

India

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1. Introduction

Over the past several years, sex workers (male, female, and transgendered), their families, and their support communities have crossed international borders and converged on different cities in India to celebrate the International Sex Workers' Rights Day on 3 March. At the epicentre of their debates and protests has been a demand to be recognised as entertainment workers as well as a challenge to the anti-trafficking initiatives being promoted by Western and South Asian countries, feminists, and human rights groups (Binodini Sramik, 2007; durbar.org, 2007a; Batliwala, 2004). These communities argue that such measures have resulted in targeting migrants, promoting highly conservative moral agendas, and denying sex workers and other migrants their rights to work, family, and mobility (durbar.org, 2007b).

As discussed below, anti-trafficking initiatives in India have emerged almost exclusively from within the debates around the legality or illegality of prostitution. Existing legal and policy initiatives and proposed reforms on trafficking have invariably been displaced onto debates about whether or not prostitution constitutes violence against women, is against Indian cultural values and compromises the nation's integrity, and whether the women involved are exclusively victims of sexual predators and sexual exploitation, incapable of choosing to engage in such work. The push and pull factors that compel unsafe movement, the various sites into which trafficking takes place and the larger issue of migration all remain largely unaddressed within the debates on trafficking in India (Kapur, 2005, 143). As a result of the narrow focus of the debate, the legal and policy responses focus almost exclusively on regulating sex work, strengthening border controls and prosecuting brothel-keepers and those who profit from the sex work industry.

Background

Human trafficking in India is thought to be largely an internal phenomenon according to the Indian government, the Asian Development Bank (ADB) and several NGOs (Shakti Vahini, 2004; ADB, 2003, 103). There is, however, evidence that people from Bangladesh and Nepal have been trafficked via India to the Middle East (UNODC, 2006, 88-90; US TIP Report, 2005). While most of the laws and policies in India have focused on the trafficking of people for sexual exploitation, a comprehensive study carried out by the National Human Rights Commission (NHRC) of India (an institution established by the state) provides strong anecdotal evidence of trafficking for the purposes of factory work, performing in circuses, camel jockeying, begging, domestic labour, adoption, organ removal, marriage, and bonded labour (Sen and Nair, 2004, 164–169).

The Indian Ministry of Home Affairs estimates that 90 percent of India's sex trafficking is internal and that India is also a destination country for women and girls from Nepal and Bangladesh trafficked for the purpose of

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commercial sexual exploitation (US TIP Report, 2006). In addition, boys from Afghanistan, Pakistan, and Bangladesh have been trafficked through India to the Gulf countries for servitude as child camel jockeys (Tumlin, 2000, 5), although there are indications that the number has diminished as a result of efforts to stop young children racing camels in the United Arab Emirates (UAE) in the past few years. Indian men and women migrate willingly to the Gulf for work as domestic servants and low-skilled labourers, but some later find themselves in situations of servitude, including extended work hours, non-payment of wages, restrictions on their movement by withholding of their passports or confinement to the home, and physical or sexual abuse (US TIP Report, 2006).

There are no accurate or reliable statistics available regarding the number of persons who are either trafficked into or out of India, or internally within India. Some reports state that “millions” of men, women and children are internally trafficked and subjected to debt bondage, experiencing servitude in brick kilns, rice mills, and *zari*¹ embroidery factories (South Asia March Against Child Trafficking, 2007). Hundreds and thousands of women and girls are alleged to be trafficked for the purpose of commercial sexual exploitation (Human Rights Watch, 1995, 1; Sen and Nair, 2004).

There are two prominent reasons why data on human trafficking is notoriously inaccurate. The first is that the clandestine nature of trafficking makes it difficult to track from the outset. The acts are hidden and the actors presumably have few incentives to be truthful even when found. In 2001, for example, the United Nations Children’s Fund (UNICEF) estimated that 1.75 million women and children were trafficked that year, while the International Organization for Migration (IOM) estimated that 400,000 women and children were trafficked that year (IOM, 2005; IOM, 1998; pbs.org, 2006). The US Department of State’s estimate for all persons trafficked each year is from 600,000 to 800,000. The second reason is that there are a number of contentious definitions of trafficking, any one of which may be used by different bodies to collect data. Depending on which definition one adopts, human trafficking may be conflated with prostitution, smuggling and/or illegal migration, and it may exclude internal trafficking, trafficking for purposes other than sexual exploitation and/or the trafficking of men and/or boys. For example, in contrast to the definition of trafficking set out in the UN Trafficking Protocol, India has accepted a much more narrow definition of trafficking in the South Asian Association for Regional Cooperation (SAARC) Convention, which conflates trafficking with prostitution, ignores trafficking in other sites of exploitation, addresses the trafficking of women and girls together, and fails to address the trafficking of men and boys.

2. Legal Framework

Trafficking is currently addressed primarily in the Constitution of India, the *Immoral Traffic Prevention Act, 1956* (ITPA) and the *Indian Penal Code (1860)*. Other relevant provisions can be found in the *Bonded Labour System (Abolition) Act (1976)*, the *Transplantation of Human Organ Act (1994)*, the *Child Labour (Prohibition and Regulation) Act (1986)* and the *Child Marriage Restraint Act (1929)*.

Background

The anti-trafficking law in India was almost exclusively enacted in pursuance of the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (UN Suppression of Traffic Convention), adopted by the UN General Assembly in 1949, which India ratified in 1953. It was initially enacted

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as the *Suppression of Immoral Traffic in Women and Girls Act, 1956*. The UN Suppression of Traffic Convention is overwhelmingly focused on abolishing prostitution and has been of little assistance to trafficked persons. The preamble of the UN Suppression of Traffic Convention notes that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”. The Convention then goes on to call for the punishment of those who, “to gratify the passions of another”, entice a person into prostitution or exploit the prostitution of another person, irrespective of the person’s consent (Article 1), as well as those who manage or knowingly finance brothels and those who knowingly rent a property for the purpose of prostitution (Article 2). In addition to a number of criminal measures designed to prosecute those implicated in the aforementioned acts, the UN Suppression of Traffic Convention further stipulates that states should adopt a broad range of supervisory functions relating to immigration checkpoints and employment agencies (Articles 17 and 20). While the Convention mentions education and rehabilitation, it merely calls for states to take or to encourage measures aimed at the prevention of trafficking, and at the rehabilitation and “social adjustment” of victims of prostitution.

The anti-trafficking law in India has largely been informed by the UN Suppression of Traffic Convention, though in many situations government policy has appeared at odds with the Convention, by seeking to regulate prostitution rather than to prohibit it. More recently, there have been two primary concerns that have drawn the government’s attention to the issue of anti-trafficking. These include a concern over the spread of HIV in India and the concern over the exploitation and trafficking of minors, in particular, young girls into sexually exploitative situations, quite specifically, prostitution.

In the early 1980s, state officials denied that AIDS could be a problem in India because of the ‘moral values’ of Indian men and women (AIDS Bhedbhav Virodhi Andolan, 1993, 25). According to the 2006 UN AIDS report, India, with 5.7 million infected people, now has more individuals living with the disease than any other country. AIDS could easily emerge as the largest cause of adult mortality in this decade. As regards the concern over the trafficking of young girls into prostitution, while there are almost no reliable statistics or data available on the number of children or women who are trafficked into this form of exploitation, there nevertheless seems to be a sense of urgency over producing a response to this ‘problem’, usually in the form of strengthening the criminal law (Gallagher, 2002, 70; Asia Foundation and Horizons Project Population Council, 2001, 17).

The AIDS crisis and concerns over trafficking of minors have produced different responses by government departments. A dominant response includes increased surveillance of so-called at-risk populations, including sex workers. The crisis over HIV in particular has sparked a plethora of research with an emphasis on “knowing and measuring sexual practices of ‘at-risk populations’, such as the youth, college students, and sex trade workers” (Puri 1999, 283). The concern over trafficking in young girls, in particular sex trafficking, has also led to an overwhelming focus on sex workers. Law reform proposals seeking to amend the existing law dealing with trafficking have been focused primarily on treating trafficking as a law and order problem, a problem of moral turpitude, and sex workers as either victims, ‘evil doers’ or vectors of immorality and criminality. The proposals do not consider sex workers to have rights to health care, a family life or access to education without discrimination, nor to be entitled to safe and non-exploitative working conditions.

Existing Laws

Constitution of India

Article 23 of the Indian Constitution prohibits “traffic in human beings, beggary and other similar forms of forced labour”. Other constitutional provisions that concern human trafficking include those that guarantee the right to equality, the right to be free from discrimination, the right to life and liberty, and the right for children under 14 years of age to be free from engaging in hazardous forms of labour.

Immoral Traffic Prevention Act, 1956

The ITPA was initially enacted in compliance with India’s obligations under the UN Suppression of Traffic Convention, ratified by India on 9 January 1953. As such, the aim of the Act is to eliminate the recruitment of women and girls for the purpose of prostitution. Among the activities prohibited by the Act are:

- keeping a brothel or allowing a premises to be used as a brothel;
- living off the earnings of prostitution;
- procuring a person for prostitution with or without consent;
- detaining a person in a premises where prostitution is carried out, with or without consent;
- prostitution in or near a public place;
- soliciting for prostitution; and
- seducing a person in custody (sections 3 to 9).

Although the prescribed penalty for women who are convicted of soliciting for prostitution is imprisonment for up to six months for their first offence and up to one year for every offence committed after that, the prescribed penalty for men who are convicted of the same crime is between seven days and three months (section 8).

The ITPA also grants police officers and magistrates broad powers in relation to the rescue and rehabilitation of victims. While section 15 allows police officers to search premises without a warrant if accompanied by two or more female police officers or by two or more “respectable inhabitants” of the community, section 16 allows the police to “rescue” any person found in a place where it is believed that prostitution is occurring. Rescued persons are then supposed to be subjected to mandatory health checks and brought before magistrates who are empowered to place rescued children (under 16) and minors (aged 16 or 17) in an authorised custodial institution and to place any rescued person in a protective home for up to three years if that person is deemed to be “in need of care and protection” (section 17). It is noteworthy that while the Act defines children as persons under 16, minors are defined as persons between 16 and 18. This definition is inconsistent with India’s obligation under the UN Convention on the Rights of the Child to define all those under 18 as ‘children’. In deciding where to place a rescued person, the magistrate will consider the age, character, history, home situation, and personality of the person, as well as the suitability of his or her parents and the likelihood of rehabilitation (section 17).

In 2005, the cabinet approved proposed changes to the ITPA that are scheduled to go before the Indian Parliament in 2007 (CFLR, 2006, 2). Among the proposed changes are: changing the age of majority from 16 to 18; adding a new offence prohibiting the purchase of the services of prostitutes; deleting the section that criminalises soliciting for prostitution; and allowing police officers of a lower rank than before to conduct raids and arrests (CFLR, 2006, 22 and 26).

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Indian Penal Code (1860)

The Indian Penal Code outlaws a number of trafficking-related activities. Among the prohibited activities are; kidnapping or abducting women and girls in order to force them to have illicit intercourse or to marry against their will (section 366); kidnapping or abducting persons in order to subject them to slavery (section 367); buying or selling, or otherwise giving or receiving, people for the purpose of slavery (section 370); and buying or selling, or otherwise obtaining, a child for the purpose of prostitution or any unlawful or immoral purpose (sections 372 and 373).

The Penal Code also has separate provisions dealing with the procurement of children (section 366A) and the importation of a girl below the age of 21 years of age (section 366B). Section 374 provides punishment for compelling any person to labour against the will of that person.

The term ‘slavery’ and related terms such as ‘bondage’, ‘forced labour’ and ‘beggar’ are not defined in the Indian Penal Code. Their meanings have been clarified over the years by the Supreme Court. In the case of the *People’s Union for Democratic Rights v. Union of India* (All India Reports 1982 Supreme Court 1273), the Supreme Court observed, “[w]here a person provides labour or service to another for remuneration which is less than the minimum wage fixed by the *Minimum Wages Act, 1948*, he renders forced labour within the meaning of Article 23 [of the Constitution]”. The *Bonded Labour System (Abolition) Act, 1976*, also gives a detailed definition of ‘bonded labour system’ (section 2(g)).

Juvenile Justice (Care and Protection of Children) Act, 2000

The *Juvenile Justice (Care and Protection of Children) Act, 2000* (*Juvenile Justice Act*) was passed in consonance with the *Convention on the Rights of the Child*, which has been ratified by India, to consolidate and amend the law relating to juveniles who have violated the law and provide for children in need of care and protection (Committee on the Rights of the Child, 2004). The *Juvenile Justice Act* recognises that a child who is vulnerable and likely to be inducted into trafficking is a child in need of care and protection, and includes elaborate provisions for the rescue and rehabilitation of such a child. It gives NGOs a position on the child welfare committees established at the local level and the Juvenile Justice Board. The focus of the Act is to provide for proper care, protection and treatment by catering to the child’s development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institutions established under the Act. ‘Child’ means a person, either male or female, who has not reached the age of 18. The Act empowers state governments to constitute child welfare committees in relation to such areas as they deem fit (section 19). It also outlines the powers of the committees and the procedures to be followed and gives the committees the ultimate authority to dispose of cases for the care, protection, treatment, development, and rehabilitation of children, as well as to provide for their basic needs and the protection of their human rights (section 31). A state government may establish and maintain children’s homes for the care and protection of children (section 34). The primary objective of the children’s home or shelter is the restoration and protection of childhood (section 39).

Goa Children’s Act, 2003

Trafficking has not been defined under Indian law. However, in 2003 Goa became the first state to provide a

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definition of 'child trafficking' under the *Goa Children's Act*. The definition states, "child trafficking means the procurement, recruitment, transportation, harbouring or receipt of persons legally or illegally within or across borders, 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 giving or receiving payments or benefits to achieve the consent of a person having control over another person for monetary gain or otherwise" (section 2(z)). The law authorises airport authorities, border police, railway police, and traffic police to report any cases of adults travelling with a child or children in suspicious circumstances or any suspected cases of trafficking. Such adults may be detained for questioning at the nearest police station (section 8(15)). Anyone who exploits a child for commercial sexual exploitation will be liable to pay a monetary fine and serve a prison sentence of one year, in addition to any other penalty that is attracted by any other Act in force (section 9(4)).

The Act also provides a definition of sexual assault that is designed to incorporate every type of sexual abuse, and not just vaginal or anal penetration (section 2(y) i, ii, and iii). Under the new legislation, the owner and manager of a hotel or other establishments will be held solely responsible for the safety of a child on the premises, as well as all the adjoining beaches and parks. It provides for strong action against making children available for commercial exploitation, including posing obscenely, selling or abetting the sale of children, even under the guise of adoption or of the dedication of a girl child as a *devadasi*.² Photo studios are also required to periodically report to the police that they have not shot any obscene photographs of children, and stringent control measures have been introduced to regulate the access of children to pornographic materials. The *Goa Children's Act* also proposes the setting up of Children's Courts, to deal with cases under the Act. However, the rules for setting up these courts had not been promulgated by early 2007.

Other Initiatives

The Committee on Prostitution, Child Prostitutes and the Children of Prostitutes, which exists within the Department of Women and Child Development under the authority of the Ministry of Human Resource Development, released the *Report and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children* in 1998. The National Plan of Action (NPA) highlights a number of initiatives in the areas of, among others: prevention, awareness raising, health services, education, housing, economic empowerment, legal reform, and rescue and rehabilitation. In the area of legal reform, the NPA recommends that trafficking laws be reviewed to ensure that victims are not re-victimised and that exploiters are punished.

To prevent the trafficking of girls in India, the government has embarked on a comprehensive public awareness campaign designed to educate influential members within the community, such as parents and teachers, on the issues surrounding trafficking in girls. Following three years of consultation, a communication strategy was developed so that information about trafficking could be passed on to the influential persons through the mass media. India is providing other countries in the region with information on how to conduct and orchestrate such a campaign (UNICEF, 2005, 16–17).

A number of development projects have also been launched by the government with the aim of addressing many of the underlying factors that lead to human trafficking. These projects are designed to alleviate, among other problems, poverty, unemployment, and poor health and sanitation. Importantly, the poverty reduction programmes have specifically targeted red-light and rural areas, both of which are considered by the government to be high source areas for human trafficking. In addition, the Indian government increased its annual budget allocation for women-specific and pro-women schemes in the 2002/2003 budget by three per cent and 23 per cent respectively

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(Asian Development Bank, 2003, 138). The ADB's report on trafficking in India noted, however, that in relation to prevention programmes, there was unfortunately a pattern of "monitoring [financial] input rather than outcome and [a] proliferation of too many programmes with too little money" (ADB, 2003, 139).

In 2001, the government sought to develop a holistic rehabilitation and reintegration programme for women in difficult circumstances, including trafficked women (Sen and Nair, 2004, 298). Under this programme, the Department of Women and Child Development provides grants to NGOs that develop innovative projects pertaining to rehabilitation, particularly, counselling, non-formal education and vocational training (Sen and Nair, 2004, 297).

The existing anti-trafficking laws and policies have been developed almost entirely without the participation of the affected communities – migrants, sex workers and children. Such exclusions partly explain why these laws have failed to successfully reduce the number of trafficked persons despite being in operation for more than 50 years.

The Durbar Mahila Samanwaya Committee (DMSC), more widely known as the Sonagachi Project, is an organised sex workers' rights movement based in Calcutta and consisting of over 60,000 sex workers. By gathering and organising information, it has been able to reduce the transmission of HIV as well as the trafficking of minors into sex work. Their anti-trafficking initiatives rely on the participation of residents in red-light areas in monitoring the entry of minors into the area and assisting in the return of any who try to enter (Sex-workers Manifesto, 1997). Over the past several years, sex workers' groups have been organising annual conferences to highlight the situation of sex workers around the country, drawing attention to the issue of trafficking as well as the impact of anti-trafficking measures on their rights and lobbying for more rights protection from the state for sex workers (Festival of Pleasure, 2003). Some of these concerns are expressed in *Tales of the Night Fairies* (Centre for Feminist Legal Research and Mama Cash 2002), a film directed by Shohini Ghosh documenting the Sonagachi Project. These sex workers and their activist allies have set up, however rudimentary, financial institutions, health clinics, sex education schools, and blood banks for the surrounding community. The work of DMSC and the representation of the sex workers in the film stand in stark contrast to assumptions about their victimisation or their portrayal by others almost exclusively as trafficked and exploited victims (Briski, 2005; Levine, 2003).

Analysis of the Impact of Laws and Policies

Enforcement

While there are innumerable legal provisions that address different aspects of trafficking in India, part of the problem lies in ineffective implementation or only partial implementation of the law. This does not detract from the fact that the provisions that do exist are deeply flawed in terms of definition of the offence as well as the gender bias and assumptions about women's roles on which they are based.

The NHRC report mentioned above paints a bleak picture of the enforcement of the ITPA. A number of findings demonstrate that women engaged in commercial sex work, whether willingly or otherwise, are being disproportionately punished and that traffickers are able to act with relative impunity (Coomaraswamy, 2000, 30). The report highlights two problems: first, the ITPA is being misused by police officers who are more concerned with arresting and charging prostitutes than traffickers, and second, the conviction of a significant number of women who were likely to have been forced into engaging in prostitution represents a misapplication of the law

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by the charging officers and the judges involved, as those women cannot have had the requisite intention to commit trafficking (Sen and Nair, 2004, 386). The report also notes, however, that there has been an important shift whereby there are more, though still relatively few, traffickers arrested now than before (Sen and Nair, 2004, 274).

A particularly troubling consequence of the conviction of the large number of women who have been trafficked for the purpose of prostitution is that the criminal justice system becomes a means through which trafficked women become even more deeply enslaved. A “spiral of exploitation” was identified in the NHRC report, whereby trafficked women are arrested and charged for soliciting for prostitution. They are then bailed out by brothel-owners who add the amount paid to secure their release to the debt the women were previously working to pay off, and the women are then forced to work more than before to pay off their higher financial burden (Sen and Nair, 2004, 85 and 86). This pattern of debt bondage is exacerbated by the ineffective application of India’s Bonded Labour Act. The report also highlighted a high level of corruption amongst police officers, with 15 per cent of the survivors of commercial sexual exploitation interviewed saying they had secured their release after being arrested by bribing police officers (Sen and Nair, 2004, 85).

The Department of Women and Child Development has established a number of shelters for trafficked women and children including protection homes created under section 21 of the ITPA, juvenile homes created under the Juvenile Justice Act, 2000 and a network of short-stay homes (ADB, 2003, 151; Sen and Nair, 2004, 296). While custodial care, education, vocational training and rehabilitation are available at the protection homes, medical and counselling services are available at the juvenile homes. NGOs that run care centres for child victims of commercial sexual exploitation also receive financial assistance from the Central Social Welfare Board.

In 1998, the *Report and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children*, released by the Committee on Prostitution, Child Prostitutes and the Children of Prostitutes, noted that the initiatives that had been previously undertaken had not had an impact on the prevalence of commercial sexual exploitation and that the legal framework re-victimised the victims of exploitation while having little impact on exploiters (ADB, 2003, 100,101). Among the reasons provided for the problems in relation to the enforcement of anti-trafficking initiatives were: the lack of seriousness among law enforcement machinery; insufficient awareness about the extent of the problem; and the lack of coordination between the border police of neighbouring countries.

Immoral Traffic Prevention Act

The ITPA primarily targets trafficking and exploitation linked to commercial sex, and does not address any other form of trafficking. Although there is no specific definition of trafficking in the Act, the focus on prostitution has narrowed the focus of the Act to women and children trafficked into prostitution. The ITPA is based on the assumption that the main victims of trafficking are those who are forced into prostitution by procurers, pimps, brothel-keepers and madams. The primary aim of the ITPA is to punish ‘immoral trafficking’ and traffickers. The ITPA is divided into two parts: the first part criminalises activities such as trafficking and the keeping of brothels, and the second part contains certain welfare measures that are directed towards the rehabilitation of sex workers. The Act was ostensibly not intended to be used against sex workers.

The provisions of the ITPA are aimed specifically at criminalising the activities of persons engaged in the sale and procurement of women *for the purpose of prostitution*. The focus is on the purpose for which the woman is

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being sold or procured rather than on the use of force, fraud, violence or deception. Where the purpose does not qualify as illegal, such as in the case of domestic labour, then the manner in which the procurement occurs, no matter how violent, would not fall under these provisions.

The ITPA deems the consent of the trafficked person relevant only for the purpose of sentencing and not at the stage of defining the offence. Excluding consent from the definition of the offence of trafficking assumes that women are victims who are invariably forced into the sex trade against their will.

Where the use of force, fraud, coercion or even sexual violence is manifest, but the woman is or has been a sex worker, is unmarried or is not a minor, then she may be less able to take advantage of these provisions. In fact, there is a risk that she can become vulnerable to prosecution as a co-conspirator. The law provides no remedy to a woman who willingly agrees to enter into sex work, but is subjected to sexual abuse by her procurers. Although the issues of force, fraud, deception, and violence are specific concerns behind the anti-trafficking provisions, these are not addressed in the ITPA, nor are remedies provided for these criminal acts in other legal provisions. The primary focus of the ITPA provisions is on whether or not the trafficking is 'immoral', which deflects attention from the main concerns, namely the use of *force, fraud, deception, coercion and sexual exploitation*, which may have been used on a woman in the process of being trafficked or at the point of arrival. As discussed above, recent evidence suggests that the provisions of the ITPA have been used overwhelmingly against women and children in prostitution (Sen and Nair, 2004, 397).

The ITPA also deals with the trafficking of women and children together. There are no separate laws dealing with child trafficking at the national level. However, there are provisions that assume that children found on premises where sex work is carried, are being used for sex work. Such provisions place a burden on the sex worker to establish that her child or children have not been used for sex work, and make her vulnerable to police harassment. In some cases, this leads to removal of the children from the premises and their placement in a government home or shelter.

In addition, if a sex worker uses her residence for the purpose of sex work, she can be charged under the ITPA. The Act also makes it an offence for a sex worker to support her family from her earnings where her children and other family members are not minors. These provisions appear to betray the ITPA's objective of not targeting the sex worker. They also effectively undermine the rights of children to be with their families, if they so choose and it is in their best interests.

The anti-trafficking law focuses on the method of rescue and rehabilitation of the women and girls assumed to have been trafficked for the purpose of prostitution. Administrative detention of the woman who has been trafficked, whether in a protective home or a corrective institution, is seen as the primary response to victims of trafficking into the sex trade. Once incarcerated, a woman has no right to privacy or bodily integrity and is subjected to invasive medical examinations and inquiries into her personal background. The conditions in corrective and protective homes have been documented and have been considered barely habitable (Coomaraswamy, 2000, 8). Indefinite incarceration, loss of liberty, forced medical examinations and appalling living conditions drive the young girls and women placed in these institutions back into sex work. Frequently, they incur huge debts to cover the cost of legal fees, bail and sureties, which reinforces their debt bondage status. Rehabilitation has the limited objective of providing the victim with temporary shelter and safeguarding her from the abusive and exploitative aspects of her work. However, these homes do not serve the function of reintegration (Coomaraswamy, 2000,

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18). Nor are women entitled to leave the homes of their own free will. They are regarded as being in protective custody and can only be removed through an application to the court. This procedure denies victims the rights to which ordinary criminals are entitled, namely, due process and the right to liberty. This omission is particularly problematic given that the women are ostensibly the victims of criminal conduct and not actual criminals themselves. These institutions also provide few options for self-employment and alternative income generation. Marriage is promoted as the primary mechanism for the reintegration of such women into society.

Brothel raids

The phenomenon of brothel raids carried out by the police with the assistance of information provided by NGOs has been one of the most problematic strategies pursued under the provisions of the ITPA. The raids are justified in order to 'rescue' women and children forced into prostitution, yet there is evidence that these raids have occasioned abuse by the police and are also counter-productive (McGill, 2002, 32). There have also been suggestions that these raids are at times politically motivated by communal or anti-migrant groups, since most sex workers in India are from lower castes, tribal groups or neighbouring countries (Joint Letter to the Chairperson, National Commission for Women, dated 21 February 2002).

While the raids are justified on the grounds that they are a means through which exploited women and children can be 'rescued', several problems have been identified with the raid process. These include a lack of sensitivity and legal knowledge by the police with respect to trafficking; the bribing of the police by brothel-owners before, during or after raids; the serious human rights violations occurring during raids; the arrest of 'rescued' women for soliciting while brothel-owners remain at liberty; and the failure to inform women of the reasons for which they have been arrested (Sen and Nair, 2004, 85, 86, 110, 133, 250, 269, 274).

Several organisations have noted that the police have expanded raids on the brothels of Kamathipura, Khetwadi and outlying brothel areas of greater Mumbai, in the name of 'rescuing children' from forced prostitution, which is specifically a government objective. These raids have been supported and encouraged by a number of NGOs including the International Justice Mission and Maiti Nepal, as well as a number of Indian NGOs. Yet the sex workers and other support groups have documented how these raids have actually encouraged and legitimated large-scale harassment, abuse and extortion of the brothel communities by the police, without clear evidence of many children being 'rescued'. NGOs have documented instances of police brutality during raids, the fact that women and children have been rounded up during the raids, and the fact that many women end up in remand homes for long periods because of delays in medical examinations and court delays, without access to counselling or other services (Terre des hommes and Partnership Nepal, 2004). One consequence has been the intensification of the mistrust that exists between the sex workers and brothel community on the one side, and the police and NGOs on the other. As a result of the raids, sex workers have been leaving established red-light areas and moving outside the range of health and other established support services (Joint Letter to the Chairperson, National Commission for Women, dated 21 February 2002). This consequence has, in turn, impacted on HIV/AIDS intervention work being conducted in these communities and hence undermined one of the primary concerns of the government in its battle against trafficking (Terre des hommes and Partnership Nepal, 2004, 4).

Sex workers have argued that in order to prevent raids on brothels, the police extract bribes from the women. During the recent festival marking International Sex Workers' Day on 3 March 2007, the sex workers of West Bengal submitted a proposal to the state government to pay taxes in return for stopping police raids and harassment

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of their clients, which were both ineffective strategies in stopping either trafficking or prostitution (reuters.com, March 2, 2007).

Children's rights and trafficking

There are no separate laws dealing with child trafficking at the national level. The laws are based on the primary assumption that the main victims of trafficking are those who are forced into sex work by procurers, pimps, brothel-keepers and madams. The *Juvenile Justice Act* recognises that a child who is vulnerable and likely to be inducted into trafficking is a child in need of care and protection and includes elaborate provisions for their rescue and rehabilitation. In such a situation, the police or an NGO can place the child in a protective home until the case is considered. In view of the provisions of the ITPA, such a child would automatically seem to include those whose parents are sex workers or who reside in a brothel.

The children of sex workers are considered “neglected children” under the interpretation of the provisions of the *Juvenile Justice Act*. The law empowers the state to intrude into the privacy of the home of the sex worker and remove her children from her custody and even guardianship (section 2(d) vii). Such provisions end up destroying the family of a woman in sex work, and penalise her for the work in which she engages. It also violates the rights of children who should be allowed to remain with their families if there is no evidence of abuse or exploitation. The “best interests of the child” should not be contingent on the nature of the work his or her mother does. Such a position could otherwise be extended to many other types of work, including garbage picking, latrine cleaning or street sweeping – these last jobs might not have much prestige but they do not involve the crucial element of sex. An odd statement perhaps, but part of the point of all this analysis is that the law is fixated upon women as sexual beings and the inherent immorality of that.

The primary focus of the *Juvenile Justice Act* and the *Goa Children's Act* is on the rescue and rehabilitation of children in trafficked situations. The *Juvenile Justice Act* does not provide any definition of trafficking. However, the definition of child trafficking provided by the *Goa Children's Act* is focussed primarily on the transportation of the child through force, fraud and deception. This Act is important insofar as it separates the treatment of children from women. It has also extended the definition of sexual abuse without being moralistic and conservative in its language. It is, however, extremely broad, and imposes very restrictive policies on other actors, such as the owners of photo studios. The definition of trafficking is also exceptionally broad and could lead to the removal of children from the care of an adult who does not conform to normative assumptions about the ‘good parent’.

There is little disaggregated data available on the number of children under 18 years of age who have been arrested or detained under the existing legal provisions. The statistics available regarding prosecutions and convictions under this Act, published by the National Crimes Records Bureau (NCRB) indicate that the total number of cases registered between 1997 and 2001 under the procurement provision of the *Indian Penal Code* (section 366A) was 715; under the importation provision of the Penal Code (section 366B) was 179; for selling minors, it was 56 and for buying minors, it was 90 (Sen and Nair, 2004, 257). These statistics indicate that despite the fact that there are laws in the statute books dealing with trafficking, especially in minors, the number of cases registered, at least under the provisions of the Penal Code, is nominal.

An adult woman who is arrested by the police after being rescued from a brothel can be bailed out, though she can also be sent to a protective or corrective home. In the case of a child under 18, the provisions of the *Juvenile*

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Justice Act apply, and he or she will be sent to a rescue home for protection and dealt with by the Child Welfare Committee. Yet, under the provisions of the *Juvenile Justice Act*, the minor is to be given no legal representation and is to be dealt with solely at the discretion of the Committee. While there is some concern that the victim may be bailed out on the basis of false evidence by brothel-owners or by traffickers regarding age, the *Juvenile Justice Act* inappropriately seeks to address this concern by denying the minor legal representation and placing the minor in a rescue home.

As regards the Plan of Action, while the UN Special Rapporteur on Violence against Women praised the plan for its innovation and comprehensiveness, particularly in relation to awareness raising and health services, she also expressed concern about the provisions that suggested that the children of prostitutes should be removed from their parents and that greater social surveillance should be used to combat trafficking. The Special Rapporteur also noted that the Plan of Action failed to provide strategies for the capture and punishment of traffickers (Coomaraswamy, 2000, 32; Sen and Nair, 2004, 26).

Judicial activism

The courts have engaged in high-level judicial activism that has had an important effect on the development, interpretation and implementation of anti-trafficking legislation. In *Vishal Jeet v. Union of India and Others* (1990 3 SCC 318) (Vishal Jeet's Case), the Supreme Court held that the results of provisions to rehabilitate girls who had been forced into prostitution were inadequate and ordered, among other measures, a review of the central and state governments' performance with respect to their implementation (Sen and Nair, 2004, 283). Similarly, the Supreme Court held in *Gaurav Jain v. Union of India* (AIR 1990 SC 292) (Gaurav Jain's Case) that a committee ought to be established to analyse prostitution and the situation of child prostitutes and the children of prostitutes (Sen and Nair, 2004, 283). The Court also stipulated that the "children of prostitutes should not be permitted to live in the inferno and the undesirable surroundings of prostitute homes" and that the human rights of such children had to be protected (Gaurav Jain, 1990, para. 1).

In a subsequent order, the Court, while drawing attention to the human rights impact of some anti-trafficking provisions, reiterated that the "eradication of prostitution is integral to social welfare and the glory of womanhood" (*Gaurav Jain v. Union of India*, AIR 1997 SC 3021, 3023, para. 15). The Court stated that it was in the interests of the children of sex workers and of society that they "be segregated from their mothers and be allowed to mingle with others and become part of society" (Gaurav Jain, 1997, para. 1). The Court was opposed to the establishment of separate hostels and schools for the children of sex workers (which had been requested by the petitioner, Gaurav Jain). However, it was of the view that "accommodation in hostels and other reformatory homes should be adequately available to help segregate these children from their mothers living in prostitute homes as soon as they are identified" (Gaurav Jain, 1997, para. 1).

The Supreme Court also observed that the capacity of a prostitute to pay for her child's education would not relieve the child from social trauma and that it would always be against the interests of the child to permit the child to remain in her custody or in a brothel. "So, they should be rescued, cared for and rehabilitated ... the three Cs, namely, counselling, cajoling and coercion of the fallen woman to part with the child or child prostitute herself from the manager of the brothel is a more effective, efficacious and meaningful method to rescue the child prostitute or neglected juvenile" (Gaurav Jain, 1997, para. 20).

Conflating Trafficking, Migration and Prostitution

The judicial decisions have also been overwhelmingly influenced by the alarm sounded on the issue of trafficking and have at times recast issues concerning the rights of migrants into issues about trafficking and the sexual exploitation of women. In *Savera and Ors. v. the State of Goa* (MANU/MH088/2003), the High Court addressed a challenge by an NGO, Savera, to the Goa municipality's efforts to evict the residents on Baina Beach to make way for the construction of luxury resorts as well as the expansion of the port. While the community, numbering about 5000 persons, consisted largely of migrants from other states who worked as daily wage labourers at the port, in garbage collection or in other types of manual labour, a local member of the legislative assembly lobbied for the beach to be 'cleaned up', alleging that it was overrun with sex workers who posed an HIV threat to the local population, and that the beach was a den of corrupt and illegal activity (Bailancho Saad, 1997). Some women amongst these workers were engaged in commercial sex work and carried on their work from 250 cubicles located among the many other small residential units, businesses and NGO offices in the area. Their clients included sailors, shipyard workers and tourists (Desouza, 2004, 3342).

The Kamat Committee that was set up by the court to examine the 'rehabilitation' of the community recommended that the cubicles used in the area for conducting the sex trade be identified, eviction notices issued and the cubicles closed. The programme for rehabilitating the sex workers was not based on any empirical evidence that either the women were being forced, exploited or abused when engaging in their trade or that girls below the age of 18 were being forced into prostitution in the area. Information gathered about the residents of Baina indicated that there were hardly any children in sex work and that sex workers were actually sending money to their native homes to fund the education of their children. However, the committee recommended that the residents, including the women, be rehabilitated, which included providing them with shelters, livelihood options, health and vocational assistance, and also indicated that those migrants who wanted to continue in the trade be shifted to another area to be notified as a 'red-light' zone.

The High Court followed the recommendations of the Kamat Committee with respect to the 250 cubicles used for commercial sex work and directed the National Commission of Women, a government appointed commission, to formulate a rehabilitation programme for the women. The court held that "*The need to protect the rights of the law abiding citizens at the same time has to be asserted. The sex workers cannot cause inconvenience to other citizens and their right to live life in a surrounding free from amoral activities*" (Savera, para. 9) (emphasis added). The right of 'decent' people to take walks on the beach on weekends undisturbed by the presence of sex workers trumped the rights of sex workers to earn a livelihood and to have a place to reside in the state of Goa. In June 2004, the municipality ordered the demolition of the entire community on Baina Beach. The demolition took place in the presence of hundreds of armed police and within hours the entire population of 5000 people was rendered homeless. The state government initially claimed the demolition only affected the cubicles of the sex workers. When the press and local NGOs exposed the falsity of this claim, the state argued that the demolished structures were, in any case, illegal and that the evicted persons were "non-Goans", that is aliens from the southern Indian states of Karnataka and Andhra Pradesh.

3. Regional and International Laws and Policies Impacting on Trafficking Initiatives in India

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

The laws and policies pertaining to female migration in India are riddled with connotations and confusions. So too are the views of various stakeholders who seek to influence how women move and why. The discourse on female migration thus often leaps from migration to trafficking to prostitution, with the exponents of the discourse thereby deeming the distinct characteristics of each phenomenon irrelevant.

All of these connotations and confusions – in addition to an overt reference to the irrelevance of the consent of women – are encompassed within the South Asian Association for Regional Cooperation (SAARC) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. The SAARC Convention, to which India is a signatory, defines trafficking as “the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking” (Article 1(3)). In an attempt to promote cooperation for the prevention and suppression of trafficking and for the rehabilitation and repatriation of victims, the SAARC Convention requires that states: criminalise trafficking, managing or knowingly financing a brothel, and knowingly renting a property for the purpose of prostitution (Article 3(1) and(2)); ensure that the confidentiality of victims is maintained and that they are provided with appropriate counselling and legal assistance (Article 5); establish a system for repatriation and collaborate with NGOs to provide for the care and maintenance of victims by, among other things, making shelters, legal advice and job training available to those victims (Article 9). The prevention measures that states ratifying the Convention are required to adopt include training relevant officials, exchanging information about offenders, supervising employment agencies and using the media to promote awareness about the underlying causes of trafficking “including the projection of negative images of women” (Article 8).

The SAARC Convention is in some ways disturbingly reminiscent of the UN Suppression of Traffic Convention. It conflates trafficking with prostitution; deals only with the trafficking of women and children and then makes relatively little distinction between the two; deems consent irrelevant and thereby encompasses voluntary prostitution; fails to consider the consent or safety of trafficked persons in relation to repatriation; and lists a host of prevention mechanisms that encourage the surveillance of a broad range of female workers and that in no way require the involvement of trafficked persons, vulnerable groups or the community. Even the prevention measure aimed at creating awareness of the underlying causes of trafficking is more concerned with reducing temptations for traffickers than it is with empowering and educating people who are vulnerable to being trafficked. The consequence of such initiatives has been to undermine the rights of migrant women and make them even more susceptible to exploitation.

The SAARC Convention is much more concerned with eliminating “the evil” of prostitution than with restoring the human rights of trafficked persons. It conflates trafficking with prostitution and seeks to criminalise prostitution-related activities that do not necessarily involve coercion or harm. The SAARC Convention is yet to be ratified by all South Asian countries, and hence it has not yet come into force.

US Victims of Trafficking and Violence Protection Act of 2000

An important source of external pressure on India to amend its trafficking laws and policies emanates from the United States (US) *Victims of Trafficking and Violence Protection Act of 2000* (TVPA) and its subsequent reauthorisations, the details of which have been set out in the introduction to this book.

The annual tier placements announced in the US Department of State's Trafficking in Persons Report (TIP Report) are regarded with considerable suspicion by some state and non-state actors, as they are frequently based on criteria that has little to do with trafficking. The impact of the US TVPA has at best been questionable, and at worst, harmful to the rights of the very constituency it is intended to help (Shapiro, 2004; Katayama, 2005). For example, India has been placed on the Tier 2 Watch List for the third consecutive year because of its apparent "failure to show evidence of increasing efforts to address trafficking in persons" (US TIP Report, 2006). While India has a range of laws on trafficking, kidnapping and slavery, it does not have a law outlawing prostitution, but rather regulates the sex industry. Yet the threat of sanctions has pressurised the Indian government to draft a new law that focuses on trafficking for prostitution, targeting, at the expense of their human rights, a broad range of consensual sexual relationships where some exchange takes place, as well as women in the sex industry.

The *Immoral Traffic (Prevention) Act (ITPA) Amendment Bill, 2006*, completely ignores trafficking into other sectors and criminalises clients, omitting employers or companies that use trafficked labour. The proposed amendments to the Indian law will do little to control trafficking, but could actually increase trafficking, as sex workers will be unable to unionise or check that no underage girl or woman is forced into the profession, as is currently done through the self-regulation boards set up by a union of sex workers in Calcutta. The sex workers have mounted a very public and vocal opposition to these reforms supported by some feminists, community-based migrant groups, and those aware of the US pressure.

With its clear emphasis on law and order, the minimum standards set out in the TVPA fail to adequately address the need to promote and protect the human rights of trafficked persons and to adopt broader prevention strategies that address the underlying causes of trafficking.

4. Migration Laws and Policies

India's constitutional safeguards against trafficking and specific legislation on trafficking are significant. Yet the laws do not provide a comprehensive approach to trafficking, that is, they do not address the issue of trafficking within the broader framework of migration. No comprehensive migration policy exists in India and the legal provisions that do exist to address migration adopt different standards for dealing with emigration, immigration and repatriation (especially with regard to sex workers). The impact of these provisions is further mediated by the class, gender and religion of the migrant subject.

At a general level, laws that deal with issues of concern to migrant workers apply mainly to documented and skilled workers rather than to undocumented workers or those working in the unorganised sector. With respect

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to women, there is a dearth of primary research on migrant women and the impact of laws and policies on the rights of migrant women. In the name of protecting women, especially from trafficking, India has imposed some restrictions on the emigration of women, particularly unskilled or semi-skilled women, which have served to push these very women who are seeking to migrate to do so through clandestine means.

The Emigration Act, 1983

The *Emigration Act, 1983*, and the accompanying Emigration Rules are the main legal instruments relating to Indian citizens who leave India with the intention of taking up a job outside India. The *Emigration Act* is primarily regulatory in nature and lays out the procedures by which an emigration check is to be conducted in relation to those countries or workers that are not exempted from such a check. It sets out the powers and duties of the Protector General of Emigrants, who is appointed by the central government to deal with protection of and aid to emigrants (section 3). It further requires that all recruiting agents can only carry on the business of recruitment after acquiring the Recruitment Certificate from the Protector General of Emigrants (section 10). Certificates are granted after taking into consideration the agent's financial soundness, trustworthiness, experience and after obtaining a security from the agent to meet the costs of repatriation and other related expenses. Employers are only permitted to employ Indian citizens who have been recruited through an authorised recruiting agent or by directly applying for the issuance of a permit from the relevant Indian authority that enables them to employ Indian citizens directly (sections 15 and 16). The issuance of a permit can be denied on several grounds, including that the type of work involved is against public policy or public interest, or that it violates human dignity and decency. The *Emigration Act* further provides that emigrants must also seek clearance from the Protector General of Emigrants in order to emigrate. Such clearance can be denied on several grounds, including that the proposed work is considered to be exploitative or discriminatory, or that the working and living conditions are substandard, or the work is considered violative of public interest, public policy or human dignity and decency.

The proposed Emigration (Amendment) Bill, 2002, introduces certain specific amendments that include the establishment of a welfare fund and a central manpower export promotion council to provide training and counselling to workers going abroad. The aim of the amendments, which have yet to be enacted, is to ensure that more workers will be deployed abroad on a contractual basis resulting in a direct increase in remittances of foreign exchange and providing timely financial assistance to the emigrants.

The central government has the power to prohibit emigration of any class or category of persons in the interests of the general public (section 32). The government has issued such an order prohibiting any female household worker below the age of 30 from being employed in the Kingdom of Saudi Arabia under any circumstance, "following complaints that many of them are being forced into the sex trade" (timesofindia.com, 2006). Such restrictive policies are conditioned by implicit and explicit assumptions about women within the family and in society – primarily that women are victims and lack decision-making capacity. In this context, the former Indian Labour Minister, Sahib Singh Verma, stated that women emigrant workers were a "particularly vulnerable lot" and that the government often received complaints regarding the maltreatment and physical abuse of emigrant women. "*We had, therefore, consulted the National Commission on Women, and based on their recommendation, have taken steps to regulate the emigration of women below 30 years for employment as housemaids and domestic workers*"³(emphasis added).

COLLATERAL DAMAGE

The concern is therefore, that women may be sexually/physically abused or trafficked into exploitative conditions and the solution to preventing such abuse serves primarily to restrict women's migration. Such paternalistic restrictions infantilise women and refuse to recognise their desire and ability to move, clandestinely, if legal means are not available to them. They are not only contrary to the human rights of the persons whose freedom they restrict, but also counterproductive. Women will either not emigrate (and consequently perhaps remain in oppressive or abusive situations), or they will emigrate and will engage potential smugglers or traffickers in an effort to do so. And finally, it fails to recognise women as economically productive agents (UN Social and Economic Affairs, 2006).

Inter-state Migration in India

According to the 2001 Census, 29.90 million people within the country have moved for work to places away from their home. In its 2002–2003 Annual Report, the Ministry of Labour declared, “Freedom of movement in any part of the territory of India and freedom to pursue any vocation of one's choice is a fundamental right guaranteed by Article 19 of the Constitution” (Ministry of Labour, 2002). The Report also acknowledged that, despite hardships and exploitation, the income of migrant labour is likely to be higher than what they would have been able to earn without migration. However, in the 2005–2006 Annual Report, there is little focus on migrant workers and no mention is made of the fundamental right to migrate for work. Instead the Report states that while the *Inter State Migrant Workmen Act* (discussed below) has been enacted to protect the rights and safeguard the interests of the migrant workers, the main objective of the government is to prevent or control migration, which is referred to as a problem. According to the 2005–2006 Report, “The problem of migration is sought to be checked through a multi-dimensional course of action through rural development, provision of improved infrastructure facilities, equitable dispersal of resources to remove regional disparities, employment generation, land reforms, increased literacy, financial assistance etc” (Ministry of Labour, 2006, para. 8.20). In this context, the government has launched several schemes, including the *National Rural Employment Guarantee Act*, which guarantees 100 days employment to rural households.

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

The ISMWA is intended to regulate the employment of inter-state migrant workers, to provide for their conditions of service and prevent the exploitation of such workers. The Act lays out provisions for the registration of establishments employing inter-state migrant workers, sets out the basis for payment of wages and hours of work (section 13), and provides for the welfare of migrant workers. The Act directs that the employers also provide equal pay for equal work irrespective of sex, ensure suitable conditions of work, residential accommodation, medical facilities, and protective clothing (section 16).

The National Commission for Women (NCW) has recommended certain changes be made to the Act in the interest of migrant women. It recommends that where women are recruited for work to another state, a family member should be permitted to accompany them to that state and their place of work at the employer's expense. The justification is “to avoid the possibility of trafficking”. Another recommendation is to establish an office of migrant workers where all the particulars of the migrant worker and the contractor/employer are recorded as another means to check that migrants are not being trafficked. While the Act is geared towards protecting migrant workers and not restricting their movement, the recommendations by the NCW can have a downside.

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Women who travel to other states without being accompanied by another family member may be deemed to have been trafficked.

The NCW has also not addressed the broader issue of migration and the effects of the ISMWA. The ISMWA is the only legislation available to migrant workers within India. The conditions of migrant workers are often such that they have a limited ability to access or demand the enforcement of some of the more rights-oriented measures in this legislation (Arya and Roy, 2006, 43). Rights under other national labour laws remain unavailable to them as they work in the informal sector and also often lack proof of residence in the host state where they work.

Transgressing Gender Norms

The judicial pronouncements on inter-state migrant workers have tended to be in favour of the promotion of migrant workers' rights, though the courts have completely ignored the rights of women migrant workers. None of the pronouncements acknowledge women's labour migration. One important case highlights the failure of the judiciary to guarantee migrant women their right to work. In Maharashtra, the state government imposed a ban on bar dancers from dancing in beer bars, eating halls and permit rooms.⁴ The new law specifically exempted dance performances in theatres, cinemas, auditoriums, sports clubs and luxury hotels (section 33B). The justifications cited for the ban included the need to prevent obscenity and protect the dignity of women, prevent the trafficking of women into the bars, in compliance with India's commitment to combat such activity under the UN Suppression of Traffic Convention, and stop the inflow of women from outside the state and outside of India, especially from Bangladesh, who were introducing a culture into the state that was against Maharashtra's tradition, and "likely to deprave, corrupt or injure the public morality or morals". The Deputy Chief Minister of Bombay, RR Patil, stated that the dance bars were "dens of crime" and "anti-national activities" and needed to be controlled (Tribune, 2005).

The ban was challenged by the Bharatiya Bargirls Union, representing 75,000 workers in bars and hotels in Bombay, as well as in other districts of Maharashtra, together with several women's groups, HIV/AIDS groups, sex workers groups, and hotel associations, on the ground that the ban violated their fundamental rights under the Indian Constitution, including the rights to equality (Article 14), freedom of speech and expression (Article 19(1)(g)), and livelihood and life (Article 21). The Bombay High Court struck down the ban without addressing the issue of trafficking, but primarily on the grounds that it should apply to all establishments and all women working in these establishments. Although the Bombay High Court upheld the validity of dance bars to function, the decision did not guarantee the women their right to migrate for work.

As regards the presence of foreigners in the bars, especially Bangladeshi migrants, several NGOs insisted that there were no Bangladeshis among the arrested bar dancers (SNDT Report, 2005, 12). However, one lawyer representing the bar dancers, found that every one

of the bar dancers who had been kept in jail was in fact Bangladeshi. Although presumably motivated by a desire to protect the Bangladeshi bar dancers and to douse the flames of the nationalist polemic about the corrupting influence of foreigners, by denying the bar dancers' foreign nationality, these NGOs ultimately bought into the nationalist argument by claiming that the sanctions imposed on the bar dancers were not justified as there were no foreigners among them. In this situation, then, with the state government claiming that 70 per cent of the arrested bar dancers were Bangladeshi, and women's groups claiming that none of the arrested bar dancers were Bangladeshi, and one lawyer stating that all of the imprisoned bar dancers were Bangladeshi, it seemed as though the migrant women were utterly expendable.⁵

In the context of women migrants, the bar dancers' case also illustrates the tensions that are produced when women do migrate for economic empowerment within the country. Internal female migrants who transgress a nation's normative boundaries of gender and assumptions about women's place in the home as strong mothers and wives, and of women as upholders of the honour and purity of the nation, can be denied a whole host of rights. Undermining the purity of women is equated with undermining the purity of the nation. Her migration constitutes a direct challenge to this construction, and even if she is a citizen, her ability to enjoy the fruits of citizenship is consequently denied. These normative boundaries have given rise to the ultimate legal paradox of the female migrant in India: that, for the most part at least, she simply does not exist.

Repatriation

There is currently no law on repatriation in India and there are no repatriation agreements in place between India and neighbouring countries such as Bangladesh, Nepal or Pakistan (ADB, 2003, 22 and 104). However, the courts in India and a number of NGOs have successfully repatriated a number of trafficking victims (Sen and Nair, 2004, 24 and 28). Furthermore, the NHRC has taken up the issue of repatriation, and formal repatriation arrangements between India and Bangladesh and between India and Nepal are being considered (Sen and Nair, 2004, 304; ADB, 2003, 104). While the Open Border Treaty, 1950 between India and Nepal means that all Nepalis have the right to reside in India, women and children trafficked from Nepal are generally treated as foreigners who need to be repatriated (ADB, 2003, 104).

Open Border Agreement, 1950

The *Open Border Agreement* allows Indian and Nepali nationals to travel freely between the two countries and to enjoy equal rights in both countries in relation to employment and residency. The expansive open border between India and Nepal, as well as the long history of the migration of Nepalis to India for employment, are considered to be key factors in fuelling cross-border trafficking in recent years, along with deteriorating economic conditions in Nepal's countryside and the chronically low status of women and girls. Trafficking is an integral offshoot of the need for emigration in Nepal. Organisations working on trafficking issues estimate that thousands of women and children are trafficked out of Nepal each year into neighbouring countries, including in particular to

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India, though the evidence on which their estimates are made is not disclosed or referenced (e.g. Human Rights Watch, 1995). Most of the estimates tend to focus on trafficking into prostitution rather than other sites of exploitation and the data is based on assumptions that cannot be readily verified.

The increased concern over the movement of women and girls crossing from Nepal into India has invited some troubling responses from a human rights perspective. For example, in 1995 Human Rights Watch recommended that the SAARC cooperate with Interpol to stem the increase in trafficking in women between India and Nepal (Human Rights Watch, 1995, 90).⁶ The report criticised the open border policy, which permits people to pass freely between the two countries without a passport, visa, or residential permit. Instead of contextualising the strengths and limitations of an open border policy in a region closed and isolated from its neighbours, Human Rights Watch stated that the policy “makes it extremely difficult for border police to check illegal activity. Traffickers and their victims move easily across the border and the onus is on individual police officers to stop and question suspicious-looking travellers” (Human Rights Watch, 1995, 12). The report recommended that Nepal and India should establish a system for strictly monitoring the border to guard against the trafficking in women and girls. Such recommendations were evidently directed towards the curtailment and restriction of rights rather than their facilitation.

Section 12 of Nepal’s *Foreign Employment Act* prohibits the employment of Nepali women and children by foreign employers without obtaining the permission of the government and the employees’ guardians. Furthermore, the Foreign Employment Order issued by Nepal’s Ministry of Labour restricts the ability of women under 35 to travel overseas without a relative or a male guardian’s written consent, and the Passport Order stipulates that women must show permission letters from their fathers or husbands if they wish to leave Nepal (ADB, 2003, 64). The interim government in power in Nepal in late 2006 was reported to be reconsidering the ban, though no decision had been taken by the end of the year.

In *Sabin Shrestha v. Ministry of Law Justice and Parliamentary Affairs* (Supreme Court Bulletin, 2001, issue no. 19, vol. 229, 4), the Court upheld the validity of the ban, stating that the law had been made in accordance with another constitutional provision that promoted the enactment of special laws for the protection and development of women, and hence did not violate women’s equality rights. In reaching this decision, the Court utilised the special measures provision of the Constitution to justify the imposition of barriers on women attempting to exercise their rights to movement and employment on the ground that such women were particularly vulnerable to exploitation. However, when women are having difficulties exercising their constitutionally enshrined rights, the special measures provision of the Constitution should be used to facilitate measures that foster the enjoyment of rights rather than their eradication. With respect to the facts before the Court in this case, for example, sound special measures would include the development of legal channels of migration for women as well as pre-departure training for female migrants on how to safeguard their rights in their country of destination.

The treatment of migrants is partly dependant on the class status and skills of the worker. Despite the large demand for cheap labour around the world, many more formal channels for migration are made available to middle and upper class women than to poor women. Indeed, the migrant label, which for many is tainted with connotations of immorality, illegality and, more recently, terrorism, is often not applied to wealthy migrants, who are instead referred to as *expatriates* or *members of a diaspora*, or whose foreigner status is simply ignored, as if their entitlement to belong is beyond question. In India this distinction is made evident in the recent amendments to its citizenship laws. Citizenship can be acquired through birth, descent or naturalisation. While the first two

modes of acquiring citizenship are clearly tied to ethnicity – in both its cultural and racial senses, the third is tied to a related understanding of ‘the good citizen’. Although the illegal immigrant clearly falls outside the realm of ‘the desirable citizen’, half-Indian and half-illegal-immigrant children are denied citizenship rights.

Foreigners Act, 1946, and the Illegal Migrants Detention Act, 1983

In 2005, in the *Sarbananda Sonawal v. Union of India* (2005) 5 S.C.C. 665 (Sonawal Case), the Indian Supreme Court was asked to resolve a conflict that had arisen in relation to two pieces of legislation that allowed for the deportation of Bangladeshis from India. The *Illegal Migrants Detention Act* placed the onus on the police to prove that the person in question was not an Indian and could therefore be deported. *The Foreigners Act, 1946*, placed the onus on the person in question to prove that he or she was Indian and could therefore not be deported. The Court struck down the first piece of legislation as unconstitutional on grounds that were based upon the assumption that the massive influx of migrants from Bangladesh into the north-eastern states of India was akin to acts of aggression, a word that should be broadly defined and not limited to acts of war. The interests of the state prevailed over the rights of the migrant.

Although it is not only Muslim migrants whose entitlement to belong is undermined by this arbitrary system for determining who can stay and who cannot, in the present political climate – in India and around the world – Muslims are disproportionately disadvantaged. From the early 1990s in India, there was a sharp rise in propaganda against the Bangladeshi migrants in which it was claimed that they were changing the demographic character of India, engaging in anti-national activities, and – a sentiment that has clearly spread much farther than India since September 11 – plotting acts of terrorism. So tainted are Muslims in North-East India, that some activists who have campaigned for their rights and highlighted the plight of Bangladeshi migrants in the area have been accused of supporting the *ihadis* (CFLR, 2007, 30).

In a related case, *Chetan Dutt v. Union of India & Ors* (civil writ no. 3170, 2001), the Delhi High Court ordered that 100 Bangladeshis had to be sent back to Bangladesh everyday, resulting in aggressive police action to round up and deport ‘Bangladeshis’ from New Delhi. However, one NGO has documented that it was not citizens of Bangladesh who were sent back, but those who the police identified as Bangladeshis and who could not afford the bribe, or the proof of property ownership, necessary to secure their release (Hazards Centre, 2005). A similar situation has been identified in North-East India where Muslims are allowed to set up their homes and work on the land but are not entitled to reciprocal rights of state protection (Barbora, 2003). In accordance with this “inchoate legal plurality of belonging”, non-nationals are allowed to reside in India if they contribute to the wellbeing of the state, but only as long as it remains in the state’s interests for them to be there (CFLR, 2007, 35). Both of these accounts thus depict an informal regime of belonging whereby migrant non-citizens have an inferior right to temporary residency that has no short- or long-term legal protections attached.

5. Human Rights Impact of Laws and Policies

A morally conservative approach to trafficking is prevalent throughout India’s position on human trafficking. Defined as the commercial sexual exploitation of women and children, its legislation, enforcement initiatives, NPA and protection initiatives all focus on this ‘immoral’ activity to the exclusion of all other forms of exploitation

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associated with trafficking, such as forced labour. Moreover, for the most part, no distinction is made between women and children and the agency of both is denied. Thus, not only do the human rights violations experienced by trafficked persons go unrecognised, it is the state that is responsible for the perpetuation of human rights violations against them.

In addition, the anti-trafficking initiatives of the government as well as of NGOs are largely informed by a law and order and criminal justice approach rather than a human rights approach. India has become increasingly concerned about 'infiltration' into the country, especially from Bangladesh, and hence has been turning to more stringent border controls and arbitrary deportation measures, especially in relation to Bangladeshi migrants. The security of the nation, rather than the security of the migrant, is being foregrounded and this, in turn, is impacting on the country's response to trafficking. Anti-trafficking measures become a tool for reinforcing border security without necessarily doing much in terms of protecting the rights and interests of trafficked persons or preventing trafficking. In fact, such measures serve to drive migrants underground and render them even more vulnerable to trafficking and exploitation.

Several laws explicitly contravene a number of human rights norms. For instance, the legislation that authorises the removal of children from women engaged in prostitution as well as the detention of women and their children for their own protection. Preventing women from engaging in sex work and from emigrating to obtain employment constitutes a violation of human rights.

The number of convictions secured against traffickers is extremely low in India. Human trafficking is simply not treated as a matter of priority for the state or its law enforcement personnel. In addition, the maltreatment of trafficked persons by law enforcement officials, including, for example, the punishment of trafficked persons for trafficking-related crimes, is indicative of the need to revisit these laws and policies and their harmful impact on the rights of trafficked persons.

Addressing the underlying causes of human trafficking in the NPA as India has done is important. The multifaceted nature of human trafficking should make the coexistence of NPAs on related issues beneficial in combating human trafficking. However, India's NPA is focussed solely on the trafficking of women and children. While it is conceivable that in some circumstances it would be desirable to have separate NPAs for different classes of trafficked persons, one for trafficked adults and another for trafficked children for example, only addressing the needs of women and children to the exclusion of men, or only addressing the needs of children to the exclusion of adults, is exclusive and myopic.

Conducting raids that violate the rights of the 'rescued' persons, immediately deporting people who may well have been trafficked, providing no services for trafficked persons or a particular class of trafficked persons, and entering into agreements that facilitate the forced repatriation of trafficked persons, are all practices that have a detrimental impact on the rights of trafficked persons. In India, the exploitation of prostitution is prohibited. Yet the raids have resulted in the arrest of sex workers in circumstances when it is reasonable to suspect that they have been trafficked rather than the arrest of possible traffickers. The 'spiral of exploitation' that occurs as a consequence of arresting trafficked sex workers is particularly egregious.

Similarly, the immediate deportation or forced repatriation, as a matter of policy, of all illegal immigrants without first ascertaining if they have been trafficked is a human rights violation. By doing this, a state not only fails to

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restore the human rights of trafficked persons within its territory, but it runs the risk that the trafficked persons it deports will be re-trafficked or subjected to torture or other reprisals after their arrival in their country of origin.

The Indian government provides no services for trafficked persons, or to any particular class of trafficked persons, apart from placing women in protective institutions or correction facilities. Men, sex workers, or even transgendered or transsexual persons do not receive assistance or do not receive assistance that is of use to them, as they do not fit the stereotype of a particular category of trafficked persons.

Promoting Human Rights Based Laws and Policies to Combat Trafficking

If the harmful impacts of India's anti-trafficking laws are to be reduced, a number of issues must be addressed. Important among these are: the lack of understanding of human rights and human trafficking among the police and members of the judiciary, police corruption and police harassment. Clearly the extent to which these issues can be adequately remedied within the framework provided by the ITPA is limited.

The question of raids and rescue operations has been a constant source of concern for human rights activists. These are carried out arbitrarily, focused almost exclusively on the brothel districts and on arresting sex workers, regardless of whether or not there is any evidence of them having been trafficked. India is a member of the Asia Pacific Forum on National Human Rights Institutions, which has recommended procedural guidelines for raids and rescues to ensure that the human rights of trafficked persons are protected. These guidelines include recommendations that the raids should not occur without adequate planning in advance for the protection and support of trafficked people and that adults identified as victims in the raids should only be removed from their situation if they want to be removed (Asia Pacific Forum of National Human Rights Institutions Workshop, 2005).

With respect to the protection services it provides, the Indian government's focus on offering a broad range of rehabilitation services, such as vocational training, is important. At the same time, these rehabilitation services cannot be divorced from the people to whom they are offered, and the circumstances in which they are offered. While India's protection scheme fails to provide protection to a number of classes of trafficked persons in India, it may also act as a means of further oppressing the one class of trafficked persons it was designed to protect. Forcing sex workers to engage in these activities after 'rescuing' them, denies them their agency and further violates their human rights.

India's efforts in relation to repatriation are also problematic. India should enter into repatriation agreements with other countries in order to facilitate the voluntary repatriation of their nationals. It should also support the efforts of NGOs and/or international organisations in this respect. In addition, trafficked persons from Nepal should be able to enjoy the residency rights given to them under the 1950 *Treaty of Peace and Friendship* rather than being detained and deported.

India's trafficking prevention initiatives, which focus on promoting public awareness as well as eliminating the underlying causes of trafficking, are important, although this assessment, of course, depends on the extent to which they are carried through to fruition. In conducting its comprehensive report on trafficking in India, the NHRC has also acted as an important prevention mechanism by monitoring and assessing the current situation. The findings of this report ought to be harnessed by the Indian government as a vehicle for change.

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Addressing the underlying causes of trafficking is one of the most important anti-trafficking prevention strategies. India has adopted an economic reform programme designed to open up her markets to foreign investment and enable Indian entrepreneurs and businesses to invest and conduct business in other parts of the world. The reforms have been lobbied as the best possible route to alleviating poverty. While, undoubtedly, millions of working class Indians have been elevated into the middle class, and constitute the over 320 million who now make up the middle class, millions of people remain in dire situations of poverty. While these policies address the push factors, they do not, however, address the pull factors. There is a distinction made between facilitating the migration and investment of young business entrepreneurs, and those who are less well off, though not in dire poverty, for whom a migration policy is desperately needed to ensure their safe, legal passage.

India is also surrounded by countries that are in political flux or crisis. Being the largest economy in the region, it remains incumbent on India to take the lead in developing strong regional economic and trade initiatives that will enable freer movement across borders and produce conditions of economic stability and growth within the region. Yet the country remains preoccupied with its historic animosity with Pakistan, as well as fearful of migrants crossing into India through the north-east. Cooperation with other South Asian states can assist in preventing trafficking. While the SAARC Convention provides a prime example of such cooperation, it has not seriously addressed the central issue of migration, and instead produced a morally conservative consensus on the issue of women and girls in prostitution.

6. Conclusion

The anti-trafficking laws in India display a profound misunderstanding of the phenomenon of human trafficking. Failing to make a distinction between human smuggling, irregular movement, illegal migration and trafficking, denies the agency of those who choose to migrate for better life opportunities and undermines the gravity of the abuses suffered by trafficked persons. Criminalising various aspects of prostitution in order to prevent trafficking, as is the case with the existing law or criminalising the purchase of sexual services, as is being proposed by the government penalises those trafficked for sexual exploitation rather than their traffickers. It renders persons trafficked for sexual exploitation more vulnerable to their traffickers, their clients and the police. Finally, failing to expand the application of anti-trafficking legislation beyond cases of trafficking for sexual exploitation has the effect of denying the harm done to persons who experience similar abuses but who are trafficked for other purposes.

The anti-trafficking initiatives reproduce assumptions about women as passive, incapable of decision-making, and in need of protection. These initiatives also fail to address the concerns of anti-trafficking advocates, as they are frequently used merely as a façade to deter the entry of certain categories of migrants or to clean up establishments within the sex industry. The anti-trafficking framework has not succeeded in detaching itself from these hidden agendas, and consequently it has proven to do little good for the trafficked person and great harm to migrants and women in the sex industry (Empower, 2003; Ditmore and Wijers, 2003; Thobani, 2001; Doezema, 1998).

The success of anti-trafficking programmes is too often measured – if it is measured at all – in accordance with the output of the department or organisation responsible, irrespective of whether or not there have been tangible improvements in the lives of the women concerned. Undertaking an assessment of the ongoing human rights

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impact of migration policies on migrant women must thus be incorporated into the policy development process. And such, a rights-based approach to migration needs to put female migrants at the centre and truly empower them.

ENDNOTES

- ¹ *Zari* is a type of fine gold or silver wire used in many traditional Indian garments.
- ² A practice in some communities in India where a young woman is married to a temple deity.
- ³ <http://moia.gov.in/shared/sublinkimages/382.%20Sahib%20Singh%20Verma>
- ⁴ Section 33A(1)(a) of the *Bombay Police (Amendment) Act, Maharashtra Act No. 35 of 2005, Maharashtra Government Gazette, 2005*.
- ⁵ The arrival of Bangladeshis into the north-eastern state of Assam has been a source of considerable tension since the creation of Bangladesh in 1971. The local Assamese complain that their arrival has threatened the cultural survival of the Assamese and that the migrants are also taking jobs away from the local residents. There is considerable similarity in terms of language, culture and ethnicity between these communities. The tension has been exploited by the Hindu nationalists who conflate the threat to Assam with the threat of Muslims infiltrating into (Hindu) India, as most of the Bangladeshis are Muslims (and those who are Hindus are referred to as refugees). The local politics together with the rhetoric of the Hindu Right has resulted in the targeting of poor migrants, especially Muslims, whether or not they are from Bangladesh. It has threatened the sense of belonging of the Muslim, especially the poor Muslim, who is an Indian citizen, and whose position is rendered unstable with threats of deportation in case he or she is unable to provide proof of residence, as well as discrimination and continuous police harassment.
- ⁶ Human Rights Watch has subsequently published quite different recommendations relating to immigration and border control, suggesting that the organisation no longer stands by the measures recommended in its 1995 report. In an article entitled “Globalization Comes Home: Migrant Domestic Workers’ Rights” in Human Rights Watch’s 2007 World Report (www.hrw.org/wr2k7), the organisation recommended that, “Governments should tackle the links between poverty, unsafe migration, and inadequate labor standards by reforming immigration policies that drive migrants underground to unlicensed recruiters and smugglers. *Anti-trafficking programs monitoring borders and women’s mobility also threaten to compound the problem.* Rather than restricting women’s and girls’ right to migrate and seek work, the real challenge lies in creating the guarantees for them to do so safely and with dignity” (emphasis added).

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