protocol at the Crossroads: Rethinking anti-trafficking law from an Indian labour law perspective

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Abstract

As we approach the fifteenth anniversary of the United Nations Trafficking Protocol, we can discern several phases of its diffusion, materialisation and interpretation in domestic criminal law regimes across the world. Although not exclusively preoccupied with sex work and sex trafficking anymore, the fact remains that the inordinate attention on trafficking in Western industrialised economies is disproportionate to the extent of the problem. Only 7% of the world's 20.9 million forced labourers are in developed economies while 56% are in Asia Pacific. Yet in BRIC countries like India, with a substantial majority of the world's trafficked victims and where 90% of all trafficking is domestic, trafficking has gained policy resonance only relatively recently. Even as India remains an active site for sexual humanitarianism with international and local abolitionist groups actively targeting sex workers, the article argues that less developed countries like India can play a crucial role in reorienting international anti-trafficking law and policy. Towards that goal, this article offers India's bonded, contract and migrant labour laws as a robust labour law model against trafficking in contrast to the criminal justice model propagated by the Trafficking Protocol worldwide.

Keywords: India, bonded labour, contract labour, interstate migrant labour, trafficking

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Introduction

On the fifteenth anniversary of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol), this article reassesses the architecture of anti-trafficking law through the lens of transnational legal studies, an emerging field of scholarship mapping the rise of technologies of global governance in response to two decades of globalisation and its

dark underside. Like many other transnational legal issues, which have cross-border implications, the anti-trafficking legal field is saturated with legal rules, norms, guidelines, policies, action plans, indicators and reports that derive from overlapping international, regional and domestic legal regimes and corresponding intergovernmental organisations such as the United Nations Office on Drugs and Crime (UNODC) and the International Labour Organization (ILO), to name a few. Increasingly visible is also the work of influential non-state actors like Anti-Slavery International and the Walk Free Foundation which are significantly reshaping anti-trafficking discourse and States' legal conceptualisation of trafficking in terms of modern slavery and forced labour, leading scholars like Janie Chuang to criticise such expansion as 'exploitation creep'.¹

As crucial as this expansive view of the anti-trafficking legal field is, looking at trafficking purely through the lens of obligations imposed by formal state law, in other words, anti-trafficking law offers us a rather different picture. After all, transnational criminal law, of which trafficking is an excellent example, refers to 'the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.'² In other words, transnational criminal law is fundamentally different from international criminal law, which is '*stricto sensu*, consisting of the crimes that provide for individual penal responsibility for violations of international law before an international penal tribunal.'³ Therefore, transnational criminal law essentially deals with domestic criminal law where states have a fair degree of freedom in deciding how to respond to their own domestic trafficking problems.

Even as the international anti-trafficking arena is in a constant state of flux and unsettled at various different levels, I argue that at the doctrinal level, domestic anti-trafficking law is a far more fertile site for conceptualising creative solutions to address trafficking. In particular, I propose that less developed countries with a vast population of trafficked persons have often pursued a quite different conceptual understanding of the key concepts of trafficking, particularly coercion and exploitation and instated institutional measures to counter trafficking. I will briefly use the example of Indian anti-trafficking law to illustrate this although many others warrant closer inspection, including the Brazilian model. At the level of method, I propose a 'legal realist' research agenda for anti-trafficking lawyers, whereby we not only examine the role of criminal law in countering trafficking but also consider civil legal rules, informal social norms and market practices within specific labour sectors with an eye to being able to assess the unintended economic consequences of trafficking law reform.

¹ J Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law', *American Journal of International Law*, vol. 108, no. 4, 2014.

² N Boister, 'Transnational Criminal Law?', *European Journal of International Law*, vol. 14, 2003, p. 953.

³ *Ibid.*, p. 955.

Shifts in Global Anti-Trafficking Discourse Over the Past Fifteen Years

Comprehending shifts in trafficking discourse is essential for appreciating the definitional conundrums of Article 3 of the Trafficking Protocol. Between 2000 and 2008, the Protocol enjoyed phenomenal levels of adoption and ratification by States. Significantly, during this phase, the interpretation of trafficking continued to be hugely influenced by the negotiations leading up to the Protocol, particularly its preoccupation with sex work (or what one might term ‘sex work exceptionalism’) and the abolitionist policies of the Bush administration. The ‘collateral damage’ and indeed some would argue, intended damage of the Protocol to the interests of sex workers, migrants, asylum seekers and other groups have been documented in great detail.⁴ During this period, the implementation of anti-trafficking law by many countries was over inclusive because it targeted women engaged in voluntary sex work and was under inclusive because trafficking for purposes other than sex work was effectively ignored. Moreover, as the anti-trafficking movement dispersed across the world, spurred by considerable Western funding, less developed countries in Asia became the theatres of sexual humanitarianism where aggressive raid, rescue and rehabilitation strategies became stock interventions. This journal has documented this phenomenon in detail. While these initiatives continue to fuel the engine of sex work exceptionalism as well as of sex trafficking exceptionalism, they are not the only players anymore. Those promoting sex work exceptionalism have themselves been exposed as evidenced by the cases of Somaly Mam⁵ and Ruchira Gupta.⁶ Further the decentring of sex trafficking within anti-trafficking discourse had commenced in 2009 when the United States (US) Department of State *Trafficking in Persons Report* referred to trafficking into varied labour sectors rather than focus merely on sex work and sex trafficking. Thus, the UNODC’s latest report on global trafficking suggests that more countries now have comprehensive definitions of trafficking than before.⁷ The ILO points to how trafficking for labour exploitation is receiving increased attention after an initial focus on trafficking for

⁴ For example, Global Alliance Against Traffic in Women (GAATW), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, 2007, retrieved 14 February 2015, http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf

⁵ S Marks, ‘Somaly Mam: The Holy Saint (and Sinner) of Sex Trafficking’, *Newsweek*, 21 May 2014.

⁶ N S Jain & T Suri, ‘A Lack of Transparency’, *The Harvard Crimson*, 2 November 2010, retrieved 6 February, 2015 www.thecrimson.com/article/2010/11/2/apne-aap-women-organization/

⁷ The percentage of countries criminalising only some aspects of trafficking (whether in terms of certain victims or certain forms of exploitation such as sexual exploitation) decreased from 17% in 2008 to 11% in 2012, then to 10% in 2014. UNODC, ‘Global Report on Trafficking in Persons 2012’, UN publication, 2012, retrieved 6 February 2015, http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf; UNODC, ‘Global Report on Trafficking in Persons 2014’, p. 51, retrieved 6 February 2015, http://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf; correspondingly 85% of the 173 countries considered by the UNODC criminalise all aspects of trafficking in persons listed in the Trafficking Protocol.

sexual exploitation.⁸ Further, the definition of trafficking in many countries covers trafficking for both labour and sexual exploitation.⁹

In addition to changes introduced by States, international organisations have played a significant role in shifting the tone of the agenda on trafficking. There are of course several arms of the United Nations (UN) working on different aspects of the phenomena that constitute trafficking including on slavery and forced labour. The momentum among States on the question of trafficking has energised organisations like the ILO to take stock of its own interventions on forced labour. Thus where the ILO has historically dealt with forced labour exacted by governments, it has in the past decade focused on exploitation in the private sector. In 2014, the International Labour Conference adopted a Protocol to Supplement the ILO's forced labour convention to address trafficking for labour exploitation.¹⁰ The relationship between trafficking and forced labour however remains murky. A tripartite group of experts that looked into the Forced Labour Convention in detail disagreed on the scope of forced labour in relation to trafficking. The Committee of Experts on the Application of Conventions and Recommendations, the supervisory body entrusted with technical supervision of the application of the ILO Conventions, viewed forced labour as encompassing trafficking.¹¹ Others proposed that both concepts were not identical, but shared some areas of overlap.¹² The Trafficking Protocol itself conceptualises trafficking as covering a range of exploitative labour forms of which forced labour is only one form.

Marginalised groups like sex workers have also had a role to play in challenging the sex work exceptionalism associated with trafficking. That the critique of sex workers' organisations against the conflation of trafficking with sex work is gaining ground was evident most recently in India. A 2013 Presidential Ordinance¹³ ushering in rape law reform, introduced a trafficking offence, which conflated it with prostitution. This was so strongly protested by sex workers' groups that a parliamentary statute replacing the Ordinance modified the trafficking offence to define exploitation in terms of physical and sexual exploitation instead of prostitution. Yet, Section 370A of the Indian Penal Code, 1860 (IPC)¹⁴ criminalises the use of a trafficked person for sexual exploitation but

⁸ ILO, 'Report for Discussion at the Tripartite Meeting of Experts Concerning the Possible Adoption of an ILO Instrument to Supplement the Forced Labour Convention, 1930 (No.29)', ILO, 2013, paragraph 120, retrieved 6 February 2015, http://www.ilo.org/global/standards/WCMS_203982/lang-en/index.htm

⁹ Ibid.

¹⁰ Protocol to Convention 29—Protocol to the Forced Labour Convention, 1930, Adopted by the Conference at its 103rd Session, Geneva, 11 June 2014, retrieved 6 February 2015, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248900.pdf

¹¹ ILO, 'Report for Discussion 2013', ILO, p. 57.

¹² ILO, 'Report and Conclusions of the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation', paragraphs 92-102, 2013, retrieved 6 February 2015, http://www.ilo.org/gbSessions/GB317/ins/WCMS_207218/lang-en/index.htm

¹³ Press Information Bureau, 'Criminal Law (Amendment) Ordinance, 2013', Government of India, retrieved 6 February 2015, pib.nic.in/newsite/erelease.aspx?relid=91979

¹⁴ Ministry of Law and Justice, The Criminal Code (Amendment) Act, 2013, Government of India, No. 13 of 2013,

not other forms of exploitation. Thus, the moral charge that prostitution produces means that it is likely to continue to have a special place for governments in their anti-trafficking policy. As the ILO notes, prosecution rates for trafficking for labour exploitation continue to be low, rather than for trafficking for commercial sexual exploitation.¹⁵ Moreover, the Swedish model criminalising demand remains popular. However, new opportunities have become available with the current shift from an earlier almost exclusive obsession with sex trafficking to one with an increased focus on labour trafficking and supply chains. The challenge for anti-trafficking law is to now go beyond sexual humanitarianism, or indeed other forms of humanitarianism, to enunciate an agenda that is committed to the fundamental redistribution of resources that reduces the vulnerability of both men and women to trafficking.

The Conceptual Ambiguity/Malleability of Article 3

The definitional ambivalence and unsettled nature of the definition of trafficking in Article 3 of the Trafficking Protocol is a starting point for envisioning a redistributive agenda *vis-à-vis* anti-trafficking law. Needless to say, criminal law is not an ideal starting point for such an endeavor until we recognise that criminal law's symbolic power often exceeds its actual enforcement, which in turn opens up regulatory spaces for more distributively-oriented legal regimes such as labour law. I will not rehearse here the deeply contentious (and well documented) debates around the issue of *consent* or *exploitation*, particularly, the 'exploitation of the prostitution of others',¹⁶ which was extraordinarily influenced by the sex work debates.¹⁷ In its most general terms, all three elements of the Protocol's definition¹⁸ of trafficking, the 'actions', the 'means', and the 'purpose', are relatively broad and open-ended. Experts disagree over whether the action element requires cross-border movement or movement of some sort or if

retrieved 6 February 2015, <http://indiacode.nic.in/acts-in-pdf/132013.pdf>

¹⁵ ILO, 'Report for Discussion 2013', paragraph 131. Similarly, the interpretation of certain means of trafficking such as the abuse of position of vulnerability is likely to be influenced by whether it is for purposes of sexual exploitation. See UNODC, 'Issue Paper: Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons', 2012, paragraph 64, retrieved 6 February 2015, http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf

¹⁶ Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, 'Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime', UN Doc. A/AC.254/4/Add.3/Rev.7, 2000, p. 12.

¹⁷ J Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy', *University of Pennsylvania Law Review*, vol. 158, 2010, pp. 1672-1677.

¹⁸ "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b): The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.' UN General Assembly, 55th Session, Supp. no. 49 at 60, UN Doc. A/55/49, 2000, p. 61.

merely ‘harbouring’ is sufficient for purposes of Article 3. Similarly, when it comes to the means element, all the means other than the abuse of position of vulnerability appear to be relatively bounded concepts defined with some precision in domestic legal systems. Even then, there is a high level of fluidity between the various ‘means’ stipulated in national laws, due, at least in part, to the absence of definitions in the Trafficking Protocol itself.¹⁹ The term ‘abuse of power or of a position of vulnerability’ is rather broad, which although not defined in the Protocol itself, according to the *travaux préparatoires*,²⁰ refers to ‘any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.’²¹ In a world economy that is rife with precarious labour, this formulation offers little direction. The ILO’s 2009 report, ‘The Cost of Coercion’, construes it narrowly when it illustrates the concept by offering the example of a worker who is economically so vulnerable that unless he complies with his employer’s demands, he is at risk of losing his job.²²

The purpose of trafficking under the Trafficking Protocol, namely, exploitation, similarly suffers from definitional uncertainties. To begin with, the definition of exploitation received a lot less attention in the Protocol negotiations when compared to the means. Although many of the terms connoting exploitation in Article 3 are defined under international law, they are not defined under the Protocol and the definition of exploitation itself is not exhaustive.²³ With the scope of the offence of trafficking being up for grabs, the UNODC commissioned three Issue Papers on core concepts central to the definition of trafficking under Article 3, namely ‘the abuse of power or of a position of vulnerability’, ‘consent’ and ‘exploitation’, the first two of which have been published.²⁴

Even as definitional debates on trafficking continue without clear resolution,²⁵ producing a widespread lack of clarity around the definition of trafficking,²⁶ the Trafficking Protocol on the face of it, offers an expansive understanding of both the means of trafficking as well as the purpose for which one is trafficked, namely, exploitation. Each of these two central legal concepts in the law of trafficking, namely, the means and purpose, both span a continuum of possibilities. The means or coercion can range from legally recognisable and fairly narrowly construed notions of coercion,

¹⁹ UNODC, ‘Issue Paper on Abuse of a Position of Vulnerability’, p. 8.

²⁰ Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, paragraph 63.

²¹ Ibid.

²² ILO, ‘The Cost of Coercion: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work’, ILO, 2009, paragraph 35, retrieved 6 February 2015, http://www.ilo.org/declaration/WCMS_106268/lang--en/index.htm

²³ A UN report in fact suggests that it is a minimalist definition allowing for region-specific forms of trafficking to be included and lists such ‘other forms of trafficking’ such as begging, illegal adoptions and forced marriages. UNODC, ‘Global Report on Trafficking in Persons 2012’, UN publication, 2012, p. 35.

²⁴ UNODC, ‘Issue Paper on The Role of ‘Consent’ in the Trafficking in Persons Protocol’, 2014, retrieved 6 February 2015, www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

²⁵ ILO, ‘Report for Discussion’, 2013.

²⁶ UNODC, ‘Global Report on Trafficking in Persons 2009’, UN publication, 2009, retrieved 6 February 2015, http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf

deception, fraud, and abduction (termed as ‘strong coercion’ for ease of reference²⁷) to the capacious, outlier concept of the abuse of a position of vulnerability (weak coercion). Similarly, while Article 3 points to specific labour conditions that constitute exploitation and are recognised and understood under international law (strong exploitation), this list of labour conditions is not exhaustive and could well include a range of working conditions that are best described as precarious, exploitative, and normatively reprehensible (weak exploitation).

A narrow construction of the offence of trafficking might entail means of entry such as coercion understood in terms of violence, deception or fraud (strong coercion) resulting in slavery (strong exploitation). A paradigmatic example would be the trafficking episode etched in our minds through repeated iterations by the media, namely, of the young woman who is offered a well-paying job as a nanny but is duped into doing sex work in a foreign country against her will and under threat of physical and sexual violence for no pay. A broader construction of the offence of trafficking, in contrast, may penalise the recruitment of a victim by abuse of the position of vulnerability (weak coercion) resulting in precarious work with less than minimum-wage pay (weak exploitation). An example would be of a Netherlands case where anti-trafficking law was invoked against a restaurant owner who employed undocumented migrant workers (who begged him for a job) working for far less than the Dutch minimum wage.²⁸ Moreover, there is no necessary correlation between a coercive means of entry and an exploitative purpose.²⁹ In other words, coerced entry into a labour sector can exist without exploitation, while exploitation can occur without coerced entry. To illustrate, a domestic worker entering the United Kingdom (UK) legally could well be paid far less than the minimum wage in a household that she works in and thus be exploited. A female migrant duped into sex work on the other hand, may well earn a lot more than she would have ever earned in her previous employment and therefore not be exploited; exploitation being understood here in purely economic terms. This incredible malleability of the definition of trafficking means that states³⁰ tailor the offence according to their need and political, ethical and normative desire. As countries increasingly ratify the Trafficking Protocol, their domestic legal mediations of the coercion-exploitation balance vary quite dramatically.

More generally, based on this analysis, we could conceptualise anti-trafficking law in terms of a pyramid of trafficking offences with trafficking episodes involving strong

²⁷ The terms ‘strong’ and ‘weak’ are not used to qualify the quality or quantity of the means of trafficking but simply to indicate the levels of relative legal certainty or legal malleability around them.

²⁸ UNODC, ‘Issue Paper on Abuse of a Position of Vulnerability’, pp. 38-39.

²⁹ J Bhabha, ‘Trafficking, Smuggling, and Human Rights’, *Migration Information Source*, 2005, retrieved 6 February 2015, <http://www.migrationinformation.org/feature/display.cfm?ID=294>

³⁰ International organisations also operationalise the definition in ways that are narrower than Article 3 would suggest. See P Kotiswaran, ‘Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law’, *University of California Irvine Law Review*, 2014, pp. 353-405; ILO, ‘Operational Indicators of Trafficking in Human Beings: Results from a Delphi Survey Implemented by the ILO and the European Commission’, ILO, 2009, retrieved 6 February 2015, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf

coercion and strong exploitation forming a narrow sliver at the top of the pyramid, while the base is occupied by instances characterised by weak coercion in relation to the means and weak exploitation in relation to the purpose.³¹ In the context of transnational labour markets, intermediate categories of trafficking might include scenarios characterised by strong coercion (e.g. deception into a certain line of work) and weak exploitation (e.g. pay below minimum wage) and weak coercion (e.g. abuse of position of vulnerability) and strong exploitation (e.g. debt bondage). There are two additional dimensions along which anti-trafficking law operates. The first is the legality of the means of entry, and the second is the legality of the sector in which trafficked labour is carried out. One can thus visualise at least sixteen scenarios based on these four factors that would implicate anti-trafficking law, only a minute fraction of which anti-trafficking law targets in reality. Further, over the life of a trafficking episode, there is considerable fluidity between statuses. A migrant may start out by migrating legally, but given the complete lack of protection within the formal sector (particularly in certain migrant worker contexts) and high levels of abuse, deploy the strategy of ‘absconding’ to shift into an undocumented immigration status or work in an illegal sector.

Viewed this way, it is not hard to understand why some states have focused unduly on targeting prostitution through anti-trafficking law. Sex work is highly stigmatised and on the surface looks to tick the boxes of both coercion and exploitation per se, the reasoning being that who but a coerced person would want to do sex work, and how can sex work be anything other than exploitative? Yet anti-trafficking law is not always used against instances involving strong coercion and strong exploitation at the top of the anti-trafficking pyramid. The preoccupation of many Western states with border control means that there is an inordinate emphasis on the legality of the means of entry and the sector migrants work in—the assumption is that such migrants are *not* exploited. Thus a Filipino migrant worker ostensibly recruited to do factory work in the United Arab Emirates, but who ends up cleaning septic tanks on an American army base in Iraq, which he is not allowed to leave,³² is subject to both strong coercion and strong exploitation but is likely to fall off the radar screen of anti-trafficking law in the host state. Migrants legally entering labour markets through the spectrum of strong or weak means of coercion for varied levels of exploitation do not fare better either.

³¹ The clarity and certainty around a narrow definition of trafficking might result in a higher rate of prosecution. Alternatively, a broader definition of trafficking might result in greater prosecutorial discretion thus bringing down the rate of prosecution.

³² P Mahdavi, *Gridlock: Labor, Migration, and Human Trafficking in Dubai*, Stanford University Press, Stanford, 2011, pp. 18, 27; 97-101.

Domestic Mediations of Coercion/Exploitation: The Indian Example

There is a deep paradox in contemporary anti-trafficking law and discourse. The inordinate attention on trafficking in Western industrialised economies is disproportionate to the extent of the problem. Only 7% of the world's 20.9 million forced labourers are in developed economies while 56% are in Asia Pacific.³³ Yet countries like India have a substantial majority of the world's trafficked victims and 90% of all trafficking is domestic.³⁴ For instance, according to the ILO, forced labour, one of the forms of exploitation listed in Article 3, is to be found largely in Asia and the Pacific. Consider debt bondage and roughly 84 to 88% of the world's 20.5 million bonded labourers are in South Asia.³⁵ Indeed, it is this very visibility of long-standing labour problems that has caused these emerging economies to engage in sex work and sex trafficking exceptionalism.³⁶ Of late however, countries like Brazil are playing a key role in reimagining anti-trafficking law; Brazil was actively involved in the discussions based on which the expert committee report recommended standard setting to the Governing Body of the ILO,³⁷ which recently adopted a Protocol and Recommendation supplementing the Forced Labour Convention, 1930 (No. 29).³⁸

Countries like Brazil and India also have sophisticated domestic legal regimes meant to target trafficking without exclusively relying on the criminal justice system. Trafficking in India has historically been associated with sex trafficking and sex work, and therefore with women. This understanding punctuated the Indian government's legislative interventions both in 2005 and more recently in 2013. However, prior to this, in the 1970s, the postcolonial state sought to address the deplorable conditions of bonded labour, forced migration and migrant labour that we would today identify as trafficking through a radically different mediation of the relationship between coercion and exploitation. I describe the Indian anti-trafficking legal regime in more detail elsewhere³⁹ but deal here with the Bonded Labour System (Abolition) Act, 1976, as amended by the Bonded Labour System (Abolition) Amendment Act, 1985 (BLSAA), the Contract Labour (Regulation and Abolition) Act, 1970, as amended by the Contract Labour (Regulation and Abolition) Amendment Act No.14 of 1986 (CLRAA),⁴⁰ and the Inter-State Migrant Workmen Act (Regulation of Employment and Conditions of Service)

³³ ILO, 'Profits and Poverty: The Economics of Forced Labour', ILO, 2014, p. 7, retrieved 2 March 2015, www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf,

³⁴ US Department of State, *Trafficking in Persons Report 2014*, retrieved 6 February 2015, <http://www.state.gov/documents/organization/226846.pdf>

³⁵ S Kara, *Bonded Labor Tackling the System of Slavery in South Asia*, Columbia University Press, New York, 2012, p. 3.

³⁶ ILO, 'Report for Discussion 2013', paragraph 120. Interestingly, trafficking in these jurisdictions is defined as trafficking only for sexual exploitation rather than labour exploitation. This has only recently changed in India.

³⁷ ILO, 'Report and Conclusions of the Tripartite Meeting of Experts', ILO, 2013, paragraphs 92—102.

³⁸ ILO, 'Decision on the Second Item on the Agenda: Agenda of the International Labour Conference', ILO, 2013, retrieved 6 February 2015, http://www.ilo.org/gb/decisions/GB317-decision/WCMS_208157/lang--en/index.htm

³⁹ P Kotiswaran, 'Beyond Sexual Humanitarianism: A post colonial approach to anti-trafficking law', *University of California Irvine Law Review*, 2014, pp. 353—405..

⁴⁰ The Contract Labour (Regulation and Abolition) Act, No. 37 of 1970, India Code, retrieved 6 February 2015, <http://indiacode.nic.in> (search by Act Year).

Act, 1979 (ISMWA).⁴¹ My goal is to first highlight the resolutely domestic legal iterations of transnational anti-trafficking law, and second to showcase alternate legal conceptualisations of the core aspects of the trafficking offence, namely, coercion and exploitation and the institutional mechanisms deployed against trafficking.

The BLSAA is a social legislation that abolishes intergenerational bondage⁴² backed up by the force of the criminal law, whereas the CLRAA and ISMWA fall within the province of labour law. Together, they form an interlocking system consisting of both criminal and labour laws aimed at targeting trafficking. The BLSAA essentially abolishes the ‘bonded labour system’, which is defined as a system of forced/partly forced labour whereby a debtor enters, or is presumed to have entered, into an agreement with a creditor under which, in exchange for economic consideration, or in pursuance of any customary or social obligation, he is required to work under certain conditions. Although terms like ‘forced labour’ and ‘partly forced labour’ are not defined, the working conditions that they entail include where the debtor renders his own labour or that of his family without wages or with the payment of nominal wages, gives up his freedom to sell his labour or the products of his labour, gives up his right to sell his property and gives up his freedom to move. ‘Nominal wages’ are defined being below the minimum wage or what is normally paid for the same or similar labour in that locality. The statute not only deals with bonded labour as a customary practice facilitated by the caste system, but also with supposedly voluntary agreements made under the force of circumstance whereby a debtor agrees to extremely harsh and ordinarily unacceptable working conditions amounting to forced labour. Transportation of the labourer is not essential for him to be considered bonded. A 1985 amendment extended the reach of the BLSAA so that any contract labourer or interstate migrant labourer working under the conditions listed in Section 2(g)(v) would be assumed to be working under the bonded labour system.

The BLSAA outlaws bonded labour and prohibits and penalises both existing and future bonded labour. All bonded labourers are set free and, by law, their obligation to pay back the debt is extinguished. The Act has several elaborate deeming provisions in relation to existing and future legal action arising from the debt. These provisions hint at a victim-centred anti-trafficking law. Creditors accepting any repayment for an extinguished debt can face imprisonment and fines. Offenses are cognisable and bailable, and civil courts have no jurisdiction under the Act. Local district magistrates and subordinate officers ensure the Act’s implementation and the rehabilitation of

⁴¹ The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, No. 30 of 1979, India Code, retrieved 6 February 2015, <http://indiacode.nic.in> (search by Act Year).

⁴² The statement of objects and reasons to the legislation clearly indicates that it is aimed towards the abolition of a system existent in many parts of the country where ‘several generations work under bondage for the repayment of a small sum which had been taken by some remote ancestor.’ The Bonded Labour System (Abolition) Act, No. 19 of 1976, India Code (1976), retrieved 6 February 2015, <http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20%28Abolition%29%20Act%201976%20and%20Rules.pdf>

bonded labourers. Vigilance committees with representatives of the state, the affected community, social workers, rural development institutions, and credit institutions are to assist the executive in this, while also defending suits against freed bonded labourers. Where the committee or labourer asserts the existence of a debt, bonded labour is presumed and the creditor has to prove otherwise.

The CLRAA and the ISMWA, deal with contract labour and migrant labour respectively. The statutory interpretive materials accompanying the BLSAA, CLRAA and ISMWA do not distinguish between these labour forms too sharply. These labour forms occupy a choice-coercion spectrum, with bonded labour at one end, ostensibly 'free' labour at the other with contract labour and migrant labour falling somewhere in between. Although CLRAA targets labour practices in the formal sector, courts have very much viewed it as a social legislation for the welfare of labourers; empirical studies confirm high levels of informality with the largest proportion of contract labourers working in the construction industry where contractors themselves are small operators.⁴³ The government can, under the CLRAA, prohibit contract labour once certain conditions are satisfied but recognising, that pending the abolition of contract labour, minimum working conditions need to be ensured, the CLRAA imposes obligations on recruiters of contract labourers and intermediaries in the employer-employee relationship with a backstop to the principal employer. Central and state-level advisory boards and inspectors enforce the law, which penalises offending parties. Given the inadequacy of the CLRAA to deal with such abuse, the ISMWA was passed to protect the interests of an unorganised migrant labour force, often recruited by contractors for out-of-State work in large construction projects with little pay for work under extremely poor conditions. The ISMWA is similar to the CLRAA in many respects and several obligations are imposed on contractors, failing which, employers become liable for these. Salient for purposes of conceptualising anti-trafficking law is the persistent role of intermediaries in all three labour forms, which explains the pragmatic imposition of obligations on them rather than their criminalisation under the CLRAA and ISMWA.

The three statutes are also key for offering an alternate conceptualisation of coercion and exploitation. In landmark judgments of the 1980s, the Indian Supreme Court interpreted force for purposes of forced labour prohibited by Article 23 of the Indian Constitution to include not only physical force, or force exerted through a legal provision, but also, 'any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action'.⁴⁴ This includes situations where the labourer was suffering from hunger or starvation or utter grinding poverty such that he or she accepted work remunerated with less than the minimum wage. Thus any labour remunerated at less than the minimum wage would be considered to be forced labour under the Constitution. Further, since a forced labourer is likely to have received an advance on his earnings to live off, the court directed that a presumption be raised

⁴³ B Tulpule, 'ILO Initiative on Contract Labour', *Economic and Political Weekly*, 30 August 1997, at L-21, L-22.

⁴⁴ *People's Union for Democratic Rights v Union of India*, A.I.R. 1982 S.C. 1473, at 1490.

as to his bonded labour status when a forced labourer was found to have received an advance.⁴⁵ It was in response to this interpretation that the Indian parliament amended the BLSAA in 1985 so that any contract labourer or ISMW working in forced labour would be considered to be a bonded labourer.

The three legislations taken together have been poorly enforced. As Siddharth Kara observes,⁴⁶ prosecutions for bonded labour are rare for several reasons including corruption,⁴⁷ an indifferent bureaucracy, the inability of government officials and vigilance committees to identify bonded labourers and social tolerance of exploitative practices.⁴⁸ To illustrate, of the 231 prosecutions that were launched under the BLSAA since 1996-1997, only six had been decided and even those cases had resulted in acquittal.⁴⁹ Also, rehabilitation is virtually nonexistent or withheld for unreasonably long periods of time.

Despite this dire enforcement, I read these laws as domestic anti-trafficking law to show how they conceptualise force, not merely in terms of physical and legal force, but in structural terms, that is, background economic conditions including poverty, in other words, 'weak coercion'. The determinative factor then is whether the recruitment results in exploitation. Section 2(g)(v) of the BLSAA sets an objective threshold for such exploitation including the payment of anything less than the minimum wage, thus targeting 'weak exploitation'.⁵⁰ Unlike contemporary anti-trafficking laws which privilege coerced entry into trafficking over exploitation,⁵¹ the BLSAA, CLRAA and ISMWA de-emphasise the *means* of trafficking and privilege the *purpose* of trafficking, namely, exploitation. Given their focus, these laws deploy a combination of criminal and labour law mechanisms to target trafficking instead of solely relying on criminal law, which is a fraught option considering the abuse-generating role of the Indian police.

Despite, or some would argue because of, this legislative backdrop, the offence of trafficking under Section 370 of the Criminal Law (Amendment) Act, 2013, criminalises trafficking along the lines of Article 3 but drops one of the means of trafficking, namely, the abuse of power or of a position of vulnerability. The forms of exploitation under Section 370 also omit reference to forced labour. Section 370A further criminalises

⁴⁵ Bandhua Mukti Morcha v Union of India, (1984) 2 S.C.R. 67, 78 (India).

⁴⁶ S Kara, pp. 39, 42.

⁴⁷ Kara also speaks of his interview of one bonded labourer who did not even bother with rehabilitation as these schemes were fraught with corruption. Ibid., p. 202.

⁴⁸ Ibid., p. 201.

⁴⁹ Ibid., p. 205.

⁵⁰ For likely objections to this approach see Kotiswaran, pp. 391-395; these include whether a domestic legal regime could be transposed to the international level, whether Indian anti-trafficking laws are not meant to address the uniqueness of Indian labour conditions such as intergenerational debt bondage, whether emphasising exploitation and expanding its remit might not further entrench a politics of abolition, and whether a broader focus on the exploitation of both men and women might not obscure specific gendered harms that female migrants are subject to.

⁵¹ This is more likely to be true for developed countries like the UK and USA. Unless of course sex work is involved in which case, it is inevitably considered to be exploitative per se.

anyone engaging a trafficked minor or adult, but only for purposes of sexual exploitation, ignoring the use of trafficked persons in myriad sectors of the Indian economy, including brick kilns, rice mills, farms, embroidery workshops, mines, stone quarries, homes and carpet factories. Although the 2013 amendment has consciously chosen to depart from the Article 3 definition of trafficking given the expansive judicial pronouncements on forced labour and bonded labour, those pronouncements continue to be good law. The striking omissions on the part of parliament could reflect the lack of political will more than anything else. The Indian domestic regime is however instructive for contemporary anti-trafficking discourse on three counts—their desire to counter a larger sliver of labour conditions falling within the anti-trafficking pyramid through a broad interpretation of coercion and a clear-cut baseline for exploitation (namely the minimum wage); the multiple institutional pathways of criminal justice, labour law and administrative law to counter trafficking and the pragmatic imposition of obligations on intermediaries in addition to principal employers to ensure decent conditions of work.

Going Forward: A research agenda for anti-trafficking lawyers and activists

I have suggested so far that domestic legal negotiations of the conceptual elements of the definition of trafficking, namely, coercion and exploitation can help elaborate a redistributive function for anti-trafficking law. However even a renewed focus on the full range of exploitative conditions in several labour sectors does not ensure that we can always identify a bright line concept (such as the minimum wage) for deciding on the boundaries of anti-trafficking law and the attendant regulatory choice between criminal law and/or labour law. This is particularly true for highly stigmatised sectors of work such as sex work where its assimilation into the world of legitimate work has always been contested. It is also true for the informal economy where the employment relationship is hard to identify or where the work involves the provision of services or for hybrid work sectors like manufacturing, which partake of the formal economy but become increasingly informal down the complex, transnational supply chain.

Abstract theorising on exploitation does not translate very well when concretely applied to the sectors I have listed. To illustrate, according to Wilkinson,⁵² exploitation could be measured in terms of the three alternate situations to being exploited. These include (1) the pre-interactive baseline (the outcome had the parties to the transaction never met); (2) the closest possible world baseline (the outcome had the exploited person entered into the same kind of transaction with someone other than the exploiter); and (3) the normative baseline (the outcome that is normatively desired for the exploited person). Given the precarious conditions of labour today, workers are invariably above the pre-interactive baseline whether they resort to work out of dire poverty or ‘dull

⁵² V Munro, ‘Exploring Exploitation: Trafficking in Sex, Work and Sex Work’, in V Munro & M Della Giusta (eds.), *Demanding Sex: Critical Reflections on the Regulation of Prostitution*, Routledge, London, 2008, p.85.

economic compulsion'.⁵³ The challenge for anti-trafficking scholars then is to reduce the gap between the closest possible world baseline and the normative baseline. However for this, some basic understanding of the political economy of these labour sectors is necessary. In addition, anti-trafficking scholars, especially lawyers would need to approach anti-trafficking provisions through a legal realist lens. In other words, rather than bemoan the ineffectiveness of criminal sanctions against trafficking, lawyers might assess the myriad sets of civil rules (immigration, emigration, housing, labour, contract), informal social norms, market practices and attempts at self-regulation operating at the international, regional, domestic and local levels that often structure the political economies of varied labour sectors. Viewed this way, the regulatory profiles of sectors such as domestic work, sex work, sexual entertainment, janitorial work, factory work-migration corridors would vary quite significantly. While I am not suggesting a depoliticising move that narrowly engages with sector-specific responses to what are endemically poor labour conditions, lawmakers do need to recognise the complex legal pluralist space of labour markets. This calls for legal ethnographic research.

Importantly also, lawyers and activists need to appreciate the unintended consequences of any form of regulatory intervention or rule change, even if ostensibly beneficial. Protective measures can in fact end up having perverse consequences in that the number of jobs available in the host State might reduce as a result.⁵⁴ As the work of Rhacel Parreñas on Filipina migrant hostesses in Japan demonstrates, an elaborate labyrinth of obligations imposed both in the Philippines and in Japan on recruiters, agencies and employers has only resulted in hostesses being indentured. Her work also illustrates that these labour sectors are quite sensitive to any regulatory changes. Thus, when the Japanese government introduced more stringent requirements for entertainer visas,⁵⁵ ostensibly to professionalise hostessing by increasing the training period (but really to improve its Tier 2 Watch List categorisation in the US Trafficking in Persons rankings), the numbers of Filipina migrant hostesses fell from 80,000 in 2004 to 8,000 in 2005.⁵⁶ This translated into more debt for the migrant workers, increasing their vulnerability to trafficking.⁵⁷ If, on the other hand, one were to reduce their qualification requirements to reduce debt levels among Filipina hostesses through their reduced dependency on talent managers,⁵⁸ the resultant increased supply of hostesses may well lower wages in the host state. We thus need to continue to explore the

⁵³ J O'Connell Davidson, 'The Rights and Wrongs of Prostitution', *Hypatia*, vol. 7, issue 2, 2002, pp. 84, 94.

⁵⁴ D McKenzie, C Theoharides & D Yang, *Distortions in the International Migrant Labor Market: Evidence from Filipino Migration and Wage Responses to Destination Country Economic Shocks*, Centre for Research and Analysis of Migration, 2012, retrieved 6 February 2015, http://www.cream-migration.org/publ_uploads/CDP_09_12.pdf

⁵⁵ RS Parreñas, *Illicit Flirtations: Labor, Migration and Sex Trafficking in Tokyo*, Stanford University Press, Stanford, 2011, pp. 51-55, 172-73.

⁵⁶ *Ibid.*, 147.

⁵⁷ *Ibid.*, 173.

⁵⁸ *Ibid.*, 177.

interface between the law and economy, especially the precise interaction between social norms driven by the economic logic of the market and formal state law to assess the most effective regulatory strategies to counter trafficking.

Conclusion

As we mark the fifteenth anniversary of the Trafficking Protocol, the challenges of using a prohibitionist international law to target a highly complex and fluid phenomenon like trafficking, which is itself embedded in global flows of people and products, are becoming apparent. I have argued in this article that the structure of transnational criminal law requires us to zero in on domestic legal regimes against trafficking, where conceptual and institutional innovations are most likely to materialise. I have also proposed actively expanding the narrow focus of current anti-trafficking efforts away from the top of the pyramid of anti-trafficking law, which targets scenarios involving strong coercion and strong exploitation, and instead pushing downwards towards the range of other trafficking scenarios. The momentum around trafficking issues will not only help re-envision international anti-trafficking law, but will also offer an opportunity to invigorate the enforcement of domestic labour laws against trafficking, which have been rendered dormant with the onslaught of neoliberal economic reforms. Similarly, fostering plurality in the regulatory mechanism such that labour law is at the centre, coupled with the highly selective use of criminal law penalties, informed in turn by a fine-grained understanding of the political economy and legal topography of labour markets is likely to be more effective. A deeper understanding of the economics driving labour markets and the highly counter intuitive effects of legal responses to forced migration and exploitative working conditions in labour markets⁵⁹ is crucial.

Fifteen years after the adoption of the Trafficking Protocol, it is this immense opportunity that we can mobilise.

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⁵⁹ For an excellent example of such analysis of the brick markets in Afghanistan, which employ bonded labour, ILO, 'Buried in Bricks: A Rapid Assessment of Bonded Labour in Brick Kilns in Afghanistan', ILO, 2011, retrieved 6 February 2015, http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/publication/wcms_172672.pdf