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Trafficking: A Development Approach

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Abstract: Trafficking is considered to be an urgent problem of global proportions warranting a robust transnational legal response. Almost twenty years since the adoption of the Palermo Protocol on Trafficking, scholars, activists and governments alike have debated criminal law, human rights and labour law approaches to the problem. With the incorporation of trafficking in the Sustainable Development Goals, this article goes beyond these conventional approaches to argue for a development approach to trafficking. It suggests that SDG 8 cannot be achieved by rehashing older debates on development in the key of trafficking. Instead, we must account for the expanding welfare functions of the postcolonial developmental state, reimagine labour laws from the vantage point of the informal economy and protect and enforce indigenous responses to extreme exploitation rather than exacerbate the negative externalities of a carceral approach in developing world contexts where the criminal justice system is built on a colonial edifice.

Key words: forced labour, trafficking, modern slavery, SDG 8.7, India

1. *Introduction*

Trafficking is considered to be one of the most pressing problems facing the world today. What started off with campaigns against the forced movement of women across borders for coerced ‘prostitution’ in the 1990s has today morphed into consumers worrying about ‘slaves’ who wash our cars, do our nails and service our hotels.¹ Along the way, the terminology used to describe trafficking has shifted to the amorphous yet evocative term ‘modern slavery’. The problem is pernicious as it is global, leading the 2018 Global Slavery Index to estimate that

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¹ F Lawrence, ‘How did we let modern slavery become part of our everyday lives?’ *The Guardian* (2 April 2018) <www.theguardian.com/commentisfree/2018/apr/02/modern-slavery-daily-life-exploitation-goods-services> accessed 12 September 2019.

there are 40.3 million ‘modern slaves’ around the world.² The production of basic commodities like tea, sugar,³ coffee,⁴ prawns,⁵ chicken, eggs, onions, mushrooms,⁶ ‘slave chocolate’ from Cote D’Ivoire and cotton from Uzbekistan is said to be tainted with forced labour.⁷ Exploitation is also rife in wartime captivity in Nigeria, bonded labor in Pakistan, fishing boats in Thailand,⁸ households employing overseas migrant domestic workers,⁹ Qatari construction sites with Nepali workers, the brick kiln industry in India, Brazilian garment factories employing Bolivian workers,¹⁰ in Unilever’s supply chain in Vietnam and in Kenyan flower and green bean cultivation.¹¹

² Walk Free Foundation, *Global Slavery Index* (Australia 2018) 21. There are severe methodological drawbacks to these estimates. See D Mügge, ‘40.3 million slaves? Four reasons to question the new Global Estimates of Modern Slavery’ (*Beyond Trafficking and Slavery*, 17 October 2017) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/403-million-slaves-four-reasons-to-question-new-global-estimates-of-modern-slavery/>> accessed 12 September 2019; AT Gallagher, ‘What’s Wrong with the Global Slavery Index?’ (2017) 8 *Anti-Trafficking Review* 90; AT Gallagher, ‘The global slavery index is based on flawed data – why does no one say so?’ *The Guardian* (28 November 2014) <<https://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher>> accessed 12 September 2019.

³ B Richardson, ‘Still Slaving Over Sugar’ in G LeBaron and N Howard (eds), *Ebook on Forced Labour in the Global Economy* (Open Democracy 2016) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/still-slaving-over-sugar/>> accessed 7 October 2019.

⁴ ‘Products of Slavery’ (*Anti-Slavery International*, 2009) <<https://productsofslavery.org/>> accessed 7 October 2019.

⁵ K Hodal, C Kelly and F Lawrence, ‘Revealed: Asian slave labour producing prawns for supermarkets in US, UK’ *The Guardian* (10 June 2014) <<https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>> accessed 7 October 2019.

⁶ G LeBaron, ‘It’s Time to Get Serious About Forced Labour in Supply Chains’ in G LeBaron and N Howard (eds), *Ebook on Forced Labour in the Global Economy* (Open Democracy 2016) <www.opendemocracy.net> accessed 17 March 2017, 33.

⁷ ‘End Cotton Crimes’ (*Anti-Slavery International*, 2016) <<https://www.antislavery.org/take-action/campaigns/end-uzbek-cotton-crimes/>> accessed 7 October 2019.

⁸ J Quirk, ‘The Rhetoric and Reality of “Ending Slavery in Our Lifetime”’ in J Quirk and J O’Connell Davidson (eds), *Ebook on Popular and Political Representations* (Open Democracy 2016) <www.opendemocracy.net> accessed 17 March 2017, 18.

⁹ A Sloan, ‘UK tied visa system “turning domestic workers into modern day slaves”’ *The Guardian* (17 March 2015) <<https://www.theguardian.com/world/2015/mar/17/uk-tied-visa-system-turning-domestic-workers-into-modern-day-slaves>> accessed 7 October 2019.

¹⁰ J Lerche, ‘ILO Campaigns: Missing the Wood for the Trees?’ in G LeBaron and N Howard (eds), *Ebook on Forced Labour in the Global Economy* (Open Democracy 2016) <<https://www.opendemocracy.net/beyondslavery/>> accessed 17 March 2017, 76.

¹¹ R Wilshaw, ‘What Would Loosen the Roots of Labour Exploitation in Supply Chains?’ in G LeBaron and N Howard (eds), *Ebook on Forced Labour in the Global Economy* (Open Democracy 2016) <www.opendemocracy.net> accessed 17 March 2017, 78.

Correspondingly, an international response originally centred around a crime suppression treaty has now evolved into a dense transnational legal field replete with alternate regulatory responses and complex sets of indicators. Several UN organisations, national governments, civil society organisations and philanthrocapitalist groups have jumped onto the anti-trafficking bandwagon. The eradication of trafficking has even been mainstreamed into the UN's 2015 Sustainable Development Goals where it now forms the substance of target 8.7. This incorporation of trafficking into the SDGs necessitates an elaboration of what I call a development approach to trafficking. In this article, I problematize the fundamental assumptions of existing approaches to trafficking to articulate a development approach to trafficking.

Over the past 19 years, at least three main approaches to dealing with trafficking have emerged, namely, the criminal law approach, the human rights approach and the labour approach. The criminal law approach, which is hegemonic, views trafficking as an exceptional aberration to otherwise normal circuits of commerce and exchange in a globalized world, thus warranting the use of the heavy, corrective hand of the criminal law. Baked in the crucible of the legal systems of developed countries, this model has had little success in the West itself, reflected in low prosecution and conviction rates. When exported to the developing world, an excessive reliance on the criminal law causes more harm than benefit to survivors of trafficking because of the colonial edifice on which the criminal law and enforcement machinery in many developing countries is based.¹² A poorly paid and corrupt police force engage in extensive rent-seeking practices such that ordinary citizens deeply abhor resorting to the police to address any form of injustice. Marginalised sections of society in particular, suffer from the brutalities inflicted by the police.

The human rights approach seeks to mitigate the harshness of the criminal law regime by bolstering the human rights of victims of trafficking.¹³ However, the 2000 UN Protocol to Prevent, Suppress and

¹² This does not mean that developing countries do not embrace a criminal law model; they are law-takers here as it increases states' sovereign powers.

¹³ As Gallagher notes, the UN Trafficking Principles and Guidelines issued by the UN High Commissioner for Human Rights in 2002 'provided a way forward that has supported the evolution of a cohesive "international law of human trafficking" which weaves together human rights and transnational criminal law': AT Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 21. In 2005, the Council of Europe adopted a Convention on Action against Trafficking in Human Beings whereby the criminal law thrust of anti-trafficking provisions was softened vis-a-

Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)¹⁴ itself arose from the alignment of geo-political interests of developed countries to police borders in the wake of globalization. Consequently, as Lloyd and Simmons explain, states prefer the 'transnational organised crime frame' over the 'human rights' frame preferred by non-state actors.¹⁵ This means that despite the best efforts of human rights advocates, states often circumscribe the protections made available to victims of trafficking.

Then there is the labor approach. It is well known that states around the world in the pursuit of neo-liberal economic policies that enable increased financialisation and flows of global capital are whittling down labour protections to workers. Hila Shamir problematizes this trend in the context of trafficking. She proposes a labour approach to trafficking as a critique of both the criminal law approach and the human rights approach to argue that the difference between the exploitation of workers and trafficking is a matter of degree not of kind.¹⁶ She points to the role of restrictive immigration regimes and deregulated labour regimes in producing structural subordination and exploitation, which render workers vulnerable to trafficking. Rather than address only the criminal acts of individual traffickers or 'bad apples' which entrenches a 'politics of exception',¹⁷ and legitimizes a range of exploitative labour practices,¹⁸ Shamir calls for more systemic changes. A labour approach would help vulnerable workers to

vis the victims of trafficking who were often prosecuted for committing crimes when trafficked. Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* (16 May 2005) CETS 197 <<https://www.refworld.org/docid/43fded544.html>> accessed 7 March 2019.

¹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

¹⁵ BA Simmons and P Lloyd, 'Framing for a New Transnational Legal Order: The Case of Human Trafficking' in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 400.

¹⁶ H Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 UCLA LR 76, 110.

¹⁷ J Quirk and A Bunting, 'The Politics of Exception: the Bipartisan Appeal of Human Trafficking' in J Quirk and J O'Connell Davidson (eds), *Ebook on Popular and Political Representations* (Open Democracy 2016) <www.opendemocracy.net> accessed 17 March 2017, 67.

¹⁸ J Halley, P Kotiswaran, H Shamir and C Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 Harvard Journal of Law & Gender 335.

collectively mobilise and demand better working conditions rather than be treated as passive victims of trafficking.

There is debate about whether a labor approach is truly distinct from a human rights approach. Jonathan Todres argues that labour rights can be understood as a sub-sect of human rights and that what we need is a multi-pronged strategy that draws on both international human rights law and labour law.¹⁹ While this is not by itself controversial, the human rights approach to trafficking has so far sought to merely blunt the effects of criminalization for survivors of trafficking rather than question the thrust of the criminal law. Proponents of the labour approach meanwhile question the very paradigm of a criminal law approach. They moreover draw on a long lineage of critical legal thinking on Western liberal rights discourse, which is skeptical about the limited potential of the international human rights movement for achieving redistributive social justice.²⁰

The labour approach is a useful corrective to the hegemonic criminal law approach. However, its assumptions need probing given the fundamentally different configurations of the state, market and civil society in many developing countries. Thus, where labor deregulation can be attributed to a receding welfare state in the West, in many countries of the global South, the developmental state is expanding. Similarly, while experts call for collective mobilisation and strengthening labour law protections to render workers less vulnerable to trafficking, the vast majority of the working population in the developing world work in the informal economy rendering conventional labour reforms and mobilisational models to be of limited value. Labour lawyers themselves recognize that the field of labour law has its origins in the industrialised world.²¹ Furthermore, informality has received little attention

¹⁹ J Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking' (2013) 60 UCLA LR Disc. 142.

²⁰ For a critique of international human rights discourse, see D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2005) 3-35. These drawbacks include the narrowness of human rights discourse, how it foregrounds participation and procedure at the cost of distribution, its juridification of political struggles, how it ignores background legal rules and is unable to reflect the plurality of human experience, the vague nature of human rights norms, conflicts between human rights norms, its reliance on the state for realization, its strengthening of state power, its inability to address root causes, its legitimization of claims to Western civilizational superiority and its insensitivity to the politics of representation.

²¹ K Rittich, 'Formality and Informality in the Law of Work' in S Archer, D Drache and P Zumbansen (eds), *The Daunting Enterprise of the Law: Essays in Honour of Harry W. Arthurs* (McGill-Queens University Press 2017) 109-123, 110.

in the field of labour law, which simply presumes that formalization would be an adequate solution.²² Moreover, informality has traditionally been considered to be an aspect of development, thus being more amenable to macroeconomic policy interventions rather than the extension of labour laws.²³ Finally, a labour approach presumes that states are beholden to neo-liberal economic agendas. As I will demonstrate using the Indian example, the state is porous both to conservative and progressive social actors forcing it to deviate from a predictable path of neo-liberal economic reforms in order to ensure political survival which can translate into unexpected gains for the most vulnerable of workers.

In this article, I argue for a development approach to trafficking, which must first and foremost, be rooted in the realities of the developing world. Such an approach would not present the lack of development (or the existence of the informal economy, gender inequality or child labour) as the root cause for trafficking or offer development as the solution. It would recognize that the meaning of development is political, deeply contested and highly contingent thereby querying the dominant paradigm of development that informs mainstream economic thinking and the SDGs. It would understand a country's development trajectory in historical perspective as the starting point for any anti-trafficking intervention. In the process, it would engage with rather than supplant the deep histories of local struggles against extreme forms of labour exploitation. In articulating this development approach, I rely heavily on the experience of India, a country with reportedly the largest number of 'modern slaves' with the hope that its lessons can be shared to produce deeply contextual and plural *development approaches* to trafficking elsewhere in the developing world.

The article will begin with an overview of the highly influential but poorly institutionalized international anti-trafficking legal order. I then speak to the recent emergence of the SDGs and SDG 8.7 in particular. I set out some preliminary theses on the theoretical and empirical relationship between trafficking and development before elaborating on the various elements of a development approach to trafficking. I then track the parallel development of the carceral, labour and development approaches to extreme exploitation in the Indian context over the past 20 years before concluding on why a development approach must be prioritized over a carceral approach.

²² *ibid* 110.

²³ *ibid* 112.

2. *The Anti-Trafficking Transnational Legal Order—Weakly Institutionalised but Rhetorically Powerful*

Since the late 1990s, an extensive transnational legal order or TLO²⁴ has developed around the Trafficking Protocol²⁵ supplementing the UN Convention against Transnational Organised Crime 2000 (UN Convention).²⁶ Participating states promised to criminally sanction anyone recruiting, harboring or transporting a person through means of coercion, force and deception for purposes of exploitation (trafficking).²⁷ Negotiated within two years ‘at lightning speed on the UN clock’,²⁸ the Trafficking Protocol was adopted in 2000, came into force in 2003 and has been exceptionally well ratified by 174 countries to date.

In addition, there are international treaties on sex work, slavery, practices similar to slavery, migration and forced labour. There is also regional EU law, soft law codes of conduct,²⁹ corporate social responsibility initiatives, ‘ethical audits,’ naming and shaming techniques such as Brazil’s publication of a ‘dirty list’ of companies using forced labor and indicators, such as the ILO’s Operational Indicators for identifying victims of trafficking, ranking-based indicators such as the US State Department’s annual Trafficking in Persons (TIP) Reports, the Global Slavery Index and the 2017 Global Estimates of Modern Slavery from the ILO, Walk Free Foundation and International Organization for Migration. There are bilateral and multilateral governmental agreements as well as dialogues such as the Bali Process Business and Government Forum convened in August 2017, the 2017 Call to Action to end Forced Labour, Modern Slavery and Human Trafficking, the Global Fund to End Modern Slavery and the 2018 Liechtenstein Initiative for a Financial Sector

²⁴ Halliday and Shaffer define a TLO as a ‘collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.’ TC Halliday and G Shaffer, ‘Transnational Legal Orders’ in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 11.

²⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons (n 14).

²⁶ Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

²⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

²⁸ Simmons and Lloyd (n 15) 423.

²⁹ *ibid* 414.

Commission on Modern Slavery and Human Trafficking. The Trafficking Protocol has thus spawned a stunning legal and extra-legal architecture, which is ever-expanding.

Despite being one of the most ratified UN instruments³⁰ however, the trafficking TLO is poorly institutionalized with low rates of conviction. According to the US State Department, in 2018, 85,613 victims were identified and 11,096 prosecutions launched which resulted in 7,481 convictions.³¹ 36 percent of countries have not had any convictions or have recorded less than ten convictions for the period between 2014 and 2017.³² The UNODC admits that the criminal justice system response is ‘stagnating at a low level’.³³ Elsewhere, I suggest that this poor enforcement³⁴ is attributable to the indeterminate nature of the concept of trafficking and its malleable definition in Art. 3 of the Trafficking Protocol, the misalignment and competition between the Protocol and pre-existing and related TLOs on sex work, slavery, servitude and forced labor and the continued contestations over whether forced labour,³⁵ trafficking or modern slavery³⁶ is the umbrella concept for the various forms of exploitation listed in Art. 3. National governments may symbolically comply with the Trafficking Protocol but as influential indicators expand their discursive understanding of ‘trafficking’ (a term defined under international law) to cover ‘modern slavery’ (a term not defined under international law and whose definitional

³⁰ United Nations Office on Drugs & Crime (UNODC), ‘Global Report on Trafficking in Persons’ (United Nations 2016) <www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf> accessed 12 September 2019, 48.

³¹ United States Department of State, *Trafficking in Persons Report 2019* <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 12 September 2019, 38.

³² United Nations Office on Drugs & Crime (UNODC), ‘Global Report on Trafficking in Persons’ (United Nations 2018) <https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_BOOK_web_small.pdf> accessed 12 September 2019, 45.

³³ Global Report on Trafficking in Persons (n 30) 50.

³⁴ See P Kotiswaran, ‘Transnational Criminal Law In a Globalised World: The Case of Trafficking’ (2019) (4) UC Irvine Journal of International, Transnational and Comparative Law 52–77.

³⁵ International Labour Organization, ‘Report for Discussion at the Tripartite Meeting of Experts Concerning the Possible Adoption of an ILO Instrument to Supplement the Forced Labour Convention, 1930 (No.29)’ (ILO 2013) 16. International Labour Organization, ‘Report and Conclusions of the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation’ (ILO 2013) 12–13.

³⁶ International Labour Office, Walk Free Foundation and International Organization for Migration, ‘Global Estimates of Modern Slavery: Forced Labour and Forced Marriage’ (ILO 2017).

parameters keep shifting)³⁷, legal experts bemoan what they call ‘exploitation creep.’³⁸ Political and ideological disagreements over the scope of anti-trafficking law have been displaced to questions of measurement on the extent of the problem.

3. *Trafficking and the SDGs*

Nineteen years after its negotiation, the trafficking TLO has entered a new phase with the adoption by the UN in 2015 of the Sustainable Development Goals (SDGs). The SDGs came into force on January 1st 2016.³⁹ SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Target 8.7 calls on states to ‘take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.’ There are related SDGs that refer to trafficking and child labour such as SDG 5.3 (on ‘child, early and forced marriage and female genital mutilation’), SDG 16.2 (on trafficking and violence against children), SDG 11 (on urbanisation) and SDG 13 (on climate action). Finally, SDG 16.3 aims to promote the rule of law and ensure equal access to justice for all.

The SDGs have been praised as an improvement over the MDGs for the deliberative and transparent manner in which they were arrived at,⁴⁰ for their breadth when compared to the MDGs,⁴¹ their

³⁷ The term ‘modern slavery’ is however reflected in the title of the UK’s Modern Slavery Act 2015. Section 1(1) states that references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the European Convention on Human Rights.

³⁸ JA Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *American Journal of International Law* 609–649; AT Gallagher, ‘The International Legal Definition of “Trafficking in Persons”: Scope and Application’ in P Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery* (CUP 2017).

³⁹ The SDGs are not legally binding although governments are expected to take the initiative towards realizing them. See *Transforming Our World: 2030 Agenda for Sustainable Development*, UNGA Res 70/1 A/RES/70/1 (adopted 25 September 2015) <<https://www.un.org/sustainabledevelopment/development-agenda/>> accessed 12 September 2019.

⁴⁰ VP Nanda, ‘The Journey from the Millennium Development Goals to the Sustainable Development Goals’ (2015-2016) 44 *Denv J Int’l L & Pol’y* 389, 406.

⁴¹ *ibid.*

applicability to the countries of the global North and global South and for their emphasis on human rights.⁴² At the same time however, critics question the SDGs' commitment to universality (without a commitment to eradicating inequality amongst nations), human rights (used for rhetorical impact rather than affixing legal obligations)⁴³ and structural reform of the global economy.⁴⁴ Bexell and Jönsson observe that 'strong global review mechanisms are lacking ... [and] the voluntary-based nature of the SDGs leads to weak and unsystematic accountability'.⁴⁵ Some scholars criticise the SDGs' preoccupation with global quantitative indicators to assess progress⁴⁶ to the detriment of important objectives that cannot be counted – such as meeting human rights obligations.⁴⁷ Specifically on SDG 8, the indicator for target 8.7 narrowly focuses on the 'proportion and number of children aged 5-17 years engaged in child labour, by sex and age'.⁴⁸

The SDGs are themselves an expression of the latest phase of thinking on development economics and practice. In broad-brush strokes, there are at least four such phases spanning several decades. The first phase between 1945 and 1970 was a period when developing countries attempted to 'take-off' towards industrialization through a combination of import substitution policies in the domestic market, national economic planning, investing and managing key sectors and the control of foreign capital.⁴⁹ A second phase of economic crises from 1970 to 1980 revealed the contingency of development models and outcomes and was marked by a shift away from economic ideas of development towards political ones. There were attempts in the early 1970s

⁴² *ibid* 412. C Williams and A Blaiklock, 'Human Rights Discourse in the Sustainable Development Agenda Avoids Obligations and Entitlements' (2016) 5(6) *Int J Health Policy Manag* 387.

⁴³ Williams and Blaiklock (n 42), 388.

⁴⁴ T Pogge and M Sengupta, 'The Sustainable Development Goals: a plan for building a better world?' (2015) 11(1) *Journal of Global Ethics* 56, 57.

⁴⁵ M Bexell and K Jönsson, 'Responsibility and the United Nations' Sustainable Development Goals' (2017) 44(1) *Forum for Development Studies* 13, 25.

⁴⁶ Beyond Trafficking and Slavery, 'Linking Modern Slavery and Human Development: Revisiting the Global Agenda for SDG 8.7' (unpublished paper, 2019); S Fredman, 'Working Together: Human Rights, The Sustainable Development Goals and Gender Equality' (The British Academy 2018) 8.

⁴⁷ 'UN Millennium Development Goals: Human Rights Must Not be Marginalized in Post-2015 Agenda' (*Amnesty International*, 23 September 2013) <<https://www.amnesty.org/en/latest/news/2013/09/un-millennium-development-goals-human-rights-must-not-be-marginalized-post-agenda/>> accessed 12 September 2019.

⁴⁸ Beyond Trafficking and Slavery (n 46).

⁴⁹ D Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' in D Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 95-173, 98.

to establish the New International Economic Order and create a level playing field for countries of the global North and South. In the 1990s, there was a turn towards a third phase of neoliberal economic and structural adjustment policies that sought to achieve development by getting prices right and allocating resources to their most productive use, promoting fiscal discipline, removing distortions created by state intervention and promoting free trade and encouraging foreign investment.⁵⁰ The Washington Consensus, as it came to be known, required a move from macroeconomics to microeconomics,⁵¹ wherein there was no ordained path to development, stages or take off. Efficiency was the buzzword not development and development was not usefully distinguishable from growth.⁵² Thus followed privatisation, deregulation and open economies.

However, with the failure of the transition project across the socialist bloc and the Asian financial crisis of 1997, the Washington Consensus had to be reimaged.⁵³ There was a recognition that markets were important but that there might be market failures which justified state intervention through 'appropriate regulation'.⁵⁴ Second generation reforms or the post Washington Consensus as Kerry Rittich calls it, incorporated a social dimension to reform, reflected in the World Bank's Comprehensive Development Framework that pays greater attention to health, education, gender equality, human rights, good governance and rule of law.⁵⁵ The shift towards greater country ownership, and inclusive and participatory processes was confirmed on the international stage in the broad endorsement of the MDGs and now SDGs.⁵⁶ However, development agencies are still largely committed to the idea of a basic model of development⁵⁷ and there is no pluralisation of reform proposals.⁵⁸ Thus the neoliberals may be chastened but neoliberal discourse has

⁵⁰ D Trubek and A Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice' in D Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 1-18, 5.

⁵¹ Kennedy (n 49) fn 40 p 12.

⁵² S Newton, 'The Dialectics of Law and Development' in D Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 174-202, 187.

⁵³ *ibid* 193.

⁵⁴ Trubek and Santos (n 50) 6-7.

⁵⁵ K Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social' in D Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 203-252, 204.

⁵⁶ *ibid* 204.

⁵⁷ Trubek and Santos (n 50) 17.

⁵⁸ Rittich (n 55) 228.

remained decisive.⁵⁹ So now, international financial institutions recognise the importance of human rights but believe that economic growth and development are necessary for their realisation, but they are resistant to endorsing a rights-based approach to development.⁶⁰

Julia O'Connell Davidson criticises this 'new developmentalist' lineage of the SDGs for their reliance on the old model of industrial growth with ever-increasing levels of extraction, production, and consumption and minimum 7 per cent annual GDP growth in least developed countries.⁶¹ Goal 8 in her view is devoted to growth, specifically export-oriented growth, in keeping with existing neoliberal models, despite being peppered with the progressive-sounding qualifications of inclusivity, full employment and decent work.⁶² Yet several international organisations—inter-governmental and private, have prioritised the realisation of Target 8.7 in their anti-trafficking agenda. The ILO's Alliance 8.7 is a case in point as is Delta 8.7, a knowledge platform, to gather evidence and data on policy reforms to realise SDG 8.7 and the Liechtenstein Initiative for a Financial Sector Commission on Modern Slavery and Human Trafficking. The SDGs, specifically target 8.7 rather than the other targets within SDG 8 have thus become a powerful touchstone for addressing the problem of extreme exploitation.

4. *New Goals, Old Playing Fields*

While sustainable development '*goal* 8.7 is relatively new, the developing world has been the playground of humanitarian interventions in the guise of anti-trafficking initiatives for over 15 years now.⁶³ One

⁵⁹ Kennedy (n 49) 151.

⁶⁰ Rittich (n 55) 227.

⁶¹ Beyond Trafficking and Slavery (n 46).

⁶² O'Connell Davidson notes the lack of correlation between the SDGs, namely SDG 8 and SDG 10.7 (on migration). Id. The negotiation process of the Global Compact for Migration meanwhile is geared towards facilitating migration on terms set out by developed countries rather than protecting and improving the bargaining power of migrant workers and reducing their vulnerability to trafficking. Rebecca Balis argues that is no explicit mention of protecting the basic rights of all migrants, regardless of status in the Zero Draft of the Global Compact on Safe, Orderly, and Regular Migration. R Balis, 'The draft global compact on migration fails one of its guiding principles. Here is how to fix it.' (Open Democracy 12 March 2018) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/draft-global-compact-on-migration-fails-one-of-its-guiding-principles-he/>> accessed 12 September 2019.

⁶³ The term 'humanitarian' can be used in two senses. International agencies use it in the narrow sense to connote any action, which is intended to 'save lives, alleviate suffering and maintain human dignity during and after man-made crises and disasters caused

only has to scan the pages of the 2018 Global Slavery Index (GSI) Report to understand how its depiction of weeping vulnerable third world men, women and children fleeing conflict and violence firmly locates ‘modern slavery’ as a problem out ‘there’ in the Global South. Based on a study of the annual TIP Reports and the Global Slavery Index, Siobhan McGrath and Samantha Watson argue that trafficking is routinely presented as a problem of and for development.⁶⁴ The indicator culture of these reports encodes states’ responses to trafficking in terms of their stages of development. Developing countries thus perform the worst and developed countries the best.⁶⁵ McGrath and Watson conclude that in these reports, representations of ‘victims’ and ‘abolitionists’ are (still) racialized; that questions of development are reduced to ‘culture’; and that the problematic ‘material connections’ raised by anti-trafficking discourse – such as supply chains and migration – that could affix responsibility on developed countries are managed. Investments are threatened to be withheld from developing countries that do not eradicate ‘modern slavery.’

Indicators are not the only tools through which civilizational superiority is established and reinforced. Surveillance is another mode of knowledge production. For instance, the University of Nottingham’s Geospatial Slavery Observatory scans thousands of satellite images of brick kilns in South Asia to ascertain their number and inform ‘evidence-based action’ for the realisation of SDG 8.7.⁶⁶ This reinforces the argument by McGrath and Watson on how colonial and developmentalist relations produce ‘regimes of truth’ which reinforce ‘ideas about which actors possess the objective (thus never self-interested)

by natural hazards.’ The broader everyday understanding of ‘humanitarian’ is an action, which improves human welfare and reduces their suffering. I use humanitarian in the general sense whereby individuals and groups prioritise the urgent rescue of victims of trafficking from their places of work and residence. Accounts of such efforts are available in ND Kristoff, ‘Girls for Sale’ *New York Times* (17 January 2004); ‘Bargaining for Freedom’ *New York Times* (21 January 2004); ‘Slavery in Our Time’ *New York Times* (22 January 2006). See also: Ami, ‘I’ve rescued hundreds of trafficked women from sex slavery – the reality is more brutal than you could imagine’ *Metro* (8 March 2019) <<https://metro.co.uk/2019/03/08/ive-rescued-hundreds-of-trafficked-women-from-sex-slavery-the-reality-is-more-brutal-than-you-could-imagine-8808826/>> accessed 12 September 2019.

⁶⁴ S McGrath and S Watson, ‘Anti-slavery as Development: A Global Politics of Rescue’ (2018) 93 *Geoforum* 22.

⁶⁵ Walk Free Foundation, *Global Slavery Index* (Australia 2018).

⁶⁶ DS Boyd, B Jackson, J Wardlaw, GM Foody, S Marsh, and K Bales, ‘Slavery from Space: Demonstrating the role for satellite remote sensing to inform evidence-based action related to UN SDG number 8’ (2018) 142 *ISPRS Journal of Photogrammetry and Remote Sensing* 380.

capacity to identify, define, measure, map, and diagnose the overall problem rather than its particular manifestations – and therefore who should prescribe the remedy.⁶⁷ Anti-trafficking discourse in the key of development according to McGrath and Watson perpetuates a damaging global politics of rescue, and inhibits alternative, progressive framings and responses.⁶⁸ Sadly, the imperialist prerogative of humanitarian anti-trafficking interventions shows no signs of abating.

5. *The Relationship Between Trafficking and Development-Conceptual and Empirical Linkages*

The existence of trafficking and ‘modern slavery’ in developing countries has thus far been presented as a proxy for the lack of development and as an indication of civilizational backwardness. Development practitioners have however offered more nuanced insights into the relationship between trafficking and development. A pioneering article published by Gergana Danailova-Trainor and Frank Laczko in 2010 concluded that the relationship between trafficking and development is non linear and is highly context-dependent.⁶⁹ Although it is now commonplace to assert that trafficking is a result of root causes such as poverty, and that development can reduce the incidence of trafficking,⁷⁰ the authors claimed that the poorest were not necessarily the ones to get trafficked as they lack the resources and information to migrate. Hence development initiatives that alleviated poverty may not lead to less trafficking; if anything, development may help people move out of abject poverty and migrate for a better life.⁷¹ Similarly, trafficking did not necessarily occur from the poorest countries or the poorest regions within the countries but from countries in the throes of economic transition such as South Eastern Europe, China or the Commonwealth of Independent States on their way to becoming market economies.⁷² Conversely, although trafficking had socio-economic and societal costs

⁶⁷ McGrath and Watson (n 64) 27.

⁶⁸ McGrath and Watson (n 64).

⁶⁹ G Danailova-Trainor and F Laczko, ‘Trafficking in Persons and Development: Towards Greater Policy Coherence’ (2010) 48(4) *International Migration* 38.

⁷⁰ The example they give is of universal primary education, which is likely to have a positive effect in the fight against child trafficking; *ibid* 67.

⁷¹ Danailova-Trainor and Laczko (n 69).

⁷² *ibid* 51. See also K Rittich, ‘Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking’ in P Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery* (CUP 2017) 242.

in lost remittances and the trauma caused to survivors of trafficking, for some women, it provided opportunities when considering the extremely limited alternatives at home.⁷³

Sverre Molland's study of anti-trafficking programs established in the Mekong region in the late 1990s by the ILO and the UN Inter-Agency Project on Human Trafficking confirms these insights. Conventional development programmes were promoted to reduce poverty in the hopes that the need for out-migration would be mitigated.⁷⁴ However, the results were inconclusive⁷⁵ and officials wondered whether development activities such as microfinance may have promoted out-migration.⁷⁶ The 'near-impossibility of meaningful evaluation'⁷⁷ led to programmatic shifts from poverty reduction to law enforcement.⁷⁸ Development became a humanitarian initiative.

A new ten year anti-trafficking initiative funded by the UK's Department for International Development (DFID) since 2013 called Work in Freedom (WIF) seeks to prevent the trafficking of women and girls from (and within) South Asia to the Middle East for domestic work and garment work. Igor Bosc of WIF found that trafficking was not the result of organised crime networks but was attributable to the development policies of the state of origin and the migration policies of the destination state. Interventions to promote safe migration were ineffective and unsustainable as long as the causes of distress migration were not addressed.⁷⁹ Migration may not be necessary with the availability of local livelihood.⁸⁰ Similarly, positive migration outcomes (including for the developing country of origin) lie with the developed, destination countries. Better labour governance of living and working conditions at destination countries are far more effective in preventing forced labour than paternalist bans on migration or pre-migration awareness-raising and the targeting of intermediaries.⁸¹ Variations between these studies in specific regional contexts underscore the thesis

⁷³ *ibid* 55.

⁷⁴ S Molland, "Humanitarianized" Development? Anti-trafficking Reconfigured' (2019) 50 *Development and Change* 763.

⁷⁵ *ibid* 8.

⁷⁶ *ibid* 9.

⁷⁷ *ibid*.

⁷⁸ *ibid* 10, 12.

⁷⁹ International Labour Organization, *Lessons Learned from the Work in Freedom Programme* (ILO 2019) <https://www.ilo.org/newdelhi/whatwedo/publications/WCMS_600474/lang--en/index.htm> accessed 12 September 2019, 51, Lesson 20.

⁸⁰ *ibid* 45, Lesson 17.

⁸¹ *Lessons Learned from the Work in Freedom Programme* (n 79); I Bosc, 'The Political Economy of Trafficking' (*Open Democracy*, 22 August 2018) <<https://www>

that the relationship between trafficking and development is contingent and non-linear and that structural reform is necessary in both states of origin and states of destination to realize SDG 8.

6. *A Development Approach to Trafficking*

Having outlined the contingent relationship between development and trafficking, I now spell out elements of a development approach to trafficking. In doing so, my goal is to rethink the epistemologies of both the hegemonic (ie criminal law approach) and critical (ie labour approach) literatures on trafficking and modern slavery. Importantly, I do not suggest that there is any 'one' universal development approach to trafficking. Instead, I draw on the experience of one developing country, India, not in the least because it has captured the imagination of the leading anti-slavery crusaders of our times.⁸² The GSI estimates that India has the highest absolute numbers of modern slaves in the world (18 million being the flow figure⁸³ and 8 million, the stock figure⁸⁴). Further, of the 4 billion USD in ODA spent between 2000 and 2013, India received an annual average commitment of USD 19.3 million ranking only behind Afghanistan.⁸⁵ Furthermore, ninety per cent of all trafficking in India is domestic⁸⁶ with roughly 400 million

opendemocracy.net/beyondslavery/igor-bosc/political-economy-of-anti-trafficking> accessed 12 September 2019.

⁸² Kevin Bales repeatedly referred to India in his keynote lecture at the 2018 Trust Women Conference in London, available at <<http://www.trustconference.com/videos/i/?id=446815ec-0536-45b6-ba1a-187b99fc8ad2&confYear=2018>> accessed 12 September 2019.

⁸³ Walk Free Foundation, *Global Slavery Index* (Australia 2016).

⁸⁴ Global Slavery Index (n 65).

⁸⁵ KA Gleason and J Cockayne, Official Development Assistance and SDG Target 8.7 Measuring aid to address forced labour, modern slavery, human trafficking and child labour, United Nations University, 2018, 8. Also, according to the ILO, forced labour is found largely in the Asia-Pacific. In 2005, of the 8.1 million victims of forced labor (excluding sex work) the world over, nearly 6.2 million were in the Asia-Pacific region. Industrialized economies had only 113,000 victims of forced labor. Similarly, one million of these victims of forced labor were trafficked into it, of which 408,968 were trafficked in the Asia-Pacific region and 74,113 in the industrialized economies. International Labour Organization, 'Report of the Director-General at the International Labour Conference, 93rd Session 2005: A Global Alliance Against Forced Labour' (ILO 2005). Roughly 84 to 88% of the world's 20.5 million bonded laborers are to be found in South Asia: S Kara, *Bonded Labor: Tackling the System of Slavery in South Asia* (Columbia UP 2012) 3.

⁸⁶ US Department of State, *Trafficking in Persons Report* (June 2012) <<https://2009-2017.state.gov/documents/organization/192595.pdf>> accessed 12 September 2019,

migrants who move from less developed to more developed states. These inter-state differences mimic cross-border migration from the developing world to the developed world. Thus, some, if not all, of the experiences from the Indian context will have resonance in other developing countries. Indeed the President of the United Nations General Assembly, Maria Espinoza recently claimed that India's realization of the SDGs could change the face of the world.⁸⁷

A. *The Developmental State*

The point of departure for critical scholarship on trafficking discourse is the project of neoliberalism—increased capital mobility, financialisation, the externalisation of the costs of social and ecological reproduction, devolved governance, lean bureaucracy and the weakening of national government capacities.⁸⁸ States remove 'most subsidies and tariffs, roll back social protections serving as safety nets for those in need, reduce anti-poverty redistribution and privatise public goods provision, allow large-scale foreign direct investment, and reinforce imbalances between workers and employers.'⁸⁹ This presumes a Western-style welfare state and a formal sector economy where workers suffer from labour market deregulation and reduced protection; universal basic income is offered as a radical solution to growing inequality.

While this narrative of the structural forces that lead to extreme exploitation is compelling and largely true, it fundamentally misses the nature of the third world state, which is a developmental state. As Roychowdhury points out,⁹⁰

In India, economic liberalisation, which proceeded in a gradual but steady manner, was never presented politically in terms of withdrawal of the state from welfare. On the contrary, a large number of welfare and social security-related provisions have been enacted, by central and state

184 (third of seven PDFs comprising the report; all other PDFs available at <<https://2009-2017.state.gov/j/tip/rls/tiprpt/2012/index.htm>>).

⁸⁷ 'India's success in 2030: UN SDGs can change face of the world' *Times of India* (8 October 2018) <<https://timesofindia.indiatimes.com/world/us/indias-success-in-2030-un-sdgs-can-change-face-of-the-world-unga-president/articleshow/66119021.cms>> accessed 12 September 2019.

⁸⁸ G LeBaron, N Howard, C Thibos and P Kyritsis, 'Confronting Root Causes: forced labour in global supply chains' (*Open Democracy*, 2017) <www.opendemocracy.net> accessed 12 September 2019, 15.

⁸⁹ *ibid* 16.

⁹⁰ S Roychowdhury, 'Welfare without Work or Wages: A Contradiction?' (2018) 53(35) *Economic & Political Weekly* 55.

governments, during the last two and half decades, even as economic liberalisation has been underway.

In India although structural adjustment policies were ushered in in 1991, schemes for pension, dependent benefit, disablement benefit, sickness benefit, maternity benefit, medical benefit, unemployment benefit, provident fund benefit and international worker pension were set up.⁹¹ Large-scale programs⁹² focused on providing basic education,⁹³ improving rural infrastructure,⁹⁴ rural health,⁹⁵ rural drinking water,⁹⁶ and rural sanitation;⁹⁷ and eradicating slums and renewing urban areas.⁹⁸ Subsidies and grants were also extended to populations below the poverty line.

This was accompanied by a slew of welfare legislations including the Right to Information Act, 2005, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, the Right of Children to Free and Compulsory Education Act, 2009 and the National Food Security Act, 2013.⁹⁹ The National Food Security Act itself guarantees subsidised food from the public distribution system, mid-day meals for school going children, maternity entitlements and the Integrated Child Development Services (ICDS)¹⁰⁰ which meets the needs of children below six years of age, adolescent girls, pregnant women and lactating mothers. Although the Act is a central legislation, provincial governments often offer more coverage than the federal government.

Crucially the developmental state has mandated the right to work. The National Rural Employment Guarantee program under the National Rural Employment Guarantee Act, 2005 (NREGA)¹⁰¹ is the

⁹¹ A Char, B Ganguli, B Amit and K Sinha, 'Dissecting the Draft Labour Code on Social Security (2018) 53(35) Economic & Political Weekly 14.

⁹² A Gupta, *Red Tape* (Duke University Press 2012) 292.

⁹³ The Sarv Shiksha Abhiyan (universal education) program cost 13,100 crores or 1.8 billion USD. Ibid.

⁹⁴ The Bharat Nirman program cost 40,900 crores or 5.8 billion USD. Ibid.

⁹⁵ The national rural health mission cost 12,070 crores (1.7 billion USD). Ibid.

⁹⁶ The rural drinking water mission cost 7400 crores (1.05 billion USD). Ibid.

⁹⁷ This program cost 1,200 crores (170 million USD). Ibid.

⁹⁸ The Jawaharlal Nehru National Urban Renewal Mission cost 11,842 crores or 1.6 billion USD. Ibid.

⁹⁹ Roychowdhury (n 90) 56.

¹⁰⁰ A Aggarwal and H Mander 'Abandoning the Right to Food' (2013) 48(8) Economic & Political Weekly 21, 23 fn 1.

¹⁰¹ This was subsequently renamed the Mahatma Gandhi National Rural Employment Guarantee Act or MGNREGA but I use the earlier acronym of NREGA throughout.

most expensive social program ever launched in India and one of the most expensive such programs in the developing world.¹⁰² In 2009-2010 it cost 39000 crore rupees or USD 5.5 billion. In 2019-2020 its outlay is 60000 crore rupees or USD 8.4 billion. I will discuss this scheme in more detail as it is closely related to forced labour. At the time that it was passed, as Mathur observes, the NREGA was considered anachronistic, as 'the insertion of something that does not quite fit, which does not appear in the correct order of chronological time, into the policy framework of a rapidly liberalizing state.'¹⁰³

So how does one explain the paradox of the developmental state in neo-liberal times? Despite varying levels of faith in the developmental state, experts agree that 'the relationship of growth to inequality is mediated by policy.'¹⁰⁴ Development economists have argued that in a representative democracy, the hegemony of the ruling elite is ensured by the discourse of development and welfarist governmentality.¹⁰⁵ Partha Chatterjee draws on Kalyan Sanyal to argue that the relationship between the formal sector and the informal sector (with 92% of the working population), characterized by 'corporate' and 'non-corporate' capital, respectively, is mediated in the governmentalized space of political society¹⁰⁶ wherein population groups negotiate for benefits with the state.¹⁰⁷ There is thus a flow of capital from the capitalist space to the developmental state to take care of the castaways of capital's agenda in pre-capitalist sectors. This produces two economies, the need economy and the accumulation economy locked in a relationship of subordination. The need and accumulation economies reside in the realms of money and exchange, but have different internal logics, labour processes and motives. People in the need economy are not given an option to perform for capital¹⁰⁸ engaging in predominantly non-

¹⁰² Gupta (n 92) 292.

¹⁰³ N Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (CUP 2016) 12.

¹⁰⁴ Roychowdhury (n 90) 56.

¹⁰⁵ K Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism* (Routledge 2007) 60.

¹⁰⁶ Chatterjee distinguishes civil society as a limited sphere of action in which the elite, a small section of culturally equipped citizens engages with the state, in contrast to political society in which the subalterns operate; the state's legitimacy in relation to these subaltern population groups is derived from the welfare nature of government function P Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia UP 2004, 38).

¹⁰⁷ P Chatterjee, 'Democracy and Economic Transformation in India' (2008) 43(16) *Economic & Political Weekly* 53, 58.

¹⁰⁸ Sanyal (n 105) 63.

capitalist production activities, involving self-employment, household production with family labour or different forms of collective/communal organization.¹⁰⁹ Economic activities are primarily undertaken for meeting needs¹¹⁰ although accumulation in the process is not ruled out.¹¹¹ Gupta similarly suggests a theory of competitive populism, in which 'regimes attempt to cement their popularity by starting programs to appeal to indigent voters.'¹¹² A hybrid developmental state thus promotes growth but also maintains at the federal and state levels, complex subsidy programmes to fund social welfare.¹¹³ It is this interventionist and expanding postcolonial state that is key to struggles to eliminate extreme exploitation.

B. *The Informal Economy*

Labour market deregulation resulting from neoliberal economic policies is said to produce and exacerbate precarious working conditions making workers vulnerable to trafficking or 'modern slavery'. This presumes the existence of a formal employment relationship with attendant benefits in terms of wages, working conditions, social security and resolution of industrial disputes. In many developing countries however, only a small fraction of the working population is in the formal or organised sector with a clearly identifiable employment relationship and workplace, based on which labour law protections are available. This is not to say that there is no labour market deregulation in developing countries; that trend seems inescapable. In India, labour law consolidation has been in the works since the 1990s and four labour codes were recently proposed, which envision a limited role for trade unions and rely less on command and control regulation than on self-certification by enterprises.¹¹⁴ Of these, the Wage Code Bill was passed by Parliament in 2019.

¹⁰⁹ *ibid* 65.

¹¹⁰ *ibid* 209.

¹¹¹ *ibid* 213.

¹¹² Gupta (n 92) 290.

¹¹³ R Jenkins and J Manor, *Politics and the Right to Work: India's National Rural Employment Guarantee Act* (OUP 2017) 243-4.

¹¹⁴ These four proposed codes are not yet law. They are at different stages of consideration by the Indian Parliament: Code on Wages 2019 <<https://www.prsindia.org/billtrack/code-wages-2019>> accessed 12 September 2019; The Occupational Safety, Health and Working Conditions Code 2019 <<http://www.prsindia.org/billtrack/occupational-safety-health-and-working-conditions-code-2019>> accessed 12 September 2019; The Trade Unions (Amendment) Bill 2019 <<https://www.prsindia.org/billtrack/trade-unions-amendment-bill-2019>> accessed 12 September 2019; Draft Labour Code

It may be tempting here to view informal labour as even more precarious than the deregulated formal sector. In development economics, there is a long tradition of viewing the informal economy as a reserve army of pre-capitalist labour which will be eventually subsumed into the formal sector. The informal economy is automatically construed to be forced labour in anti-trafficking campaigns. Thus satellite imaging of mining activities in Ghana is used to distinguish between mines with heavy equipment that are presumed to be legal as opposed to 'illegal' mines where mining is done by hand by 'slaves'. However, this ignores the reality and extent of the informal economy in developing countries and more importantly, innovative policy measures taken by national governments to secure workers' rights in this sector. If anything, the informal economy has been the starting point for rethinking the field of labour laws *tout court*. I illustrate this by briefly elaborating on the architecture of Indian labour laws.

Only 8% of India's working population is in the formal sector. Consequently, conventional labour laws apply to a tiny section of Indian workers. The first generation of Indian labour laws established tripartite relationships between the state, employers and employees and imagined the workplace to be a factory with unionized workers. These laws dealt with working conditions, wage issues, social security benefits, and the management of industrial disputes.¹¹⁵ A second generation of labour laws enacted largely as a result of local pressure from labor movements, was geared towards the informal economy. Laws were sector specific and sought to address the circumvention by employers of traditional labor laws such as the Factories Act, the poor definition of the employer-employee relationship, the use of contract and home labor, the significance of intermediaries and the collective action problem that workers in the informal sector faced.¹¹⁶ These

on Social Security 2018 <<https://www.prsindia.org/billtrack/draft-labour-code-social-security-2018>> 12 September 2019.

¹¹⁵ These include the Industrial Disputes Act 1947, Payment of Wages Act 1936, the Minimum Wages Act 1948, the Payment of Bonus Act 1965, Workmen's Compensation Act 1923, Employees' State Insurance Act 1948, Employees' Provident Fund & Miscellaneous Provisions Act 1952 and the Payment of Gratuity Act 1972. These can be found at <<https://indiacode.nic.in/>> accessed 7 October 2019.

¹¹⁶ Some examples include the Plantations Labour Act 1951; Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955; The Beedi & Cigar Workers (Conditions of Employment) Act 1966, amended in 1993; The Beedi Workers Welfare Cess Act 1976, amended in 1998; The Beedi Workers Welfare Fund Act 1976; The Cine Workers Welfare Fund Act 1981; Seamen's Provident Fund Act 1966, as amended in 1997; The Indian Dock Labourers Act 1934; Building & Other Construction Workers (Regulation of Employment &

laws dealt primarily with the payment of wages and social security benefits rather than with workplace conditions and were funded through indirect taxation. Provincial governments meanwhile enacted labour laws that were not sector specific but which included a list of scheduled employments with dedicated welfare schemes.¹¹⁷ These laws further creatively defined the employment relationship to capture complex sub-contracting arrangements and self-employment. Scheduled employments covered the production of goods but also the performance of services.

In the wake of structural adjustment policies in 1991, an umbrella legislation for the informal economy, the Unorganised Workers' Social Security Act was introduced in 2008.¹¹⁸ Although the Act incorporated a broad definition of 'unorganized worker' it did not define 'social security' and used it interchangeably with 'welfare'. Several of the federal schemes listed in the schedule to the Act were already-existing poverty alleviation schemes for those living under the poverty line. With no assurance of minimum wages or minimum conditions of work, or the involvement of trade unions, the language of rights was displaced by a discourse of welfare.¹¹⁹

Paradoxically, Rina Agarwala argues that the shift from rights to welfare in Indian labour laws is one that workers in the informal economy welcome. In a study of social movement unionism in the bidi (cigarette) and construction sectors in three Indian states, Agarwala concludes that:¹²⁰

... rather than fighting flexible production structures and demanding traditional work benefits such as minimum wages and job security) from employers, *Indian informal workers are using their power as voters to demand state responsibility for their social consumption or reproductive needs (such as education, housing, and health care).*

Conditions of Service) Act 1996; The Mica Mines Labour Welfare Fund Act 1946; available at <<https://indiacode.nic.in/>> accessed 7 October 2019.

¹¹⁷ These include The Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act 1969 <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/17861/110575/F-1301927122/IND17861.pdf>> accessed 12 September 2019; The Tamil Nadu Manual Workers (Regulation of Employment and Conditions of Work) Act 1982 <<https://indiacode.nic.in/>> accessed 7 October 2019; and the Karnataka Unorganized Workers Welfare Bill 2002 (on file with author).

¹¹⁸ Available at <<https://indiacode.nic.in/>> accessed 7 October 2019.

¹¹⁹ P Goswami, 'A Critique of the Unorganised Workers' Social Security Act' (2009) 44(11) Economic & Political Weekly 17, 18.

¹²⁰ R Agarwala, *Informal Labor, Formal Politics and Dignified Discontent in India* (CUP 2013) 15 (italics in original).

Where both the state and the trade union movement ignored them, workers in the informal economy claims Agarwala, were using the rhetoric of citizenship to negotiate directly with the state rather than pursue labour rights to bargain with their employers.¹²¹ Not only was opposition to neoliberal economic policies not the cause for worker mobilization, where provincial governments were pro-liberalisation, workers were strategically willing to promise their cheap labour and industrial peace in exchange for welfare benefits.¹²² This departs radically from the narrative of entrenched neoliberal economic policies, a weak state and a defeated labour movement. What we find instead are new forms of collectivization by workers and the willingness of the state to meet workers' demands for welfare benefits and social security, while continuing to pursue neoliberal economic policies.

C. *Alternate Vocabularies of Extreme Exploitation*

In every national context, there are deep local histories of how extreme exploitation is understood and how political struggles have unfolded to counter it. 'Trafficking' or 'modern slavery' may not resonate with local activists. For example, in Brazil, trafficking is understood as an imported concept and the country's successful anti-slave labor movement is 'loath to change their brand'.¹²³ Similarly, domestic regulators may not default to the criminal law approach. These alternate approaches are however at risk of being obliterated by the hegemonic international discourse on trafficking. To illustrate this, I map the parallel tracks along which criminal law, labour laws and development laws have emerged in India to counter trafficking.

(i) *Criminal Laws Against Extreme Exploitation*

As in other countries, the general criminal law, the Indian Penal Code, 1860 (IPC) deals with aspects of trafficking such as kidnapping or abduction (Sections 365, 367), procuring, buying and selling minors for prostitution (Sections 366A, 366B, 372, 373), slavery (Section 371), and unlawful compulsory labor (Section 374).¹²⁴ However, many of

¹²¹ *ibid* 16, 23.

¹²² *ibid* 29.

¹²³ G Davida, 'Trafficking as a Floating Signifier: The View From Brazil' (2015) 4 *Anti-Trafficking Review* 161.

¹²⁴ The Indian Penal Code, No 45 of 1860, INDIA CODE <<http://indiacode.nic.in>> accessed 7 October 2019, §§365–74.

the IPC's labor-related provisions reflected colonial prerogatives. Pursuant to India's ratification of the Trafficking Protocol, the IPC was amended in 2013 to include a stand-alone trafficking offence (section 370) which I will discuss later.

(ii) *Labour laws against extreme exploitation*

On independence, Art. 23 of the Indian Constitution prohibited indigenous forms of servitude such as *begar*¹²⁵ and similar forms of forced labor. However, extreme exploitation persisted, forcing the state to enact new labour laws in the 1970s and 1980s including the Bonded Labour System (Abolition) Act, 1976, as amended by the Bonded Labour System (Abolition) Amendment Act, 1985 (BLSAA), the Contract Labour (Regulation & Abolition) Act, 1970, as amended by the Contract Labour (Regulation & Abolition) Amendment Act, 1986 (CLRAA), and the Inter-State Migrant Workmen Act (Regulation of Employment and Conditions of Service) Act, 1979 (ISMWA).¹²⁶

Why do these labour laws matter for our purposes? Because their interpretive materials describe conditions where workers were routinely recruited and transported under false promises to distant places within the country for exploitative purposes—in other words, trafficking. The term 'trafficking' is however not used, affirming its historical association with prostitution. The postcolonial state used a combination of labour law, administrative law and contract law to address extreme exploitation which I will detail now.

Considered by administrators and legal experts as 'the best piece of central legislation passed by the Parliament in independent India,'¹²⁷ the BLSAA abolishes the 'bonded labor system,' or a system of forced/ partly forced labor whereby a debtor pays off his debt by rendering his own labor or that of his family without wages or with the payment of nominal wages, gives up his freedom to sell his labor or the products of his labor, gives up his right to sell his property and gives up his

¹²⁵ Indian courts find 'begar' requires showing 'that the person has been forced to work against his will and without payment.' See *Ram Khelwan Pathak v. State Of U.P.*, (1998) 2 AWC 1171 (India); see also *Kara* (n 85) 284; (n 12).

¹²⁶ The Bonded Labour System (Abolition) Act, No. 19 of 1976, INDIA CODE (1976); The Contract Labour (Regulation and Abolition) Act, No 37 of 1970, INDIA CODE (1986); The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, No 30 of 1979, INDIA CODE (1979) <[https://india code.nic.in/](https://india.code.nic.in/)> accessed 26 November 2019.

¹²⁷ BN Yugandhar, 'Bondage to Freedom' (2011) (unpublished paper).

freedom to move.¹²⁸ 'Nominal wages' are wages below the minimum wage or what is normally paid for similar labor in that locality. The Act sets bonded laborers free and protects them from existing and future legal action arising from the debt. Local district magistrates and subordinate officers have to ensure the Act's implementation, the eradication of bonded labor, and the rehabilitation of bonded laborers. Vigilance committees with representatives of the state, social workers, rural development institutions, credit institutions and bonded labourers themselves are to assist the executive, while also defending suits against freed bonded laborers. The BLSAA thus pioneered innovative strategies by prioritising access to welfare over a carceral model of raids, rescue and rehabilitation, proposed community-based rehabilitation rather than institutionalised rehabilitation, and allowed for a summary trial by district magistrates resulting in a prominent role for the executive than the police.

The CLRAA seeks to ensure that formal sector employers do not routinely employ contract laborers, making them ineligible for benefits under labor laws.¹²⁹ The government can, under the CLRAA, prohibit contract labor by assessing the working conditions of contract laborers, their indispensability, and whether regular workmen cannot take their place in the production process. Where abolition is warranted, a contract laborer becomes a regular employee.¹³⁰ Recognizing, however, that pending the abolition of contract labor, minimum working conditions need to be ensured, the CLRAA imposes obligations on recruiters of contract laborers and intermediaries. Principal employers and contractors must be registered. Contractors are responsible for ensuring proper working conditions and payment of full wages with a backstop to the principal employer.

The statement of objects and reasons of the ISMWA notes that in several Indian states, contractors or agents called *sardars* or *khatadars* recruited laborers for out-of-state work in large construction projects. The worker was taken to a far-off place on payment of railway fare only and worked seven days per week without fixed hours under extremely poor conditions. Agents promised, but eventually reneged on, the monthly settlement of piece-rate wages. Given the inadequacy of the CLRAA to deal with such abuse, the ISMWA was passed to protect

¹²⁸ No movement of the labourer is required for proving the existences of bonded labour; bonded labourers often know the employers that they work for.

¹²⁹ The Contract Labour (Regulation and Abolition) Act, No 37 of 1970, India Code (1986).

¹³⁰ *Sec'y, Haryana State Elec. Bd. v. Suresh*, AIR 1999 SC 1160, 1165–66 (India).

the interests of this illiterate and unorganized migrant labor force. The ISMWA is similar to the CLRAA in that both principal employers and contractors must be registered and are responsible for providing employees a displacement and round-trip journey allowance, suitable conditions of work, housing, medical facilities, and protective clothing as well as the labor law protections of the host state.

Interestingly, the statements of objects and reasons of the CLRAA and ISMWA do not strictly demarcate contract and migrant labour from bonded labour. Especially salient is how these laws treat intermediaries who would today be criminalized as traffickers. These laws instead acknowledge the insights of Indian historians that in the Indian context, 'the key opposition is not clearly between capital and labour; rather the line is once again blurred by the use of intermediaries.'¹³¹ Intermediaries are influential even within the formal sector, where laborers are recruited through caste or village ties, managed by jobbers, subject to debt-bondage and paid only nominally in cash, replicating agrestic servitude rather than a labour market.¹³² Their persistent role explains why the CLRAA and ISMWA imposes obligations on them rather than criminalizing them.

(iii) *Forced Labour Jurisprudence*

The Indian Supreme Court interpreted the BLSAA, CLRAA and the ISMWA at the height of the public interest litigation movement of the 1980s. In these cases, the state undertook large-scale projects—either developmental projects or workfare projects, which were executed by private party contractors who, in turn, employed subcontractors to recruit workers. In *PUDR v Union of India*,¹³³ Justice Bhagwati interpreted the term 'force' under Art. 23 of the Constitution¹³⁴ as follows:¹³⁵

'[F]orced labour' may arise in several ways. It may be physical force . . . or it may be force exerted through a legal provision . . . or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it

¹³¹ P Robb, 'Introduction' in Peter Robb (ed), *Dalit Movements and the Meanings of Labour in India* (OUP 1993) 1, 17.

¹³² *ibid* 61.

¹³³ *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473 (India).

¹³⁴ Indian Constitution, art 23.

¹³⁵ *People's Union for Democratic Rights v. Union of India* (n 133) 1490 (emphasis added).

would be 'forced labour'. Where a person is suffering from hunger or starvation, ... he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. ... And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour' ...

The court held that any labor remunerated at less than the minimum wage would be forced labor under Art. 23. The Supreme Court's decision was reinforced in cases involving the ISMWA,¹³⁶ the applicability of the Minimum Wages Act 1948 to famine relief works,¹³⁷ on minimum wages for prisoners¹³⁸ and on aligning the Maharashtra Employment Guarantee Act, 1977 with the Minimum Wages Act.¹³⁹ Notably, the state was the employer in all these instances.

Further, in the 1984 case of *Bandhua Mukti Morcha*, the Supreme Court held that given the likelihood for a forced laborer to have received an advance on his earnings, 'whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance ... and he is therefore a bonded labourer.'¹⁴⁰ In response to these Supreme Court decisions, the Indian Parliament passed an amendment to the BLSAA in 1985 declaring that where any contract laborer or ISMW worked in a system of forced labor under the conditions listed in Section 2(g)(v) (which includes being paid below the minimum wage), it would amount to bonded labor.

The Supreme Court's forced labour jurisprudence is notable because it construed force not merely in terms of physical and legal force but in structural terms, that is, background economic conditions including those of poverty. Thus the CLRAA and ISMWA do not mention the means of recruitment into exploitation; they presume coercion. The BLSAA, CLRAA, and ISMWA instead focus on labor conditions. Section 2(g)(v) of the BLSAA in fact sets an objective threshold for exploitation as payment below the minimum wage thus predating EU jurisprudence on this issue by decades. Where working conditions

¹³⁶ *Labourers Working on Salal Hydroelectric Project v Jammu and Kashmir* (1983) 2 SCC 181, 186–188 (India).

¹³⁷ *Sanjit Roy v State of Rajasthan* (1983) 1 SCC 525.

¹³⁸ *State of Gujarat and Ors v. Hon'ble High Court of Gujarat* (1998) (7) SCC 392, 404 para 21.

¹³⁹ *Ahmednagar Zilla Shet Major Union v State of Maharashtra and others* (1985) (2) Bom CR 18.

¹⁴⁰ *Bandhua Mukti Morcha v Union of India* (1984) 2 SCR 67, 78 (India).

were poor, irrespective of the means of recruitment, intermediaries, namely, the recruiters and contractors, were held liable for providing appropriate pay and working conditions with a backstop to the primary employer. This is useful for establishing principles of joint and several liability in global supply and migration chains today.

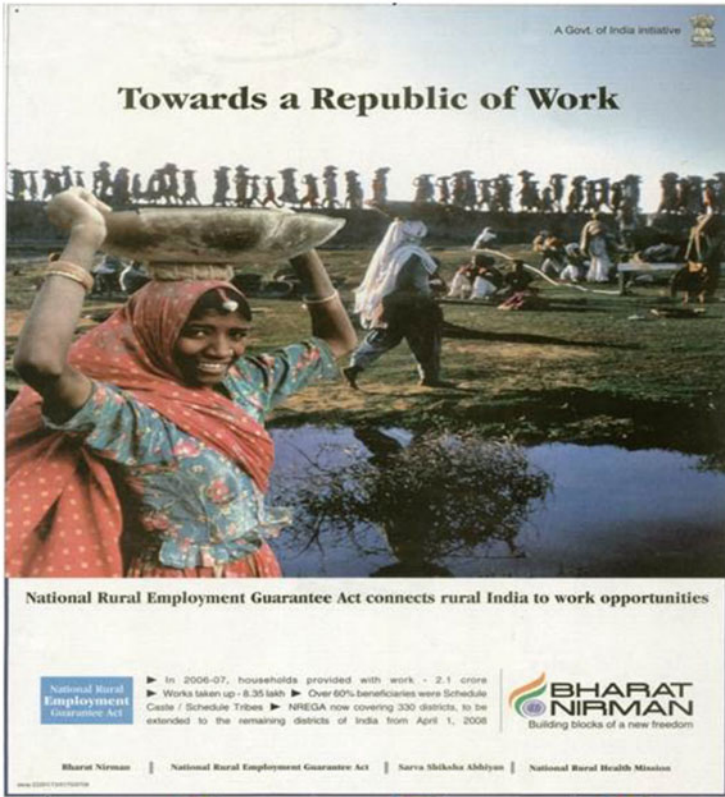
Unfortunately however, these innovative labour laws were chronically under-enforced. The CLRAA has been severely undermined and unable to realise either goal of the law—abolition or regulation of contract labour, with contract labourers routinely being paid less than the minimum wage.¹⁴¹ The ISMWA has been used even more sparingly. However, it is too soon to consign the forced labour jurisprudence emanating from these laws to the dustbin of history. If anything, it has been revived in the context of the most ambitious welfare program of the developmental state to date, namely the rural employment guarantee scheme.

7. *Development and the Right to Decent Work*

Post-1991, the Indian Parliament passed numerous social welfare laws to operationalize several Directive Principles of State Policy under the Indian Constitution. These principles are not justiciable in a court but are nevertheless fundamental to governance. Several principles relate to the right to decent work but key is Article 41 which urges that the ‘state, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.’ The National Rural Employment Guarantee Act, 2005 or NREGA in particular, actualises a constitutional aspiration into a tangibly redrawn social contract by guaranteeing employment to global capital’s forgotten others and recognising the right to work and the right to a life free from impoverishment for the rural poor. Not only that, the Act directly links work performed under the Act to sustainable development. As far as practicable, the tasks should need manual labour not the use of machines and can involve water works, land development and transport infrastructure. The Act thus seeks to ‘strengthen natural resource management and address causes of chronic poverty such as drought, deforestation, and soil erosion, thereby encouraging sustainable

¹⁴¹ Rakhi Sehgal n.d. *Contract Labour in India: Judicial Trends*. (Copy on file with author).

development.¹⁴² Furthermore, NREGA provides socio-economic rights but also governance rights whereby workers can use statutory mechanisms to ensure state accountability for implementation of the Act.¹⁴³ Testament to its radical aspirations is the poster advertised when the NREGA came into force—'a Republic of Work'.



The NREGA provides adults in rural households with at least one hundred days of guaranteed wage employment in unskilled manual work every financial year. The program is demand driven; if employment is not provided within 15 days, workers are entitled to a daily

¹⁴² K Ranaware, U Das, A Kulkarni and S Narayanan, 'MGNREGA Works and Their Impacts: A Study of Maharashtra' (2015) 50(13) Economic & Political Weekly 53.

¹⁴³ Jenkins and Manor (n 113) 16.

unemployment allowance subject to the government's economic capacity. Daily wages are to be paid on a weekly basis; in case of delay, compensation is payable. Social audits maintain transparency and accountability and contractors are not allowed in the program. Benefits include free medical treatment for injury, compensation in case of death or permanent disability and freedom from gender-based discrimination. The federal government pays for wages and splits the cost of materials with provincial governments in a ratio of 3:1.

The NREGA was celebrated as a singular achievement of the developmental Indian state¹⁴⁴ and praised for being progressive, historic, flagship, revolutionary, empowering, radical¹⁴⁵ and as epitomizing an emerging class of social policy legislation, which holds the state accountable to the citizen.¹⁴⁶ The 'inclusive growth' policies of the Congress Party exemplified by NREGA is said to have secured its electoral victory in 2009.¹⁴⁷ The program is enormous in scale and guarantees the right to work for 67% of India's 1.3 billion people.¹⁴⁸ 132 million households have job cards under the scheme. In 2015-6, 4.7 million households had been provided 100 days of employment and 2.7 million were in drought-affected states. Although the current Prime Minister Narendra Modi has labelled NREGA as a 'monument to the failure of the Congress party',¹⁴⁹ the budgetary allocation in 2019 was 60000 crores or 8.4 billion USD, the highest allocation to date.

The NREGA has already generated employment for over 50 million people in 2009, empowered rural women and workers from scheduled castes and tribes,¹⁵⁰ decreased rural-urban migration, created numerous productive assets, and increased depressed wage rates earned by the

¹⁴⁴ Mathur (n 103) 8.

¹⁴⁵ *ibid* 7; Mathur notes that the colonial state organised massive public works during famines as recommended by the 1880 Famine Commission. N Mathur, 'Anthropology News State Debt and the Rural: Two Historical Moments in India' 54(5) *Anthropology News* e12-21.

¹⁴⁶ R Gupta, 'Subverting Democracy' (*Bourgeois Inspirations*, 6 January 2011) <<https://bourgeoisinspirations.wordpress.com/2011/01/06/subverting-democracy/>> accessed 12 September 2019.

¹⁴⁷ Mathur (n 103) 9.

¹⁴⁸ *ibid* 6.

¹⁴⁹ *ibid* 10.

¹⁵⁰ A Aggarwal, 'Fairness of Minimum Wages for MGNREGA' (2017) 52(44) *Economic & Political Weekly* 18, 18; A Aggarwal, 'The MGNREGA Crisis: Insights from Jharkhand' (2016) 51(22) *Economic and Political Weekly* 38, 42; Jenkins and Manor (n 113) 9-11.

poor.¹⁵¹ It has helped free the poorest workers, namely bonded labourers.¹⁵² It has contributed towards agricultural productivity, environmental restoration and creating useful rural infrastructure.¹⁵³ Fears of elite capture seem misplaced and the scheme has benefitted small and marginal farmers.¹⁵⁴ It has generated a multiplier effect as an average of five households benefit from the construction of one asset on private land.¹⁵⁵ It has produced a substantive increase in annual income and a reduced need to resort to NREGA thus generating long-term effects.¹⁵⁶ These effects have not been confined to the poor; the non-poor use it to hedge against economic insecurity and shocks and supplement household income.¹⁵⁷ Even the World Bank has advocated for NREGA given its provision of a safety net and promotion of dignity for marginalised groups.¹⁵⁸ These successes have generally outweighed concerns with its implementation, particularly, chronic delays in the disbursement of funds by the federal government.

NREGA has a close nexus with distress migration and therefore vulnerability to trafficking. The macroeconomic backstory here is that although agriculture accounts for 52% of all employment, it accounts for only 16% of the GDP.¹⁵⁹ Moreover, all of this employment is not necessarily agricultural employment. There is a substantial rural population that subsists by seasonal migration.¹⁶⁰ In recent years, India has suffered from a deep agrarian crisis with 'massive distress movement of populations, causing broken childhoods, interrupted education, life in camps, city pavements or crowded shanties'¹⁶¹ exacerbated by droughts and famines. In the high Himalayas in fact, the non-implementation of NREGA has caused distress migration.¹⁶² Elsewhere, inadequate

¹⁵¹ Gupta (n 146) 43; A Bhaskar, S Gupta and P Yadav, 'Well Worth the Effort Value of MGNREGA: Wells in Jharkhand' (2016) 51(19) *Economic & Political Weekly* 40, 47.

¹⁵² Jenkins and Manor (n 113) 179.

¹⁵³ Bhaskar and others (n 151) 40.

¹⁵⁴ Ranaware (n 142) 56; Bhaskar and others (n 151) 47.

¹⁵⁵ Bhaskar and others (n 151) 47.

¹⁵⁶ *ibid* 48; Bhaskar and others also report that 96% of beneficiaries interviewed were happy; 86% were living and eating better and 85% felt that their incomes had gone up as a result of the wells.

¹⁵⁷ Jenkins and Manor (n 113) 166-7.

¹⁵⁸ *ibid* 227.

¹⁵⁹ Gupta (n 92).

¹⁶⁰ *ibid*.

¹⁶¹ A Roy, J Dreze, H Mander and others, 'Dear PM, Our Farmers Are Dying' (*Down to Earth*, 27 April 2016) <<https://www.downtoearth.org.in/news/supreme-court-order-triggers-nregs-wage-debate---35837>> accessed 7 October 2019.

¹⁶² Mathur (n 103) 14; see also Jenkins and Manor (n 113) 172.

work under the NREGA and delays in wage payments have caused economic hardship and migration to southern states as far as Kerala.¹⁶³ Social security laws like the National Food Security Act are similarly crucial for preventing impoverishment.¹⁶⁴ Quite basic social services provided by the state can thus have huge effects on the rural poor. Indeed, a multi-pronged strategy to provide education and mid-day meals to children helped reduce child labour in India.

A. *Minimum Wage Jurisprudence under NREGA*

The most litigated issue under NREGA is wages, one that is key to centre-state relations. Section 6(1) of the Act allows the federal government to specify a wage rate, notwithstanding the Minimum Wages Act, 1948 (MWA), until which time, the minimum wage fixed by the provincial government for agricultural labour applies. In 2009, the federal government invoked Section 6(1) by capping the NREGA wages at 100 rupees a day and effectively delinked the NREGA from the MWA. Workers' groups successfully challenged the federal government's order in two state High Courts (Andhra Pradesh and Karnataka) and the Supreme Court. The Supreme Court directed the government to end the disparity between wages under the NREGA and state-mandated rates under the MWA¹⁶⁵ given that the NREGA was a beneficiary legislation. All three courts relied on precedent on forced labour to hold that any payment less than the minimum wage amounts to forced labour and that the federal government's failure to pay the minimum wage amounts to contempt of court. Despite these orders, the federal government has not converged the NREGA wage with minimum wages for agricultural labour. Whereas in 2009, only 6 states paid more than the centre, as of 2018, 27 states and union

¹⁶³ Aggarwal (n 150) 39.

¹⁶⁴ In states like Odisha where the primary source of livelihood is a combination of subsistence agriculture and casual labour, and where child under-nutrition is rampant, the most common coping strategy in the absence of the public distribution system (PDS) among landless households was that of migration. M Chatterjee, 'An Improved PDS in a "Reviving" State: Food Security in Koraput, Odisha' (2014) 49(45) *Economic & Political Weekly* 49, 50. A male household head said 'if the PDS did not exist today, we would have to go to Andhra [Pradesh] and work as coolies. Whatever we get from that we'd eat or go hungry. We have no land, what else can we do?' *ibid.* 53.

¹⁶⁵ 'Supreme Court upholds verdict matching NREGA pay with state wages' *Economic Times* (24 January 2012) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-upholds-verdict-matching-nrega-pay-with-state-wages/articleshow/11610999.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 12 September 2019.

territories paid more than the federal wage.¹⁶⁶ A 2015 public interest litigation by Aruna Roy, one of the chief architects of the Act demanding that the state pay minimum wages under the NREGA¹⁶⁷ is pending before the Supreme Court.¹⁶⁸ It is significant that the Supreme Court has brought India's largest welfare scheme aimed at the rural poor within the ambit of forced labour jurisprudence.

8. *The Dominance of the Carceral Anti-Trafficking Regime*

The labour and development approaches to extreme exploitation have taken root in India on parallel tracks to anti-trafficking law and policy. The international carceral regime on trafficking has been incorporated domestically through processes of global governmentality.¹⁶⁹ State and civil society actors in India routinely interact (with each other and their respective counterparts internationally) in spheres of transnational modernity¹⁷⁰ often deriving legitimation from each other, in turn enabled by substantial flows of development aid especially from the US Agency for International Development (USAID).¹⁷¹ India is the

¹⁶⁶ 'Supreme Court's naïve assumption: State govts function for the best interests of rural workers' (*Counterview.org*, 19 May 2018) <<https://counterview.org/2018/05/19/supreme-courts-naive-assumption-state-govts-function-for-the-best-interests-of-rural-workers/>> accessed 12 September 2019.

¹⁶⁷ Roy was appointed to the National Advisory Council set up by Smt Sonia Gandhi when the Congress-led United Progressive Alliance was in power at the centre.

¹⁶⁸ According to labour scholar Kamala Sankaran, the minimum wage under the Minimum Wages Act is required to ensure certain minimum of basic needs of food, clothes, housing, educational costs and social security in order for it to be a minimum wage. Also there is a more consultative process of fixing wages under MWA. She calls for the NREGA wage rate to 'logically be a need-based national minimum wage under the MWA.' K Sankaran, 'NREGA Wages: Ensuring Decent Work' (2011) 46(7) *Economic & Political Weekly* 23, 25.

¹⁶⁹ Gupta (n 92) 239. Gupta describes this as implicating 'transnational linkages in the movement of ideas, material resources, technologies, and personnel [which] are critical to the care of populations'.

¹⁷⁰ SE Merry, *Human Rights & Gender Violence: Translating International Law Into Local Justice* (University of Chicago Press 2016).

¹⁷¹ The Indian state is however not beholden to the international community's agenda on trafficking. It has resented the TIP ranking system (see Ramachandran, *The Politics of the US State Department's TIP Report in India: Ethnographic Vignettes and Theoretical Possibilities* (2010)) and recently protested the 2017 Global Estimates of Modern Slavery. B Debroy, 'International Labour Organisation's Omissions' *The Indian Express* (30 November 2017) <<https://indianexpress.com/article/opinion/columns/international-labour-organisation-modern-slavery-forced-marriage-4960954/>> accessed 12 September 2019.

second highest recipient of such aid, receiving 19 million USD every year only behind Afghanistan according to a Delta 8.7 study.

Development aid against trafficking mostly went to neo-abolitionist anti-sex work groups which include radical feminist groups and culturally nationalist and socially conservative NGOs, that seek to protect the 'dignity' of Indian women and children. These NGOs are heavily invested in raids, rescue, and rehabilitation and subscribe to a crime control paradigm of trafficking. When efforts to amend the anti-sex work criminal law, the Immoral Traffic Prevention Act, 1986 (ITPA) did not materialise through the 1990s, they took to public interest litigation (PIL) to achieve institutional reform. As repeat players in such litigation, they collaborated with the police in raids and rescue operations compensating for the executive's lack of resources. Consequently, a small number of neo-abolitionist groups found traction within the bureaucracy who were appointed to every single expert committee appointed by the courts or the relevant ministry (typically the Ministry for Women and Child Development (MWCD)) to address trafficking.

The international sex work debates had already cast a long shadow on the Trafficking Protocol. In the 2000s, when trafficking became a high-profile international issue, India, like other countries conflated trafficking with trafficking for sex work and with sex work itself. In 2005, in response to a poor ranking by the US TIP Report, the Indian Parliament nearly passed a Swedish-style law that sought to criminalise the customers of sex workers. In 2013 when the Indian Parliament passed sweeping rape law reforms, neo-abolitionist groups lobbied the government for an offence (s 370) criminalising trafficking (defined in consonance with Art. 3 of the Trafficking Protocol but excluding forced labour). Further, a 2004 PIL filed by a neo-abolitionist group came alive in 2015 which led to the MWCD's introduction of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (2018 Bill).

The 2018 Bill was passed by the lower house in July 2018 but lapsed before introduction in the upper house. The Bill is a draconian legislation that entrenches a classic raid-rescue-rehabilitation model, alongside several aggravated offences which are cognizable and non-bailable, stringent penalties, reversals of burden of proof, provisions for forfeiting traffickers' assets, and an extensive surveillance machinery to prevent trafficking. The Bill has vaguely worded offences and an illogical gradation of offences without a clear sentencing policy. The Bill violates the right to fair trial and some sections are constitutionally suspect. The Bill vests excessive powers in the police and creates layers of bureaucratic institutions with no accountability. The Bill relies on existing

shelter homes for rescue and rehabilitation although they have been ineffective at best (causing women to escape and return to sex work) and have facilitated sexual abuse and even suicide at worst.¹⁷² The UN Special Rapporteurs on Trafficking and on Contemporary Forms of Slavery expressed grave concern that the Bill violated international human rights norms.

Importantly, the Bill does not repeal the ITPA nor does it make explicit its relationship with the BLSAA, CLRAA, ISMWA, NREGA or the four labour codes proposed by the government. The Bill unthinkingly applies techniques developed against sex work such as raids, rescues and rehabilitation to all forms of extreme exploitation which could freeze the economy. Although the Bill covers labour exploitation beyond sex work, the letter and spirit of labour law jurisprudence is entirely missing from the Bill.

Numerous groups representing sex workers, transgender persons, bonded labourers, civil liberties groups and trade unions offered a robust critique of the 2018 Bill, especially its heavy reliance on the criminal law—a model that has barely worked even in the West. Yet drafters have not accounted for how the Indian criminal justice system actually works. In an honest appraisal of the system, Justice Muralidhar of the Delhi High Court has reflected on its colonial origins, its visibly anti-poor nature and its disproportionate impact on ‘minorities and [the] under-privileged’ wherein a lengthy trial period itself functions as punishment.¹⁷³ He worries about how ‘newer and harsher criminal laws are enacted without accounting for the impact that they have on the functioning of the law enforcement apparatus and the judiciary.’¹⁷⁴ The carceral model envisaged in the 2018 Bill unfortunately only strengthens a corrupt police force and its rent-seeking practices. The

¹⁷² ‘Hyderabad: Rescued Uzbek woman ends life in shelter home’ *Deccan Chronicle* (15 April 2018) <www.deccanchronicle.com/nation/crime/150418/hyderabad-rescued-uzbek-woman-ends-life-in-shelter-home.html> accessed 12 September 2019; Review of Women’s Studies in Economic & Political Weekly (2016), 51(44-45); P Govindan, ‘Rethinking Emancipation: The Rhetorics of Slavery and Politics of Freedom in Anti-Trafficking Work in India’ (2013) 15(4) *Interventions: International Journal of Postcolonial Studies* 511; M Seshu and A Ahmed, “We Have the Right Not to Be Rescued . . .”: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers’ (2012) 1 *Anti-Trafficking Review* 149; V Magar, ‘Rescue and Rehabilitation: A Critical Analysis of Sex Workers’ Antitrafficking Response in India’ (2012) 37(3) *Signs* 619.

¹⁷³ S Muralidhar, ‘Crime, Justice and Punishment in India: The Trajectories of Criminal Law’ (September 2018) *The Project 39A Annual Lecture in Criminal Law*, National Law University, Delhi (on file with author) 5, 9, 11.

¹⁷⁴ *ibid* 15, 21.

more harsh-sounding the criminal law, the higher its negative externalities. The criminal law should therefore be an option of last resort in a country like India, notwithstanding what neo-abolitionist groups claim. The 'Do No Harm' adage could not be more urgent.

The 2018 Bill threatens to erase local vocabularies of extreme exploitation. Kiran Kamal Prasad, of the Bangalore-based bonded labour rights group Jeevika argues that the 2018 Bill in the statement of objects and reasons attributed trafficking to economic issues like poverty, when in fact bonded labour is socially approved by the caste system.¹⁷⁵ Moreover, although the BLSAA prioritises the identification and release of bonded labourers over rescue, neo-abolitionist NGOs like the International Justice Mission focus on rescue. IJM has even litigated to have courts strike down beneficial provisions of the BLSAA dealing with the power of the district magistrate to conduct a summary trial. Although bonded labour activists believe that the BLSAA is superior to international law and is rooted in Indian realities, several of its provisions are being undermined by neo-abolitionist activism in legal arenas and by the 2018 Bill.

9. *Tango at the Margins and the Relationship between SDG 8 and 8.7*

Returning to the SDGs, as I have already mentioned, international actors, the ILO included, have embraced SDG 8.7. International philanthropocapitalists like Andrew Forrest argue that slavery is bad for development¹⁷⁶ and that countries which do not act on eradicating slavery will risk losing foreign investment.¹⁷⁷ The Indian government meanwhile presumes that high economic growth rates will produce a trickle down effect that will implicitly address SDG 8.7. In a planning document on SDGs, the Government of India lists the centrally sponsored programs of the National Service Scheme, Skill Development

¹⁷⁵ KK Prasad, 'The Bill is likely to Harm Bonded Labourers' (2018) 53(28) Economic & Political Weekly (online) <<https://www.epw.in/engage/article/trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018-harms-the-cause-of-bonded-labour>> accessed 12 September 2019.

¹⁷⁶ 'Economic empowerment is the key to long-term growth and so it is no surprise that slavery, more than many other factors, cruels sustainable development': A Forrest, 'Public Procurement: The Trillion-Dollar Missing Link' in *Global Slavery Index 2018* <<https://www.globalslaveryindex.org/resources/downloads/>> accessed 12 September 2019 21.

¹⁷⁷ *ibid* 20.

Mission and Social Security for Unorganised Workers but makes no effort to explicitly link SDG 8 and 8.7 given its previous successes in reducing child labour.

Where the international community privileges SDG 8.7 and the domestic government prioritises SDG 8, NGOs and labour groups working with those subject to extreme exploitation have a different approach. In August 2017, 55 activists and academics working on bonded labour, contract labour, domestic work, inter-state and international migrant work and sex work, released a statement on SDG 8.7. They rejected the sensationalist, international discourse on modern slavery as not reflecting Indian working class realities of extreme exploitation and refused the criminal law approach of the Trafficking Bill (then the 2016 version). They elaborated on the systemic causes for exploitation in India:¹⁷⁸

We believe there is a direct relationship between distress migration and vulnerability to trafficking, forced labour and slavery. We oppose policies that aggravate this vulnerability caused by the agrarian and environmental crises, the displacement of tribals, the commercialisation and mechanization of agriculture, the militarization of entire regions in the country, pauperization and immiseration of the rural population, the informalisation of the employment relationship, and the effects of globalisation, privatisation, and contractualisation on the urban workforce.

In effect activists critique the stances of both the international community and the domestic government's neo-liberal economic policies. Activists believe that to address extreme exploitation and forced labour, unsustainable models of development that result in the dispossession of millions of people must be ditched and that the state must ensure decent work including by implementing the NREGA as per the Indian Supreme Court's orders to pay minimum wages. For them, alternate forms of development leading to decent work will prevent forced labour and they have institutional processes in laws like NREGA to hold the state accountable.

Crucially, efforts to fight forced labour need buy-in from within the labour movement. Paradoxically, however even as the deep histories of labour struggle are being supplanted by the carceral anti-trafficking regime, 'trafficking' has had little buy-in with the Indian left. Indian

¹⁷⁸ Collected activists, 'No easy answers for ending forced labour in India,' (*Open Democracy* 20 September, 2017) <<https://www.opendemocracy.net/beyondslavery/collected-activists-and-academics/no-easy-answers-for-ending-forced-labour-in-india>> accessed 12 September 2019.

feminists harbour radically different positions on sex work. Labour groups and trade unions find the term 'trafficking' and neo-abolitionist discourse too limiting and foreign. Unlike in the West, trafficking has failed to capture the popular imagination and trafficking is a weak contender¹⁷⁹ in national policy circles.

As an academic-activist, I found this apparent indifference to extreme exploitation to be perplexing. The answer came from Praveen Jha, a labour economist at a conference of central trade unions at Jaipur convened by the ILO, where he characterised our deliberations on forced labour as 'tango at the margins.' He queried whether forced labour was a meaningful category when only 10% of the jobs needed to cater to 10-15 million new workers was being created each year. Between 1990 and 2000, 37 million people had been dispossessed by recurrent cycles of unemployment, under-employment, income insecurity, poverty, denial of minimum wages, distress migration, inequities in the land tenure system, credit failures and indebtedness, aggravated by globalisation.¹⁸⁰ To speak of trafficking thus seemed like cruel irony if not outright irresponsible. This macro-economic context of a lack of job creation will remain significant and economists point to a fall in the GDP growth rate as reflecting a structural economic slowdown in the Indian economy. This could amplify a disconnect between providing welfare on the one hand, and work and wages¹⁸¹ on the other, and render even more fragile the 'deal' struck by the developmental state to accommodate the interests of global capital while dispensing welfare to the disenfranchised poor. In anticipation of the 2019 general elections, hundreds of thousands of workers, farmers and agricultural labourers marched into Delhi in late 2018 demanding the implementation of the NREGA and an assured minimum wage of Rs. 18,000 per month (picture below). Workers' discontent will likely continue to simmer.

¹⁷⁹ The Parliamentary Standing Committee received 1.5 lakh representations on the food security law. A Aggarwal and H Mander, 'Abandoning the Right to Food' (2013) 48(8) Economic & Political Weekly 21; the Verma Committee received 70,000 submissions on rape law reforms; the Ministry of Women and Child Development received around 300 submissions on the 2016 Trafficking Bill.

¹⁸⁰ M John and H Mander, 'Bonded Labour System Abolition Act, 1976: Review of Law and Implementation' (2012) Center for Equity Studies, 7, quoting Lakshmidhar Mishra.

¹⁸¹ (n 90) 59; N Pani instead calls for the scheme to be treated as an employment initiative with a focus more on the work and the quality of the assets; Moyna, 'Supreme Court order triggers NREGS wage debate' (*Down to Earth*, 4 July 2015) <<https://www.downtoearth.org.in/news/supreme-court-order-triggers-nregs-wage-debate---35837>> accessed 27 November 2019.



Worker-Farmer Rally in Delhi, September 2018, ©THE INDIAN EXPRESS [P] LIMITED.

10. *Conclusion*

Almost two decades after the adoption of the Trafficking Protocol, its discursive reach has expanded beyond cross-border movement for forced sex work to include forced labour used in the everyday manufacture of goods and services. Even as the core criminal law instrument flounders given its unsettled definition, its poor implementation and its continued generation of collateral damage, the SDGs offer us the opportunity to rethink trafficking from a structural perspective rather than continue to prioritise a carceral approach.

In this article, I argue that while the criminal law, human rights and labour approaches to trafficking are important, they need rethinking in the context of the developing world. All three approaches exist in the Indian context. The carceral approach is popularised by a small but highly influential set of neo-abolitionist groups. Hypercriminalisation and forced institutionalisation, the mainstays of the 2018 Trafficking Bill will however produce perverse consequences for victims of trafficking given the colonial edifice on which the Indian criminal justice system is built. The human rights approach while valuable is tethered to the criminal law paradigm. I have demonstrated with the 2018 Bill how the Indian state prioritised security concerns over human

rights.¹⁸² A labour law approach is vital at a time when workers' rights are being obliterated yet conventional labour laws reach a minuscule minority of the working population.

I present a development approach to trafficking by retheorising the relationship between the state, the market, civil society and legal system. I consider at least three sets of legal initiatives—for workers in the informal economy, for precarious workers in contract labour, bonded labour and inter-state migrant work and finally rural workers. They all reveal the state's fundamental role in redistribution and workers' struggles to hold the state accountable for this. While some of these laws reflected India's socialist development ethos predating the structural adjustment policies of 1991, the most ambitious welfare legislation to date, the NREGA followed structural adjustment. Far from receding, the developmental state has expanded its protective role. Alongside its appeasement of global capital, it ensures its political survival through the prolific promulgation of rights-based laws and welfare schemes. In the case of the informal economy, the state's role has over time become crucial as the benefits of labour laws meld into welfare schemes. With rural labour, the state has undertaken the role of an employer by creating a powerful alternative to the coercion exerted by the landed elite on rural workers. Robert Jenkins and James Manor quote one such worker:¹⁸³

Before this program, we were . . . subservient to the *jamindar*, and to the 'high' caste. With the NREGS, we can live in the village without having to adhere to the village rules, of working the *jamindar's* land. By seeing us in the village, without us begging him for work, he understands that we are human beings too, capable of a dignified life.

Given the high levels of poverty in India, neo-abolitionist groups often call for incremental reform by prioritizing a carceral approach to target the worst exploitation involving physical brutality while deferring more 'idealistic' plans for decent work that require payment of the minimum wage. However, this will not pass constitutional muster as the Supreme Court has for more than 35 years unfailingly held that any labour paid less than the minimum wage is forced labour. It has

¹⁸² See P Kotiswaran, 'The criminal law as sledgehammer: the paternalist politics of India's 2018 Trafficking Bill' (*Open Democracy*, 9 July 2018) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/criminal-law-as-sledgehammer-paternalist-politics-of-india-s-2018-tr/>> accessed 12 September 2019.

¹⁸³ Jenkins and Manor (n 113) 181-182, quoting Indrajit Roy, 'Guaranteeing Employment, Forging Political Subjectivities: Insights from the NREGS' (June 2012) unpublished paper, 26.

refused to distinguish between categories of exploited labour whether it be bonded labour, contract labour, inter-state migrant work or agricultural labour under NREGA. The Court also recognizes the endemic coercion in labour markets but has prioritized a non-negotiable minimum threshold for ensuring decent, dignified work. Given that NREGA costs 1% of the national GDP to implement and has had high impact in preventing distress migration, pursuing a development approach should be no major obstacle. Reliance on these laws (which are not just welfare schemes) provides a whole new meaning to the term 'prevention' which in the carceral scheme simply meant increased surveillance powers for the state.

Above all, notwithstanding the various phases of development economic thinking and the current ascendance of chastened neoliberalism and the SDGs, the meaning and practice of development itself is highly contested and contingent. There is no preordained institutional framework for achieving development goals that necessarily 'works' or 'fails.' As Agarwala notes, the relationship between the state, capital and labour is qualitative, diverse and dynamic.¹⁸⁴ There is room for successful experimentation as the examples of innovative laws for the informal economy or employment guarantee laws show. If SDG 8.7 is to be realised, we cannot play safe and work with narrow understandings of coercion and exploitation. Worse still, we cannot rehearse decades of development debates wherein developed countries labelled as backward, what they viewed as proxies for underdevelopment, such as the existence of the informal economy, or child labour or the lack of 'rule of law'. The existence of 'trafficking' or 'modern slavery' cannot be reason to thrust failed and/or weak regulatory models that inflict violence on workers in developing countries. Most critically, the hard-won legislative victories of the labour movement need to be stopped from being repealed in the name of consolidating labour laws that are passed mostly with an eye to ease-of-doing business indicators.

In conclusion, a development approach to trafficking focuses on addressing root causes rather than an ex post facto approach based on prosecutions, raids, rescues and paternalist models of institutionalised rehabilitation. The essence of this approach comes from this pithy observation from a female agricultural labourer as recounted by an Indian civil service officer:¹⁸⁵

¹⁸⁴ Agarwala (n 120) 23.

¹⁸⁵ Yugandhar, 'From Green Hills of Purola to the Brothels of Delhi and Meerut' (1975) 20(2) *Journal of the Lal Bahadur Shastri National Academy of Administration*.

Nearly thirty-five years ago, a lady J—, a Lohar by caste and from Kumulogaon, a mile and a half from Purola tehsil headquarters told an IAS probationer (Rabindra Nath Gupta of WB cadre), who was investigating bonded labour and immoral trafficking of women, plainly that efforts to deal with her predicament through nariniketans, widow pensions, checkposts, police raids, etc., are all fun and games. She said: 'Buy freedom for our men, give them land and only land. It is this land, these green fields, which will protect their girls. Nothing else can . . .'

It is indeed time to end the fun and games, including from space, and join these workers on the ground. This is absolutely essential in order to prevent SDG 8.7 from becoming another tool of imperialist humanitarianism.