

**CHALLENGES AND OPPORTUNITIES IN MAKING  
INTERNATIONAL LABOUR RECRUITMENT GENDER-  
RESPONSIVE: LESSONS FROM INDIA AND PHILIPPINES**

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## **Abstract**

This paper was conceptualised in the backdrop of two significant developments in the past few years: renewed threats by the Trump administration of discontinuing work authorisation for H4 visa holders in the USA, and the Indian government's acknowledgement of unprecedented rise in reported cases of abuse within NRI marriages. Immigrant women being common category of affected person in both, the developments merited a scrutiny of vulnerabilities among them, and the linkages with restrictions in policy regimes of labour and migration. Since Philippines is often upheld as a successful model of labour management in the field of international labour recruitment, this thesis enquires into the Philippines model as a comparative study against Indian experiences of labour export. It concludes that neither country have successfully fulfilled their obligations towards protecting universal human rights of women migrants for multiple reasons that are largely attributable to the inherent characteristics of neoliberal trade regime and corresponding weaknesses in international human rights regime. Further it proposes that the current challenges merit combined consideration of strengthening multi-lateral standards, and supra-national oversight on administration of justice, as recognition of emerging transnational subjectivities among a growing migrant population and the need for their incorporation in legal rights discourse.

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## Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1978
GATS	General Agreement on Trade in Services
EFMA	Employment of Foreign Manpower Act, Singapore
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic Social and Cultural Rights, 1966
ICRMW	International Convention the Protection and the Rights of All Migrant Workers and Member of Their Families
ILO	International Labour Organisation
IMF	International Monetary Fund
IOM	International Organisation for Migration
IRIS	International Recruitment Integrity System
MEA	Ministry of External Affairs, India
MMW	Male Migrant Worker
NRI	Non-resident Indian
OPT	Optional Practical Training
OWWA	Overseas Workers Welfare Administration, Philippines
PGE	Protector General of Emigrants, India
POE	Protector of Emigrants, India
POEA	Philippine Overseas Employment Administration
UN	United Nations
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
WMW	Women Migrant Workers

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## Introduction

The past couple of decades have witnessed an unprecedented surge in neoliberal economic policies favouring free market capitalism on a global level. This phenomenon although not uniform in its extent or form, can be generally characterised by increased privatisation and trans-nationalisation of capital, lesser public sector regulation, and reduction of welfare benefits by states.<sup>1</sup> The resultant vigorous capital accumulation and socio-economic restructuring has today reached a juncture, where multinational business entities wield the same financial power and influence over global governance as nation states, signalling the emergence of non-state entities/ actors as direct competitors against state power.<sup>2</sup> Simultaneously, labour migration has today become a pillar of global capitalism with the World Bank having estimated 601 billion US dollars as remittance sent home by international migrants in 2015<sup>3</sup> and ILO estimating 164 million migrant workers globally in 2017.<sup>4</sup> Transnational labour migration, originating in the form of “colonial workers” and “guest workers” from less developed countries and former colonies to Western Europe, Northern America and Oceania during post-World War II era<sup>5</sup>, has grown exponentially in the past few decades, gaining recognition for its potential contribution to global economy in mid-1990s under supra-national trade institutions such as the World Bank, IMF and the WTO. The eventual incorporation of GATS Mode 4 commitments by WTO formalised cross-border temporary migration of “natural persons” as one component of liberalised trade in services, introducing a new era of commodifying labour.<sup>6</sup>

Despite the rapid diminishing of state-control over economic activities, increase in cross-border resource flows and fundamental changes to intra and inter-state relationships, existing global regulatory regimes remain fragmented, inconsistent and at worst non-responsive to changing

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<sup>1</sup> William K. Carroll and Jean Philippe Sapinski, ‘Neoliberalism and the transnational capitalist class’ in Kean Birch, Julie MacLeavy and Simon Springer (eds), *The Handbook of Neoliberalism* (Routledge 2016). See also: Manfred B Steger and Ravi K Roy, *Neoliberalism: A Very Short Introduction* (OUP 2010); David Harvey, *A Brief History of Neoliberalism* (OUP 2005); Alfredo Saad-Filho and Deborah Johnston, *Neoliberalism: A Critical Reader* (Pluto Press 2005)

<sup>2</sup> Milan Babic, Jan Fichtner & Eelke M. Heemskerk, ‘States versus Corporations: Rethinking the Power of Business in International Politics’ (2017) 52 (4) *The International Spectator*

<sup>3</sup> The World Bank Group, ‘Migration and Remittances Factbook 2016’

<sup>4</sup> ILO Global Estimates on International Migrant Workers: Results and Methodology, 2<sup>nd</sup> ed. (ILO Labour Migration Branch and ILO Department of Statistics 2018)

<sup>5</sup> Laurens de Rooij and Zsoka Koczan, ‘World War II, Effects on Immigration’ in Frederick F. Wherry & Juliet B. Schor (eds.), *The SAGE Encyclopedia of Economics and Society* (Sage Publications 2015)

<sup>6</sup> World Trade Report 2004: Exploring the linkage between domestic policy environment and international trade, (WTO 2004) 46

realities in terms of who regulates, how they regulate, and the subject of such regulations.<sup>7</sup> The deficits are particularly glaring in international human rights law, which though developed on principles of universality remain constrained in seeking accountability based on state sovereignty. Indeed, past examples of adjudicating human rights violations in transnational trade practices, such as the cases of Bhopal gas tragedy<sup>8</sup>, the Kiobel case<sup>9</sup>; and the Chandler case<sup>10</sup>, depict continued lack of success due to self-imposed limitations on jurisdiction by domestic courts. As deterritorialization in trade relations continue to pose new challenges to issues of governance, and by extension to justiciability of universal human rights, discussions on policy approaches remain largely divided in three sets of ideas: the first continues to insist on strengthening state policy-making as home and host countries for purposes of seeking accountability from global market actors;<sup>11</sup> the second, seeks to impose state-like responsibilities on transnational corporations and business enterprises;<sup>12</sup> and the third, advocates for governance and justice through supra-national institutions<sup>13</sup>. More recent developments such as the UNGP<sup>14</sup> and the draft UN treaty on business and human rights<sup>15</sup> although enhanced in their recognition of the power nexus between states and business enterprises, and attempting to integrate the first two policy approaches, continue to focus on state as the primary source of accountability under international law. The GATS commitments on temporary transnational labour migration having built on the existing fault lines between human rights law and trade policies, recruitment and treatment of migrant workers therefore

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<sup>7</sup> Philip L. Martin, 'GATS, Migration and Labour Standards', DP/165/2006 (Decent Work Research Programme, International Institute for Labour Studies 2006)

<sup>8</sup> Tim Edwards, 'Criminal Failure and "The Chilling Effect": A Short History of the Bhopal Criminal Prosecutions' (2014) 41 Social Justice 53

<sup>9</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)

<sup>10</sup> *Chandler v Cape plc* [2012] EWCA Civ. 525

<sup>11</sup> Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003) 10 (5) *Indiana Journal of Global Legal Studies*

<sup>12</sup> Jeanne M. Logsdon and Donna J. Wood, 'Business Citizenship: From Domestic to Global Level of Analysis' (April. 2002) 12 (2) *Business Ethics Quarterly*, 155 - 187

<sup>13</sup> David Held and Anthony McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalisation Debate*, 2<sup>nd</sup> Ed. (Polity Press 2003)

<sup>14</sup> UN Guiding Principles on Business and Human Rights'

<[https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)> accessed 10 May 2020

<sup>15</sup> 'Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises (Revised Draft)'

<[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf)> accessed 10 May 2020

remain largely under-regulated, and dependent on migration policies and cheap labour requirements of receiving states.<sup>16</sup>

In the current context of transnational labour migration, this thesis proposes to explore factors that contribute to the violation of women's human rights in the context of international labour recruitment, and the opportunities in preventing violations through comprehensive policy approaches. It is premised on the hypothesis that, despite women's human rights being recognised as universal under international law, attempts to continue seeking accountability for violations through traditional approaches in international and national legal frameworks are unlikely to succeed given the peculiarities of transnational labour recruitment. The hypothesis builds on two primary observations:

- a. *Discrimination is inherent in transnational labour migration and integral to the success of trade liberalisation*

Liberalisation of trade in services through temporary movement of workers has been promoted by supra-national and international economic institutions on convictions of boosting other forms of trade and contributing to the economic development of sending countries through reduction of labour market pressures and remittances.<sup>17</sup> Yet, evidence of uneven development between countries, growing social inequalities and low economic growth prove the contrarian role of neoliberal trade policies in embedding unequal exchange of labour and benefits between under-developed and developed economies.<sup>18</sup> Indeed, legal scholarship has repeatedly highlighted the role that global trade regulatory regimes play in promoting an economic order that profits from and sustains inequalities both within and across borders, and their detrimental impact on the enjoyment of human rights by citizens of developing and less developed countries.<sup>19</sup> Given this context of existing discrimination based on race and national identity within the international trade regime, violations experienced by migrant women are essentially

<sup>16</sup> Raúl Delgado Wise, Humberto Márquez Covarrubias and Ruben Puentes, 'Reframing the Debate on Migration, Development and Human Rights' (2013) 19 *Population, Space and Place* 430; Raúl Delgado Wise, *Capitalism, Migration and Development* (2017).

<sup>17</sup> OECD, The World Bank and International Organization for Migration, *Trade and Migration: Building Bridges for Global Labour Mobility* (OECD 2004) <[https://www.oecd-ilibrary.org/trade/trade-and-migration\\_9789264016408-en](https://www.oecd-ilibrary.org/trade/trade-and-migration_9789264016408-en)> accessed 27 May 2020. See also: World Trade Report 2004: Exploring the linkage between domestic policy environment and international trade, (WTO 2004).

<sup>18</sup> Raul Delgado Wise and Humberto Marquez Covarrubias, 'Strategic Dimensions of Neoliberal Globalization: The Exporting of Labor Force and Unequal Exchange' (2012) 02 *Advances in Applied Sociology* 127

<sup>19</sup> See for example: James Smith, 'Inequality in international trade? Developing countries and institutional changes in WTO dispute settlement' (2004) 11 (3) *Review of International Political Economy* <<https://www.tandfonline.com/doi/abs/10.1080/0969229042000252891>> accessed 2 March 2020; Gillian Moon, 'Fair in Form, But Discriminatory in Operation – WTO Law's Discriminatory Effects on Human Rights in Developing Countries', (2011) 14 (3) *JIEL* 553



results of multiple and cumulative discrimination on grounds of race, national identity, migrant status, as well as gender. As shown in subsequent chapters, while women were already relegated to second class citizenship and bearers of disproportionate impact of neoliberal policies within home states, transnational migration subjects them to a new gendered and unregulated economic order that is essentially built on existing inequalities, prejudices and stereotypes yet justifies extended social and political subjugation on the basis of material position.<sup>20</sup> A plethora of sociological and anthropological scholarship have documented the form and extent of discrimination experienced by women in transnational labour migration, and the resultant cross-border cultural and political subjectivities that have been largely undermined in global trade policy discussions.<sup>21</sup>

*b. Women's contributions and experiences continue to be invisibilised through labour force statistics*

Data and statistics have remained the largest concern for policy-making on transnational labour migration despite it having been subject of continuous discussions by international organisations.<sup>22</sup> This is due to several factors, the first being, that 'labour migration' lacks a universal definition, with those that are available often conflicting in inclusion or exclusion of categories of people depending on their place of birth, residence status, and cause of migration etc.<sup>23</sup> ILO, as the primary source of data on migrant labour, estimated that 59% (164 million) of the world's migrant population were migrant workers in 2017, out of whom 41.6% (68.1 million) of migrant workers were female.<sup>24</sup> However, ILO's own definition of 'migrant workers' is dependent on inconsistent concepts and definitions of "residence" and duration of stay in individual countries:

<sup>20</sup> Mary Condon and Lisa Philipps, 'Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory' 28 THOMAS JEFFERSON LAW REVIEW 47.

<sup>21</sup> See for example: Valerie Francisco and Robyn Magalit Rodriguez, 'Countertopographies of Migrant Women: Transnational Families, Space, and Labor as Solidarity' (2014) 17 WorkingUSA 357; Emiko Ochiai and Kaoru Aoyama, *Asian Women and Intimate Work* (Brill 2014); Melanie L Straiton, Heloise Marie L Ledesma and Tam T Donnelly, 'A Qualitative Study of Filipina Immigrants' Stress, Distress and Coping: The Impact of Their Multiple, Transnational Roles as Women' (2017) 17 BMC WOMENS HEALTH.

<sup>22</sup> ILO, 'Statistics on International Labour Migration', 20th International Conference of Labour Statisticians Geneva (10-19 October 2018) ICLS/20/2018/Room document 11; Eivind Hoffmann and Sophia Lawrence, 'A REVIEW OF SOURCES AND METHODOLOGICAL ISSUES' 98; 'ICLS 2013 - Statistics on Labour Migration and Resolution IV' (2013) <[http://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_225495/lang--en/index.htm](http://www.ilo.org/global/topics/labour-migration/publications/WCMS_225495/lang--en/index.htm)> accessed 30 May 2020; World Trade Report 2004: Exploring the linkage between domestic policy environment and international trade, (WTO 2004), 62

<sup>23</sup> 'Labour Migration' (Migration data portal) <<http://migrationdataportal.org/themes/labour-migration>> accessed 29 May 2020.

<sup>24</sup> Natalia Popova and others, *ILO Global Estimates on International Migrant Workers: Results and Methodology* (2018)

...“migrant worker” refers to all international migrants who are currently employed or are unemployed and seeking employment in their present country of residence.<sup>25</sup>

Due to the above-mentioned disparities, the 2017 estimates could potentially exclude emerging trends in recruitment of temporary guest workers. Second, is the lack of consistency in data recorded by sending and receiving countries, attributable to a large extent to the inadequate data collection systems in developing countries.<sup>26</sup>

The data disparity is however even more acute with regards migrant women in general, which includes women migrant workers. ILO acknowledges “*the fragility of national data on women compared to men*” (referring to both home and host countries) impacting statistical estimation of female international migrant workers even in 2017.<sup>27</sup> Simultaneous to studies acknowledging the growing presence of women in international labour migration and their contributions as better remitters to home countries<sup>28</sup>, women migrant workers are also reported as ‘vulnerable groups’ with predominant presence in low-paid service jobs<sup>29</sup>. The absence of common standards or disaggregated data on skills classification in labour statistics, fail to represent the existing gender disbalance in several sectors of employment, the working conditions or their allied gender-specific experiences. On the other end of the spectrum, statistics is yet to account for spouses/partners who are mostly women accompanying male migrant workers.<sup>30</sup> The combination of restrictive visa regimes ignoring untapped human capital in women by denying “dependents” the right to seek employment in host countries, and non-acknowledgement of unpaid contributions through domestic work in host countries, both infantilises women in migration policy and invisibilises them in market economy. In one of the latest debates on prevalence of violence against women migrant workers, the UN Secretary General noted the need to examine policies relating to recruitment and deployment as factors that perpetrate and perpetuate gender-based violence.<sup>31</sup> Yet, essential linkages remain to be

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<sup>25</sup> International Labour Office and others, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers: Results and Methodology: Special Focus on Migrant Domestic Workers* (ILO 2015)

<sup>26</sup> Supra n.24

<sup>27</sup> Ibid.

<sup>28</sup> ILO Decent Work, ‘Men and Women Migrant Workers: Moving towards equal rights and opportunities’ <[https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms\\_101118.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_101118.pdf)> accessed 30 May 2020

<sup>29</sup> International Labour Office (ed), *International Labour Migration: A Rights-Based Approach* (International Labour Office 2010).

<sup>30</sup> Nicola Piper, ‘Feminisation of Migration and the Social Dimensions of Development: The Asian Case’ (2008) 29 Third World Quarterly 1287

<sup>31</sup> “Violence against Women Migrant Workers: Report of Secretary-General” (A/74/235) [EN/AR/RU] - (ReliefWeb) <<https://reliefweb.int/report/world/violence-against-women-migrant-workers-report-secretary-general-a74235-enarru>> accessed 30 May 2020.

drawn between discrimination in skills-classification, non-recognition of women's unpaid contribution in the global supply chain, the resultant imposition of discriminatory visa regimes and work conditions in host countries, cumulative impact of discrimination on their existing vulnerabilities as mere migrants in host countries and non-resident status in their home countries, etc.

One of the key motivations of this thesis is the noted under-representation of gendered impacts of discriminatory trade and business practices in legal scholarship. Despite a deluge of empirical research by economists and sociologists, and concerns raised by civil society organisations as well as the UN, gender discrimination in labour migration remain to be addressed through wholistic appraisals of regulatory frameworks. The lack of a comprehensive legal approach perhaps is another dimension of the larger and continuous systematic discrimination experienced by women.

### ***Comparative research methodology and findings***

This research, borrowing from a pre-existing body of empirical studies by sociologists, employs a three-step methodology of legal analysis.

The first, a mapping and analysis of existing international regulatory frameworks that directly impact or are expected to indirectly influence transnational business practices and the recruitment of migrant workers as part of global supply chain sourcing. Juxtaposed against regulatory frameworks employed by two distinct channels of labour recruitment between Philippines-Singapore and India-USA, it highlights main problems in monitoring international labour recruitment as: fragmentation in regulatory regime; structural weaknesses in human rights regime due to over-dependence on state sovereignty and state-accountability.

The second segment of analysis in Chapter 2 builds on the demonstrated challenges in international regulatory frameworks to depict its impact on lives of women migrants. The analysis draws from empirical studies and controlled comparisons, of common human rights violations experienced by migrant women from India and the Philippines as labour exporting countries, and USA and Singapore as corresponding labour importing countries. India and Philippines have been identified as specific countries for comparative analysis due to their similar position in the global labour market as two of the top ten labour exporting and

remittance receiving countries,<sup>32</sup> with a significant section of population of migrants consisting of women. Similarly, USA and Singapore are being addressed as specific corresponding labour importing countries within this study for practical reasons of availability of primary empirical studies, similar profile of violations in supply chain, and the fact that both economies are heavily dependent on labour imports. Export and import of labour between these 4 countries are conducted in the context of functionally different and varied set of legal frameworks and arrangements, however, despite the differences there are common illustrative trends and patterns of migration and violations, which highlight key challenges as the basis of deduction of international failures.

The third segment of analysis explores opportunities for challenges arising out of fragmentation in legal framework, and deterritorialization of labour markets. It proposes a two-pronged approach of strengthening multi-lateral standards as well as supranational oversight. The former draws on standards and recommendations existing in international discourse and identifies specific areas that require attention in order to bridge normative lacunae in regulatory frameworks. The latter, in consideration of the changing nature of actors and power structures in global markets, is an extension of M. Cherif Bassouni's arguments for an independent convention on crimes against humanity.<sup>33</sup> It explores possibilities of a supranational justice mechanism protecting rights of migrant women as direct subjects of global governance.

It must be noted that this paper engages in controlled analysis restricted to South-North migration patterns which may not have reflected additional dimensions of discrimination and exploitation emerging out of South-South migration. Additionally, while it scrutinises existing depictions of economic migration and makes a case for expanding its scope to address inter-linkages with marriage migration and trends in family re-unification, other inter-relations such those with forced migration or climate migration are not being considered. Demonstrative aspects of trafficking in labour migration will also not be included due to space constraints. International legal framework on trafficking being subject of vociferous contentions among advocates of women's human rights, and often being cited as reproducing vulnerabilities among specific categories of women, would have merited an entire extended study of its own. Attempts will instead be made to address underlying causes and contributors to vulnerabilities

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<sup>32</sup> G. Pison, *Population and Societies*, no. 536, 219; World Bank Press Release, April 8, 2019 <https://www.worldbank.org/en/news/press-release/2019/04/08/record-high-remittances-sent-globally-in-2018> (Last accessed on 1st February 2020)

<sup>33</sup> M Cherif Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention' (1994) 31 *Colum J Transnat'l L* 457

among migrant women in international labour market, which may result in trafficking or experiences of other forms of gender-based violence.

# 1 Chapter I:

## Regulatory Frameworks and its Key Contentions

Close to a century since the first wave of economic migration post-WWII, ‘migration’ and ‘migrants’ remain the world’s most contentious issues. While states remain reluctant towards discussing a binding set of norms to address the phenomenon or its full range of changing and over-lapping dimensions, international labour recruitment continues to operate in the context of fragmented frameworks of regulatory instruments and mechanisms, belonging largely to 3 diverse areas/ systems of international law: trade and economic laws, international human rights law, and labour law.

As one of world’s latest attempts to address economic migration, a UN High-Level Debate on International Migration and Development was organised in 2019. It witnessed discussions and recommendations on a range of issues emphasising better management of migration by states, strengthening data collection, the continued potential of migration to catalyse socio-economic progress. etc.<sup>34</sup> The discussions however lacked any mention of human rights, and more concerningly it characterised private sector as service providers capable of ‘developing and implementing well-managed migration policies’, a role that was traditionally left to the state. Following the Debate, a zero draft of UNGA Resolution was issued referring to the establishment of a ‘Start-up Fund for Safe Orderly and Regular Migration’ that encouraged international financial institutions and private sector to co-contribute towards implementation of UN Global Compact for Safe, Orderly, and Regular Migration (UNGCM).<sup>35</sup> The UNGCM of 2018, is a non-binding negotiated agreement on 23 objectives and aligned commitments promoting collection of disaggregated data for evidence-based policies; alignment of policies with higher degree of predictability between countries; flexibility in pathways for migration including skills-matching within national economies; facilitation of ethical recruitment through improved regulatory oversight on private and public recruitment, etc. The agreement was vociferously criticised for breach of sovereign control over borders and creating unreasonable burdens on states by some of the prominent labour receiving wealthier states of Europe and

<sup>34</sup> UNGA, Summary of ‘High-Level Debate on International Migration and Development’ (New York, 27 February 2019) < <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/03/20-March-Summary-HLD-on-Intl-Migration-and-Development.pdf>>. The debate organised under the office of the President of the UN General Assembly informed the High-Level Political Forum on Sustainable Development, which in turn inputs into the 2030 Agenda for Sustainable Development.

<sup>35</sup> “Format and organisational aspects of the international migration review forums, Zero Draft” (7 June 2019) < <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/06/IMRF-co-facilitators-letter-zero-draft.pdf>>

north America including USA, who either abstained from voting or did not join.<sup>36</sup> This trend of response follows from 3 other UN High-Level Dialogues on International Migration and Development held in 2006, 2013 and 2016.<sup>37</sup> Evidently, some earlier observations from discussions around GATS Mode 4 made in 2004 remain true even today:

... states have been reluctant to undertake binding international commitments that limit their sovereign right to determine who enters and remains within their territories and under what conditions, although they increasingly recognise the need to facilitate certain types of movement.<sup>38</sup>

While the fragmented regulatory frameworks continue to fail in addressing increasing polarisation in debates around migration, states are progressively partnering with private actors for executing regulatory functions that were traditionally their exclusive domain. Therefore, questions relating to who regulates, what they regulate, and who is regulated to what extent continue to elicit conflicting answers.

### ***1.1 Binding human rights treaties and its standards***

The international human rights framework hinges on the universal set of values and norms outlined in the Universal Declaration of Human Rights, and the recognition of states as primary duty-bearers through an extensive network of multi-lateral treaties that create binding obligations for states. Specific to labour recruitment, UDHR acknowledges right to choose employment, equal pay for equal work, prohibition of slavery and servitude, and right to form and join trade unions.<sup>39</sup> These rights are then reflected, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights adopted in 1976. ICESCR specifically ventures beyond UDHR to stipulate against women being compelled to conditions of work below those offered to men.<sup>40</sup> It is also known over the years to have built through its recommendations and general comments, the most exhaustive list of standards on the issue of labour rights outside of the ILO.

The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the International Convention on the Protection of the Rights of All Migrant Workers and

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<sup>36</sup> 'The Global Compact on Migration and Refugees: Endorsement and Dissent' (2019) 45 (1) Document, Population and Development Review, 257 - 262

<sup>37</sup> Joseph Chamie and Barry Mirkin, *Who's Afraid of International Migration in the United Nations?* (Palgrave Macmillan, New York 2011)

<sup>38</sup> OECD, The World Bank and International Organization for Migration, *Trade and Migration: Building Bridges for Global Labour Mobility* (OECD 2004) <[https://www.oecd-ilibrary.org/trade/trade-and-migration\\_9789264016408-en](https://www.oecd-ilibrary.org/trade/trade-and-migration_9789264016408-en)> accessed 27 May 2020

<sup>39</sup> Art. 4 & 23, UDHR

<sup>40</sup> Article 7, ICESCR

Members of Their Families, 1990 elucidate on the human rights of women and migrant workers respectively. CEDAW's significance, is in its near universal ratification status of 189 states. It incorporates guarantees from UDHR, ICCPR and ICESCR, elucidating its core objectives of non-discrimination, indivisibility and inter-relatedness of women's human rights. Articles 1 – 5 define discrimination against women; impose obligations on State Parties to respect, protect, promote and fulfil the right to non-discrimination for women; require State Parties to undertake all appropriate measures including legal and institutional reforms, and reforms in cultural practices towards ensuring de jure as well as de facto equality with men; acknowledge systemic and historical discrimination against women as grounds for State Parties to adopt corrective and redistributive approaches to equality. The remaining articles provide guidance on state obligation in specific areas such as employment, education, health, marriage and family life, nationality, participation in decision-making etc.; and establish a reporting and monitoring mechanism to assess progress made by State Parties in fulfilling their obligations. In 2009 CEDAW adopted General Recommendation 26 addressing multiple discrimination experienced by women migrant workers based on race, nationality, class and gender.<sup>41</sup> It identifies specific categories of WMWs within its scope as: women who migrate independently; who follow their spouses or family members to receiving countries; and undocumented WMWs. State obligations of protecting and promoting human rights of WMWs are extended throughout the entire migration cycle, including in countries of origin, countries of transit, and countries of destination. It further acknowledges discrimination experienced through interactions with various actors and specific sex and gender-based human rights challenges experienced both before departure and after their return. Specifically, it emphasises formulation of gender-responsive migration policies through active participation of WMWs; the need for multi-lateral, bi-lateral and regional cooperation among states; collection of disaggregated data to inform policy approaches; lifting of sex-specific restrictions on migration in countries of origin; supervision of recruitment agencies; and specific rights in countries of destination including access to legal remedies, family-reunification and services as well as freedom of movement.

Despite its detailed approach, a key shortcoming of GR 26 is in its characterisation of WMWs as:

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<sup>41</sup> UN CEDAW, General recommendation No. 26 on women migrant workers (5 December 2008) UN Doc. CEDAW/C/2009/WP.1/R



...migrant women who, as workers, are in low-paid jobs, may be at high risk of abuse and discrimination and who may never acquire eligibility for permanent stay or citizenship, unlike professional migrant workers in the country of employment.<sup>42</sup>

Combined with its subsequent failure to address definitional disparities in ‘migrant women workers’ and skills-classification between countries, completely undermines the role they play in entrenching discrimination and preventing full recognition of human capital in recruitments as professional migrant workers. It also fails to recognise that in certain countries, a migrant woman’s status as potential permanent resident is essential for gaining very basic access to labour markets, which may still only offer low paid jobs due to gender and racial discrimination. Lastly, it fails to identify or address specific nature of violations perpetrated by recruitment agents, and business entities as institutional employers.

As opposed to CEDAW, the ICRMW’s key contributions are in defining ‘migrant worker’ based on past, present, future remunerative activity in a country of which he is not a national, and inclusion of ‘members of their family’ in outlining access and enjoyment of rights in the host country. It defines non-discrimination in the context of migration through identification of a near exhaustive range of intersecting identities. Consolidating standards from CEDAW as well as standards from the ILO, it guarantees a range of rights to all migrant workers including irregular migrants such as: minimum standards in work conditions; right to fair treatment under law specifically in arrest, detention, expulsion; freedom of association and speech; equal access to national courts; right to cultural identity; social security etc. Additional rights are acknowledged for regular migrants including the right of family members to engage in remunerative service, however distinctions are made based on access to residence authorisation. Those with residence authorisation are free to choose their work, while those without are to be prioritised by the host state in grant of permission to work. Significantly, Articles 25 and 70 offer rely on “treatment not less favourable” as a standard for remuneration and working and living conditions of migrant workers and their families.

Despite its detailed coverage, ICRMW subjects several rights and obligations to other bilateral and multi-lateral treaties and has further failed to attract ratification beyond 55 countries.

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<sup>42</sup> UN CEDAW, General recommendation No. 26 on women migrant workers (5 December 2008) UN Doc. CEDAW/C/2009/WP.1/R

## 1.2 ILO and its tripartite framework

Since 1919 the International Labour Organisation has remained the primary body on labour regulation through its goal of achieving social justice through labour markets,<sup>43</sup> recognition of freedom of expression and of association as essential for sustaining progress,<sup>44</sup> and conceptualisation of “decent work” as basic rights in a decent society irrespective of legislative action.<sup>45</sup> As a tripartite UN Agency consisting of governments, worker and employer representatives, it allows multiple avenues for advocating State compliance, including but not limited to a periodic reporting mechanism similar to that of UN treaty bodies.<sup>46</sup>

Some of its conventions and recommendations on international trade in services and labour recruitment predates GATS to as far back as 1949,<sup>47</sup> having deliberated and adopted state obligations for protecting rights and interests of migrant workers and their families in a piecemeal manner. These also address specific needs of migrant workers, conditions and contexts of migration for employment which in effect could mitigate, and even prevent vulnerability to forced labour. ILO Convention No. 97 requires Member States, among other obligations, to take appropriate measures to facilitate departure, journey and reception of migrants for employment; to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals on remuneration and work conditions, benefits of collective bargaining, accommodation, social security, employment taxes and rules for legal proceedings.<sup>48</sup> Similarly, ILO Convention No. 143, building on Convention No. 97 requires Member States to respect the basic human rights of all migrant workers; extend specific protections against loss of residence or work permit due to loss of employment etc.<sup>49</sup>

The ILO treaties however, fall short of their relevance in the current context of globalised markets in two key areas:

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<sup>43</sup> ILO, ILO Constitution, <  
[https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO)> accessed 5 May 2020

<sup>44</sup> ILO, Declaration Concerning the Aims and Purposes of International Labour Organisation, 1944

<sup>45</sup> ILO, Declaration on Fundamental Principles and Rights at Work and its Follow-up, 2010

<sup>46</sup> ILO, ILO Constitution, <  
[https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO)> accessed 5 May 2020, Art. 22

<sup>47</sup> ILO Convention No. 097, Migration for Employment Convention (Revised), 1949; ILO Convention No. 143, Migrant Workers (Supplementary Provisions) Convention, 1975; Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955

<sup>48</sup> ILO Convention No.97 on Migration for Employment Convention (Revised), 1949, Arts. 3 & 6

<sup>49</sup> ILO Convention No. 143, Migrant Workers (Supplementary Provisions) Convention, 1975, Arts. 1 & 8

- Non-holistic definitions of labour migration – While the Conventions do not adequately describe or define labour migration beyond providing a few exceptions,<sup>50</sup> Convention No. 143 goes to the extent of excluding temporary/ short-term workers from its ambit.<sup>51</sup>
- Limitations in applicability - The ILO Conventions limit their own application by preferential territorial jurisdiction of Member States.<sup>52</sup> Convention No. 97 additionally limits specific obligations to federal jurisdiction of Member States, excluding legislative, executive and judicial powers exercised by constituent states from its ambit.<sup>53</sup>

Beyond treaty norms, the ILO Multilateral Framework on Labour Migration, is a non-binding set of principles and guidelines for voluntary reference by the states. It compiles all ILO standards impacting labour migration, laying significant emphasis on the disproportionate discrimination experienced by women in all stages of migration.<sup>54</sup>

Although not an exhaustive overview of ILO's framework, the above in conjunction with scholarly attempts such as those by S.J. Rombouts, providing an exhaustive explanation of ILO's scope and shortcomings, is being relied on for deducing the framework's reliability in relation to gender dimensions of international labour recruitment.<sup>55</sup>

### ***1.3 International Economic and Trade Law***

The WTO framework on General Agreement on Trade in Services was introduced in clear acknowledgement of the need for internationally recognised rules to match the rapid proliferation of international supply chains, with its Preamble stating:

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.<sup>56</sup>

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<sup>50</sup> Supra n.47, Art.11

<sup>51</sup> Supra n.48, Art. 11

<sup>52</sup> Supra n.47, Art. 15

<sup>53</sup> Id. Art. 6

<sup>54</sup> ILO International Migration Programme, "ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration", (2006) Geneva

<sup>55</sup> S.J. Rombouts, "International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights under Public, Private, Binding and Voluntary Regulatory Regimes", (2019) 50 (3) Columbia Human Rights Law Review 78

<sup>56</sup> General Agreement on Trade in Services, April 15, 1994, WTO Agreement

Through the three main pillars of contribution to trade in services it promotes transparency and predictability of rules and regulations, a common framework of disciplines governing international transactions, and promoting progressive liberalisation. In stark contrast with jurisdictional restrictions on application of the ILO Conventions and the international human rights framework, GATS is stipulated to apply to all measures taken by Member States in terms of trade in services irrespective of the level of government or exercise of delegated powers by non-governmental bodies.

The main contentions in WTO's framework lie in its adoption and translation of "non-discrimination" into concrete obligations of "most-favoured-nations treatment" (MFN) and "national treatment" (NT). MFN and NT are subsequently referenced in GATS. Non-discrimination as a principle of international human rights law, has evolved through concepts of substantive equality and obligations of affirmative action, and addresses actions by state as well as non-state actors in both its direct and indirect form. Emerging jurisprudence from WTO however indicate that non-discrimination remains limited in its interpretation to signify equal treatment for "similarly situated", and without clarity on standard of assessment for similarity or likeness. The relegation of the definition of non-discrimination to minimalist formal equality is a significant regression from established principles of international law which could potentially classify trade relationships between Member States and valuation of their human capital as right-holders based on their development status.<sup>57</sup> This is not to mention that NT obligations under GATS has even the basic effect only if WTO members have explicitly agreed to granting national treatment to specific sectors of services. Therefore a Member State may restrain commitment on national treatment to protect domestic industries or achieve domestic policy objectives.

Notably, the WTO regime severely lacks in uniform acknowledgement of labour standards, a problem that has been traced back to the WTO Ministerial Conferences of 1996 and 1999 where developing countries such as Brazil, India, and Malaysia opposed attempts at including labour standards within its ambit.<sup>58</sup> Labour standards are therefore presently subjects of bi-lateral agreements, free trade agreements or preferential trade agreements which may or may not

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<sup>57</sup> Qin, Julia Ya, "Defining Non Discrimination under the Law of the World Trade Organisation." (2005) 23 (2) Boston University International Law Journal

<sup>58</sup> Anuradha R.V. and Nimisha Singh Dutta, 'Trade and Labour under the WTO and FTAs', Centre for WTO Studies <<http://wtocentre.iift.ac.in/Papers/Trade%20Labour%20Study.pdf>>

include general commitments for adherence to ILO standards, or labour laws under their own countries.

In 2017, the WTO Ministerial Meeting in Buenos Aires adopted a Declaration on Trade and Women's Economic Empowerment.<sup>59</sup> Despite being the first discussion of its kind, and especially holding references to CEDAW, the content of the Declaration itself was much criticised for lacking in reference to feminisation of labour in informal sectors, the negative impacts of existing trade and economic policies and regime, the lack of women's presence or representation in WTO mechanisms, and in general for imposing a gender-neutral lens to trade.<sup>60</sup>

#### ***1.4 Regulatory frameworks influencing labour exporting and importing countries***

It is evident that international labour migration has received its fair share of attention in international policy debates, including to a lesser extent questions of protecting rights of migrant women workers. However, such concerns or standards outlined by international conventions and mechanism fail to translate into opportune action for several reasons beyond the normative shortcomings.

##### ***1.4.1 Influence of obligations undertaken vis-à-vis international instruments***

In 2018, in its vocal objection to UNGCM, USA had categorically pointed out the fact that international instruments and standards referred in the document lacked uniform recognition or ratification by many States creating a “*false sense of implicit international support and recognition for such documents*”.<sup>61</sup> Given the over-dependence of international human rights frameworks on state co-operation and state sovereignty, this observation holds more weight than what most discussions on guidelines and inter-national cooperation are willing to admit. As can be seen from the table below, there is only one international convention that all four states have ratified.

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<sup>59</sup> WTO, “Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017”

<[https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf)> accessed 1 June 2020

<sup>60</sup> Balakrishnan Rajagopal, “Women and Trade at the WTO; Pink Herring, Trojan Horse or Historic Advance”? (2018) Centre for International Governance Innovation <<https://www.cigionline.org/articles/women-and-trade-wto-pink-herring-trojan-horse-or-historic-advance>> accessed 1 June 2020

<sup>61</sup> Supra n.36

**Table 1: Compiled Ratification Status of International Instruments by Country**

International Instrument	Philippines	Singapore	India	USA
CEDAW	✓	✓	✓	-
ICRMW	✓	-	-	-
ICCPR	✓	-	✓	✓
ICESCR	✓	-	✓	-
ICERD	✓	✓	✓	✓
CAT	✓	-	-	✓
Slavery Convention 1926 & and the Supplementary Convention on the Abolition of Slavery 1953	✓	-	-	-
ILO Conventions				
<i>No. 97 Migration for Employment Convention (Revised)</i>	-	-	-	-
<i>No. 143 Migrant Workers (Supplementary Provisions) Convention</i>	✓	-	-	-
<i>No. 87 Freedom of Association and Protection of the Right to Organize Convention</i>	✓	-	-	-
<i>No. 98 Right to Organize and Collective Bargaining Convention</i>	✓	✓	-	-
<i>No. 100 Equal Remuneration Convention</i>	✓	✓	✓	-
<i>No. 29 The Convention on Forced Labour</i>	✓	✓	✓	-
<i>No. 105 Abolition of Forced Labour Convention</i>	✓	-	✓	✓
<i>No. 111 Discrimination (Employment and Occupation) Convention</i>	✓	-	✓	-

(Sources: ILO &amp; UN Treaty Body Database)

Even then, differences in practices and norms between the states could depend on the particular way in which these countries transmit obligations into domestic legal frameworks and the political will of each government in creating transparency around their implementation.<sup>62</sup>

#### **1.4.2 Bilateral agreements and regional co-operation**

ILO notes that while Philippines is the labour-exporting country with the most bilateral agreements, it does not have any formal agreement with countries that are its principle corresponding labour importing countries such as Saudi Arabia, Singapore and Japan.<sup>63</sup> Labour recruitment between Philippines and Singapore is therefore conducted entirely on a need basis and monitored directly by the corresponding regulatory authorities in both countries. The two

<sup>62</sup> Supra n. 53

<sup>63</sup> ILO, "Bilateral Agreements and Regional Cooperation", < [https://www.ilo.org/asia/areas/labour-migration/WCMS\\_226300/lang--en/index.htm](https://www.ilo.org/asia/areas/labour-migration/WCMS_226300/lang--en/index.htm) > accessed 1 June 2020

countries are however, participants of the ASEAN Forum on Migrant Labour (AFML), which as part of the ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) Work Plan brings together tripartite body of stakeholders annually. The Work Plan includes four thematic areas on governing labour mobility, social protection of migrant workers, protection and promotion of the rights of migrant workers, and trafficking in persons.<sup>64</sup> Thematic recommendations from AFML often cover a range of emerging issues related to labour management, however more often than not they lack in specifications for allocation of responsibilities on states based on their export or import status.<sup>65</sup>

India and USA on the other end of the spectrum lacked any formal commitment or agreement relating to labour export/ import.

### ***1.4.3 National framework and regulatory bodies: Philippines - Singapore***

The presence of labour brokers in international labour recruitment is an emerging global phenomenon. It's origins however lie in labour migration reforms undertaken by the Philippines government as a response to the prosecution and hanging of Filipina domestic worker, Flor Contemplacion in Singapore in 1995 and the emerging gendered crisis in migration of Filipino workers. The government's eventual "labour management" scheme was in recognition of the synonymous connection between the WMWs from Philippines and its image as the nation state.<sup>66</sup>

Presently, Philippines manages international labour export through two agencies of the Department of Labour and Employment, i.e. the Philippines Overseas Employment Administration and the Overseas Workers Welfare Administration. The POEA is vested with regulatory powers; the role of marketing and negotiating job prospects with labour importing countries; regulating labour recruitment including registration of labour recruiters; provides pre-departure and intermittent skill-building trainings to workers; aims to provide socio-legal support in host countries; and even operates a system of compelling the migrant workers to

<sup>64</sup> "The ASEAN Forum on Migrant Labour: Background Information Booklet", 4<sup>th</sup> Edition (2019)

<[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms\\_733912.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_733912.pdf)> accessed 25 May 2020

<sup>65</sup> See for example: "12<sup>th</sup> ASEAN Forum on Migrant Labour, Recommendations", (25 - 26 September 2019), Bangkok, Thailand <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms\\_722162.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_722162.pdf)> accessed 25 May 2020

<sup>66</sup> Robyn Rodriguez, 'Domestic Insecurities: Female Migration from the Philippines, Development and National Subject-Status' (2005) Working paper 114, The Centre for Comparative Immigration Studies, University of California, San Diego

remit money back to Philippines. The OWWA largely looks after welfare of workers, including administration of mandatory welfare fund allocated under government budget ear-marked for the agency. It is also in charge of re-integration programmes for Filipino workers who return to the country. An additional unit, Philippine Overseas Labor Office (POLO) within the Philippines Embassy in Singapore, is vested with accepting and processing requests for direct-hiring in exceptional cases.

The regulatory framework for recruitment of Filipino workers include the Migrant Workers and Overseas Filipinos Act of 1995 (RA 8042) as amended by the Republic Act No. 10022 which among others monitors deployment to countries that have been approved as safe and able to protect the rights of Filipino workers. It additionally requires recruitment agencies or employers to provide Filipino workers with mandatory insurance as coverage for accidental death or disability. Other laws and regulations on minimum labour standards include the Labor Code of the Philippines; Department of Labor and Employment (DOLE) Administrative Order No. 196 Series of 2018; and the Revised Philippine Overseas Employment Administration (POEA) Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Filipino Workers of 2016 which prohibits levying exorbitant placement fees and contract substitution.

This model of labour management however leaves the Filipino migrant worker with no or little control over what country they are sent to or what work they are allocated. Approval of countries as safe destinations for Filipino workers is still dependent on political and diplomatic sensitivities and may not be reflective of workers' real experiences. It is also noted that despite the POEA providing regular skill-building trainings to all migrant workers, skills-classification in employment and the resultant socio-economic as well as political status of a migrant worker is still dependent on sectoral needs, and visa norms of labour importing countries such as Singapore.

Singapore as the receiving country, imports labour through 3 main categories: Employment Pass issued to foreign expatriates, skilled professionals and executives; S Pass for semi-skilled/mid-level employees; and Work Permits for unskilled workers. The Singapore government revises the quota for each visa category from time to time depending on policy goals, need and surplus of labour in specific sectors.<sup>67</sup> Foreign workers hired in any of the three categories are

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<sup>67</sup> ASEAN Briefing, <<https://www.aseanbriefing.com/news/singapores-ministry-manpower-revises-rules-hiring-foreign-employees/>> accessed 5 May 2020



entitled to a minimum salary standard, hours of work, leave under the Employment of Foreign Manpower Act (EFMA) which also provides for monitoring offences. However, those recruited as domestic workers or nurses under Work Permits are excluded protection under the law and their terms and conditions of service are exclusive to individual work contracts<sup>68</sup>. As will be demonstrated in Chapter 2, this exclusion is not only a blatant discrimination of women workers as opposed to their male counterparts under the same visa category, but it has drastic impacts on the life and security of domestic workers and nurses.

Singapore also regulates conduct of employers and migrant workers through the Employment of Foreign Manpower (Work Passes) Regulations 2012. A stark contention in the regulation is the restriction against all categories of foreign workers from marrying a Singaporean national or a Permanent Resident without prior approval from Controller of Work (Ministry of Manpower), even if the marriage is solemnised outside of Singapore or after the cancellation, expiration or revocation of Work Permit.<sup>69</sup> Although a blatant violation of Article 16 of CEDAW by Singapore, GR 26 by essentialising vulnerability of migrant workers, on the basis of their negligent possibilities of gaining citizenship or rights to permanent stay, fails to recognise the precise role of state in perpetuating discrimination and entrenching vulnerabilities.

#### ***1.4.4 National framework and regulatory bodies: India - USA***

Emigration from India for work is currently overseen by the Ministry of External Affairs, through a specified office of the Protector General of Emigrants, under a fairly elementary regulatory instrument, The Emigration Act 1983. The PGE is further sub-divided into 10 field offices named Protectors of Emigrants. The Act was a consequence of a Supreme Court judgement<sup>70</sup> noting the need for a systematised and regulated emigration system in India. It introduced a recruitment licencing regime which included granting, suspension, revocation and cancellation of registration certificates to recruitment agencies; granting permits to foreign employers and project exporters; entertaining complaints from emigrants regarding treatment at any point in the recruitment process and journey to the destination country. It also brought into force a bifurcated system of emigration clearance for citizens through issuance of passports

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<sup>68</sup> Ministry of Manpower, Singapore < <https://www.mom.gov.sg/employment-practices/employment-act/who-is-covered>> accessed 5 May 2020

<sup>69</sup> Ministry of Manpower, Singapore, 'Employment of Foreign Manpower (Work Passes) Regulations 2012' < <https://www.mom.gov.sg/-/media/mom/documents/services-forms/passes/wpsspassconditions.pdf>> accessed 3 May 2020

<sup>70</sup> *Erach Sam Kanga etc. vs. Union of India & Anr.* (WP No.2632 of 1978 decided on 20.3.1979)

as Emigration Clearance Required (ECR) and Emigration Clearance Not Required (ECNR), based on educational status. ECRs are those without secondary education qualifications, requiring them to seek emigration clearance from the POE prior to recruitment in a list of 17 countries in the Gulf and in South-east Asia which are primarily destinations for low-skilled workers. While this distinction is unnecessary for recruitment in rest of the countries around the world including USA, the following chapter will indicate how together with the PGE's powers to prohibit and restrict emigration of any category or class of citizens, it works to deny women employment opportunities.

The Emigration Act, in Chapter IV enumerates terms and conditions for recruitment by employers. It allows foreign employers to recruit either directly through the Government or its appointed representatives (who may not be a citizen of India),<sup>71</sup> or through a registered and certified recruitment agent. It further allows recruitment agents to charge a service fee from prospective emigrants, on the basis of fixed prescribed amounts, as well as seek an indemnity bond as and when the POE deems necessary. A category may be identified as 'Project Exporters' to deploy workers for temporary periods in foreign countries directly through issuance of permits by the Government, based on individual work contracts that are enforceable under the labour laws of the country of employment.<sup>72</sup> The role and extent of powers exercised by the recruitment agencies and project exporters as non-state actors will be discussed in the next chapter, however for the purposes of charting recruitment channels between India and USA, it is important to note that the vague and wide roles and powers on recruitment under the law are the bedrock of exploitation of immigrant workers in USA creating unpredictability in accountability and insecurity among Indian immigrant workers, and has heightened impact on immigrant women.<sup>73</sup>

Corresponding framework in the USA consists of multiple individual yet intersecting agencies including the Department of Homeland Security (DHS), Department of Labour (DOL), Department of Justice (DOJ), State Department. The overarching law relating to all requirements for employment visas is Immigration and Nationality Act (INA). The Immigration Reform and Control Act of 1986 (IRCA) in connection with INA outlines

<sup>71</sup> The Emigration Act 1983, Comments to Sec.15 < <https://emigrate.gov.in/ext/static/emig-act.pdf>> accessed 2 May 2020

<sup>72</sup> Ministry of External Affairs, 'Guidelines for Deployment of Workers by Pes' < [https://mea.gov.in/Images/attach/12\\_Project\\_Exporter.pdf](https://mea.gov.in/Images/attach/12_Project_Exporter.pdf)> accessed 2 May 2020

<sup>73</sup> Robin L. Savinar, 'Job hopping and hunkering down: How H-1B migrant workers survive the US labour market' (2019) *Journal of Ethnic and Migration Studies*

restrictions on employment of undocumented workers.<sup>74</sup> The DHS and DOL are primary agencies for scrutinising labour contracts and approving them for visa applications. The U.S. Citizens and Immigration Services, a part of DHS issues atleast 20 categories of temporary work visas, a combination of high-skilled and low-skilled categories opted by Indians including H-1B visas for employment in IT sector, H-2B for un-skilled non-agricultural work, L-1 A & B for intra-company transferees; 5 categories of permanent work visas; 3 categories of student and exchange visitors' visas such as F-1 category used by Indian students to seek temporary traineeship; and finally, visas for temporary visitors for business.<sup>75</sup> In addition to the above the USCIS allows migration under family-reunification clauses, for spouses and family members of L-1 category and H-1B category visa holders to immigrate under H-4 and L-2 visas.

A separate system operated by the USCIS, termed "Employment Authorisation Document" allows H4 visa holders to seek employment in the USA provided their H-1B visa holding partners are in advanced stages of green card application. Beyond holding a distant job opportunity, the EAD being merely a departmental mechanism, is under continuous threat of being discontinued creating job uncertainties and economic challenges for women.<sup>76</sup>

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<sup>74</sup> Kati L. Griffith, U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law (2009) Cornell University ILR School < <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2040&context=articles>> accessed 20 May 2020

<sup>75</sup> U.S. Immigration and Citizenship Services < <https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers>> accessed 30 April 2020

<sup>76</sup> Shreya Mishra, 'H4 Visa Shift: Constant Threat Of Losing The Right To Work In U.S.' (29 July 2018) <<https://www.bloombergquint.com/global-economics/h4-visa-shift-constant-threat-of-losing-the-right-to-work-in-us>>accessed 20 May 2020

## 2 Chapter II:

### Home to Host Countries: Migrant Realities of Filipino and Indian Women.

Taking into consideration the multi-tiered and multi-policy framework discussed in Chapter 1, this chapter will discuss their de facto influence over international labour recruitment, and the resultant impact on women and their exercise of rights.

Past patterns of emigration from India and Philippines included permanent migration, student migration, marriage migration, as well as in some cases irregular migration. In more recent years, due to changes in global economy and increasing concerns of migrant receiving states against influx of migrants and burdens of integration, temporary contract migration has emerged as the preferred mode of trade in labour, hinged on dual interests of migration control and economic development. This largely explains the emergence of India and Philippines as two of the top labour sending countries in the world in recent years, having capitalised GATS Mode 4 channels to create niche markets for commodification of labour.<sup>77</sup>

In 2017, UN Women estimated an annual average of 172,000 Filipino WMWs as being deployed overseas in the past two decades.<sup>78</sup> Two years later, the Philippine Statistics Authority, stated an estimated 2.2 million Filipino migrant workers to have been employed overseas within April – September 2019. Of these 2.2 million, 96.8% were contract workers and 56% were women.<sup>79</sup> Since Singapore does not publish disaggregated labour data based on country or sex/gender these figures cannot be confirmed via stock data. Nevertheless, it is widely known that Singapore hosts the highest proportion of foreign workers in Asia,<sup>80</sup> with foreign workforce numbers estimated at 1427,500 in 2019.<sup>81</sup>

Similarly, the total population of Indians living overseas has increased exponentially during the past few decades, and is estimated at 32,100,340 by 2020.<sup>82</sup> The MEA's estimation of 13%

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<sup>77</sup> Supra n. 32

<sup>78</sup> UN Women, 'Filipino Women Migrant Workers Factsheet' (2016)

<sup>79</sup> 'Philippine Statistics Authority | Republic of the Philippines' <<https://psa.gov.ph/statistics/survey/labor-and-employment/survey-overseas-filipinos>> accessed 4 June 2020.

<sup>80</sup> Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Glasshouse Book 2008)

<sup>81</sup> Ministry of Manpower, Singapore, 'Foreign Workforce Numbers' <<https://www.mom.gov.sg/documents-and-publications/foreign-workforce-numbers>> accessed 5 June 2020.

<sup>82</sup> Ministry of External Affairs, 'Population of Overseas Indians' <[http://mea.gov.in/images/attach/NRIs-and-PIOs\\_1.pdf](http://mea.gov.in/images/attach/NRIs-and-PIOs_1.pdf)> accessed 5 June 2020. Includes category of Persons of Indian Origin (non-citizens).

total population of overseas Indians living in USA,<sup>83</sup> translates into them being third largest of all immigrant population in the USA.<sup>84</sup> Latest trends depict higher education and temporary employment as preferred options of entry in USA by Indians.<sup>85</sup> In 2016, Indians were granted 70% of H-1B visas and 84 % of H4 visas.<sup>86</sup> Gender discrepancies in recruitment can be noted in H-1B visa petitions received by the U.S. Citizen and Immigration Services in 2018, which show only 20.4% petitions by Indian women as opposed to 79.2% by Indian men.<sup>87</sup> The gender imbalance in the Indian immigrant population is seen even in F-1 visas for students.<sup>88</sup>

In the case of both Philippines and India, labour statistics and policies exclude international marriage migrants or women who migrate under family reunification policies. However, as argued by scholars, economic migration and marriage migration are inter-related fields that present a more complex context within which women negotiate labour markets.<sup>89</sup> E.g., Filipino women economic migrants have been known to marry local men in Singapore for purposes of securing long-term stay options with guaranteed employment opportunities. For Indian women as demonstrated by M.B Radhika, marriage to an NRI is the accepted and preferential mode for socio-economic mobility.<sup>90</sup> It results in educated and highly qualified employable young women submitting themselves to economic dependency combined with reinforced domestic gender-stereotypes.<sup>91</sup> The perils of migrating as H4 visa holders have only recently gained publicity with women narrating their experiences of isolation, economic abuse, resultant mental health challenges and an official increase in reported incidents of domestic violence. This propelled the Indian government to formally address the issue of inter-relation between marriage migration and economic migration by issuing a guidance booklet titled “Marriages to Overseas Indians”, which acknowledges issues of restrictive visa regimes in host countries,

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<sup>83</sup> *ibid.*

<sup>84</sup> Neil G. Ruiz, “Indian Migration to the US” (2018) Pew Research Centre <<https://www.brookings.edu/wp-content/uploads/2018/01/indian-migration-to-the-us.pdf>> accessed 5 June 2020

<sup>85</sup> Migration Policy Institute & RAD Diaspora Profile, The Indian Diaspora in the United States (July 2014) <<file:///C:/Users/DELL/Downloads/RAD-IndiaII-FINAL.pdf>> accessed 12 May 2020

<sup>86</sup> Divya Ravindranath, “Visa regulations and labour market restrictions: implications for Indian immigrant women in the United States” (2017) 60 Ind. J Labour Econ, 217 - 232

<sup>87</sup> U.S. Immigration and Citizenship Services, “H-1b Petitions by Gender and Country of Birth Fiscal Year 2018” <<https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-petitions-by-gender-country-of-birth-fy2018.pdf>> accessed 5 May 2020

<sup>88</sup> US Immigration and Customs Enforcement, “Student and Exchange Visitor Program (SEVP) 2018, SEVIS by the Numbers Report” <<https://www.ice.gov/doclib/sevis/pdf/sevisByTheNumbers2018.pdf>> accessed 5 June 2020

<sup>89</sup> *Supra* n.30

<sup>90</sup> M.B Radhika, *Visa Wives: Emigration Experiences of Indian Women in the US* (Ebury Press 2016)

<sup>91</sup> *Supra* n.85

uncertain employment conditions, and probable mental health issues among migrant women.<sup>92</sup> It also set up an NRI Cell under the National Commission of Women to provide support services for women who report abuse.<sup>93</sup> However, neither attempt to rectify vulnerabilities arising out of economic dependence nor have they attempted to influence labour brokerage discussions between India and USA to gain better protections of rights.

While it is not the intention of this chapter to claim that exploitation in international labour recruitment is essentially an outcome of GATS Mode 4 negotiations, it is certainly true that neoliberal policies have exacerbated exploitation and labour insecurities on the pretext of “development” and “remittances”. The comparative experiences of women migrants from Philippines and India are precisely demonstrative of the prominent and common impacts of trade liberalisation including, valorisation of submission to unequal treatment at the expense of their lives and security. Economic well-being of their country and community of origin are placed as paramount. Most importantly if remittances are considered to signify successes and justify trade liberalisation, any scrutiny of the impact of trade liberalisation must include the spectrum of experiences of those who contribute to such remittances irrespective of their mode of migration.

## ***2.1 Sex-role stereotyping and gender discrimination as cross-cutting markers in labour markets of home and host countries.***

The increase in south-north economic migration through temporary work permits was preceded by “feminisation of labour” in domestic labour markets in Asia between 1980s -1990s.<sup>94</sup> The term however, is more in reference to women’s dominant presence as wage workers in specific sectors that were organised around export-oriented manufacturing industries, than being indicative of relative increase of women’s participation in the labour market.<sup>95</sup> Demand and continuity in employment was however conditional on women’s acceptance of inferior conditions of work and pay such as lower wages, longer hours, hazardous factory conditions and most importantly lack of permanent contracts. The latter specifically rendered women more disposable with changing market dynamics, a phenomenon that Filipino women experienced

<sup>92</sup> Ministry of External Affairs, Govt. of India, “Marriage to Overseas Indians: A Guidance Booklet” <<https://mea.gov.in/images/pdf/marriages-to-overseas-indians-booklet.pdf>> accessed 3 June 2020

<sup>93</sup> ‘NRI Cell | National Commission for Women’ <<http://ncw.nic.in/ncw-cells/nri-cell>> accessed 4 June 2020.

<sup>94</sup> Supra n.77

<sup>95</sup> Jayati Ghosh, ‘Globalization, Export-Oriented Employment for Women and Social Policy: A Case Study of India’ (2002) 30 Social Scientist 17

during recession in mid-1997,<sup>96</sup> serving as a push factor for Filipino women to migrate overseas for work.<sup>97</sup> An additional factor was domestic sex-role stereotyping and over-burdening with care work.<sup>98</sup> Feminisation of labour for Filipino women becomes, a vicious cycle of abuse when foreign employment opportunities places them in gender-specific low-skilled care work sectors in countries like Singapore. According to POEA, till 2017 Singapore was the third highest recipient of migrant labour from Philippines, majority being recruited as contract labour under short-term work permits of 1 – 2 yrs.<sup>99</sup> Last gender and occupation disaggregated data produced by POEA in 2010, depicts export of labour to Singapore as both sector and gender specific with highest overall recruitments as well as female presence being in domestic work and nursing.<sup>100</sup> As Huang & Yeoh demonstrate, treatment of male and female workers under the same category of work passes irrespective of the size of the category is vastly different.<sup>101</sup>

On the other end of the spectrum, women's migration from India is subject to both formal restrictions by the state and informal social restrictions rendering a poorly valued and under-paid domestic labour force,<sup>102</sup> to become further invisible in international labour markets. Peculiarly, women outnumber men as internal marriage migrants and contribute to the overall household income through unpaid assistance to men's work or employment in low-paid unorganised home-based labour sectors. Yet, their mobility for work as single women is regulated both by social expectations of primary caregiving at home, as well as state-imposed skills classification.<sup>103</sup> In 2007, the Government of India issued a set of policy measures for the protection and welfare of women in ECR categories, disallowing recruitment of those below 30 yrs irrespective of nature of employment; imposed minimum wage requirement of US \$400 per month; required pre-paid mobile facility for every household worker. Beyond this it requires employers directly recruiting any Indian woman irrespective of ECR/ ECNR to furnish security deposit of US \$2500 in the form of bank guarantee with Indian Missions abroad; mandatory undertaking by insurance companies against cancellation of insurance policies

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<sup>96</sup> Ibid.

<sup>97</sup> Supra n.77

<sup>98</sup> Supra n.30

<sup>99</sup> POEA, '2016-2017 Deployment by country' < <http://www.poea.gov.ph/ofwstat/compendium/2016-2017%20deployment%20by%20country.pdf>> accessed 28 May 2020

<sup>100</sup> POEA, '2010 OFW Deployment per country and skill'

<<http://www.poea.gov.ph/ofwstat/percountryperskill/2010.pdf>> accessed 25 April 2020. 2839 Filipino women and 9 men were recruited as domestic workers, while 658 women and 64 men were recruited in nursing.

<sup>101</sup> Shirlena Huang and Brenda S.A. Yeoh, 'The Difference Gender Makes: State Policy and Contract Migrant Workers in Singapore' (2003) 12 (1-2) Asian and Pacific Migration Journal 85

<sup>102</sup> Rahul Menon, 'Never Done, Poorly Paid, and Vanishing: Female Employment and Labour Force Participation in India, (2019) 54 (19) EPW

<sup>103</sup> Supra n.30

without prior permission from the PGE.<sup>104</sup> This policy beyond being overly protectionist towards women curtailed their right to seek employment, particularly since the additional burdens imposed on Recruitment Agencies, resulted in them withdrawing from recruiting women in sectors that are deemed “unskilled” or “semi-skilled” by labour importing countries.<sup>105</sup>

Indian women of educational status and perceived “skills” are exempted from formal migration control by the Indian state. Yet for those who do migrate to USA as either marriage migrants, H4 visa holders, and even primary workers themselves, migration experiences to the USA impose a continuum of socio-economic subjugation. Sex-role stereotyping experienced by H4 visa holders needs to be considered vis-a-vis both their H-1B visa holding partners, as well as domestic labour market in host countries. Human capital in women H-4 visa holders is automatically rendered second place to their male spouses with restrictions on employment in USA irrespective of skills or qualifications. Even in instances where an EAD is approved, due to the dependence of H4 visa holders on the primary work status of H-1B visa, the uncertain work conditions of the latter are doubly manifested in reduction of employment opportunities for the former. The exploitative work conditions experienced by H-1B categories, also perpetually re-thrust H4 visa category holders into unpaid primary domestic caregiving to compensate for their partners in social networks that are deemed essential for their survival.<sup>106</sup>

Skills classification has very little common pattern or logic in the labour importing states. As seen in the cases of Singapore and USA, work in service sectors, blue-collar jobs, construction work are being differently categorised as semi-skilled, skilled or high-skilled.<sup>107</sup> Yet, the classification and treatment of domestic work/ care work with overwhelming presence of women continues to be that of low-skilled and undeserving of recognition or legal protections.<sup>108</sup>

<sup>104</sup> Ministry of External Affairs, Overseas Workers Resource Centre, ‘Policy measures for the protection and welfare of women emigrants’ (01.08.07)

<sup>105</sup> Irudaya Rajan Sebastian Nil, V.J. Varghese and M.S Jayakumar, *Dreaming mobility and buying vulnerability: Overseas recruitment practices in India* (Routledge 2016), 38

<sup>106</sup> Bandana Purkayastha, ‘Skilled migration and cumulative disadvantage: the case of Asian Indian immigrant women in the US’ (2005) 36 *Geoforum* 181-196. See also: Paula Chakravartty, “Symbolic Analysts or Indentured Servants? Indian Hi-tech Migrants in America’s Information Economy”, (2006) 19 *P. Know Techn Pol* 27; Supra n.72

<sup>107</sup> Ministry of Manpower, Singapore, ‘Work Passes and Permits’ < <https://www.mom.gov.sg/passes-and-permits>>; U.S. Immigration and Citizenship Services < <https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers>> accessed 30 April 2020

<sup>108</sup> See for example: Sujani Reddy, *Nursing and Empire: Gendered Labor and Migration from India to the United States* (Chapel Hill University of North Carolina Press 2015); Brenda S.A. Yeoh, Shirlena Huang, Joaquin



## 2.2 *Role of non-state business actors in cross-border recruitment*

The roles of non-state actors as significant stakeholders in labour supply chains have been legally acknowledged in both labour migration channels of Philippines-Singapore and India-USA. They may be present in the form of recruitment agencies, direct foreign employers, or project exporters.

As of 6<sup>th</sup> June 2020, India has an active list of 1448 recruitment agencies that have been certified by the PGE,<sup>109</sup> beyond categories of Foreign Employers and Project Exporters who register directly through the PGE or through RAs. Studies indicate these entities translate into “outsourcing companies” and “bodyshops” are the primary point of entry for H-1B visa workers in the supply chain, determining their eventual contractual terms and treatment at work. These companies may be incorporated in either India or the USA but hold transnational business operations supplying labour to a network of companies in the USA. Bodyshops are famously known as the most exploitative factor in the lives of H-1B visa holders, their treatment often resonating ILO’s definitions of forced labour and debt bondage.<sup>110</sup> Therefore actions of such outsourcing companies and bodyshops by extension translate into overall conditions of insecurity for women who are H4 visa holders, and especially those who hold aspirations of gaining an EAD.

Similar labour supply chains are noted in the recruitment of Filipino domestic workers and nurses in Singapore. E.g., Filipino nurses are recruited by hospitals in Singapore through two main Singaporean firms which in turn have established connections with a network of recruitment agencies in Philippines. They are responsible for verifying clearance of a specific licensure examinations required of foreign nurses, and deciding the skill-level, designation of nurses and their contractual terms.<sup>111</sup> In the case of domestic workers recruitment agents across the borders have often been accused of pursuing recovery of placement fees over and above their primary responsibility of assisting workers and over-seeing their well-being. Agencies are

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Gonzalez III, *Migrant Female Domestic Workers: Debating the Economic, Political and Social Impacts in Singapore* (1999) 33 (1) *International Migration Review* 114 - 136

<sup>109</sup> Ministry of External Affairs, Overseas Employment Division <[https://emigrate.gov.in/ext/openPDF?strFile=RA\\_LIST\\_REPORT.pdf](https://emigrate.gov.in/ext/openPDF?strFile=RA_LIST_REPORT.pdf)> accessed 5 May 2020

<sup>110</sup> Supra n.72; Paula Chakravarty, “Symbolic Analysts or Indentured Servants? Indian Hi-tech Migrants in America’s Information Economy”, (2006) 19 P. Know Techn Pol 27

<sup>111</sup> Seori Choi and Lenore Lyons, “Gender, Citizenship and Women’s “Unskilled” Labour: The Experiences of Filipino Migrant Nurses in Singapore”, (2012) 24 (1) *Canadian Journal of Women and the Law* 1

therefore often known to advise employers to deny workers rest days and to confiscate their passports to prevent mobility.<sup>112</sup>

### ***2.3 Forfeiture of rights as a precondition to transnational recruitment and migration***

Violations of human rights begin from the very point of identification and classification for the labour market. As already mentioned, skills-classification has little or no correlation with educational degrees or skills training when it comes to WMWs, resulting in denial of appropriate recognition of their human capital and potential enjoyment of right to property. Unpaid care work by H4 visa holders which is effectively the channel of social sustenance for H-1B visa holders, remains unrecognised in terms of social or welfare benefits despite concerted discussions at the international level about recognition, reduction and redistribution, of such work, therefore effectively keeping them away from labour market.<sup>113</sup> The cumulative impact is economic dependence, conditions of enhanced vulnerability and power differentials within domestic sphere, often extending to restrictions in mobility and participation in social and cultural life, and more significantly, domestic abuse.<sup>114</sup>

Transnational recruitment is also conducted in the context of starkly different guarantee of work conditions for men and women. For example, Singapore regulate the rights and entitlements of contract workers through the Employment of Foreign Manpower (Work Passes) Act of 2012 (EFMA), which contain Conditions of Work Permit stipulating that employers must accommodate domestic workers in their own residence without further stipulating minimum standards of accommodation. Filipino WMWs therefore are faced with squalid living conditions, infringement of their privacy and potential conditions of enforced slavery.<sup>115</sup> In comparison, male contract workers are accommodated on site, in independent dormitories or shop houses. Due to comparative seclusion and isolation and lack of legal protections, abusive work conditions, physical abuse, food deprivation, sexual abuse and harassment, verbal abuse and threats are reportedly common.<sup>116</sup> Huang and Yeoh's description of Muawanatul

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<sup>112</sup> Universal Periodic Reporting, 'Singapore: A joint submission by members of Solidarity for Migrant Workers for the 11th Session of the Universal Periodic Review, May 2011' <[https://lib.ohchr.org/HRBodies/UPR/Documents/session11/SG/JS4\\_JointSubmission4-eng.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/session11/SG/JS4_JointSubmission4-eng.pdf)> accessed 10 May 2020

<sup>113</sup> ILO, "Care Work and Care Jobs for the Future of Decent Work, <[https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_633166.pdf](https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_633166.pdf)> accessed 5 June 2020

<sup>114</sup> Supra n.85

<sup>115</sup> Supra n.112

<sup>116</sup> Shirlena Huang, Brenda S.A. Yeoh and Joaquin Gonzales III, "Migrant Female Domestic Workers: Debating the Economic, Social and Political Impacts in Singapore" (1999) 33 (1) The International Migration Review 114

Chasanah, an Indonesian maid who was murdered by her employer and eventually discovered as having been a victim of continuous physical abuse and torture is prototypical of work-place conditions for Filipino domestic workers.<sup>117</sup> Domestic workers are required to seek permission from current employer to change employer, allowing employers the power to terminate work contracts immediately, repatriate or deny the worker other opportunities during the pendency of the contract.<sup>118</sup> The latter is an experience that resonates with Filipino nurses as well, where employers often impose contractual restrictions outside the purview of law, limiting their opportunities for seeking permanent residence, and creating conditions for bonded labour.<sup>119</sup> Singapore's Employment of Foreign Manpower (Work Passes) Regulations 2012 forbidding workers from engaging in "immoral and undesirable" activities adds to the vagueness of norms regulating contract workers, in effect leaving them open to be abused specifically against domestic workers and nurses who may resist abuse by employers.

In a marked departure from standards laid down by the ICRMW as well as CEDAW, Filipino WMWs recruited as work permit holders are precluded from bringing their family members to Singapore. Restrictions on marriage and family life extend to pregnancy being a legitimate ground for termination of work and deportation, a policy that then compels WMWs to undergo compulsory pregnancy tests in addition to medical tests undertaken by their male counterparts. This forces many migrant workers to resort to unsafe abortion.<sup>120</sup>

## ***2.4 Challenges in access to justice***

Huang and Yeoh report that women's access to justice is disproportionately curtailed in comparison to MMWs who often bring well-publicised civil suits against their employers to Singaporean courts, WMWs are not known to bring suits for breach of contract.<sup>121</sup> Singapore Govt. has continued to exclude domestic workers as a category from any regulatory oversight with the justification that their nature of work and duties vary from home to home which makes it impractical to lay down common employment conditions, issuing instead information kits for employers seeking humane treatment of domestic workers.<sup>122</sup> As apparent, in Singapore violations of men's labour rights is subject of justice while the same for women is subject of community advocacy.

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<sup>117</sup> Supra n.101

<sup>118</sup> Supra n.112

<sup>119</sup> Supra n.111

<sup>120</sup> Supra n.68

<sup>121</sup> Supra n.101

<sup>122</sup> Supra n.101

In USA, Indian women as H4 category visa holders who experience domestic abuse due to increased dependency have less access to law enforcement and justice mechanisms due to isolation, lack of legal knowledge and support systems.<sup>123</sup> However, women who had succeeded in accessing employment opportunities under EAD, were seen to be more empowered in seeking legal action. For example, in response to a petition challenging EAD by an organisation named Save Jobs USA, a mobilisation of Indian immigrant women under the organisational banner of Immigration Voice submitted an intervention letter to the court and ensured full legal engagement. Their consistent lobbying eventually resulted in President Trump formally announcing his decision to continue the EAD programme irrespective of the adverse order by courts in May 2020.<sup>124</sup>

## ***2.5 Participation in political decision-making: a case for legal recognition of global citizenship***

A crucial fallout of commodification of labour through transnational labour recruitment is the loss of participation in political decision-making resulting from loss of domicile in home country and the lack of citizenship rights in host countries. As labour exporting countries India and Philippines restrict voting rights of migrants in various ways.

Exercise of voting rights in India is through the Representation of the People Act 1950 (RPA), which allow absentee voting rights by postal ballot onto to those employed in essential services such as armed forces or otherwise employed by the Government of India. NRIs are allowed to register themselves as voters with the Election Commission for India, however there are two main barriers to exercising their vote: a) an NRI would first have to submit their application for registration in the electoral role either in person or through post; b) postal ballots are still not allowed for NRIs, requiring them to travel to India and to their specified constituency to vote in each election.<sup>125</sup> Women who migrate as marriage migrants are additionally burdened with procedures that require evidence of change in residential address in India for allocation of constituency prior to registration.

<sup>123</sup> Teuta Peja, “Domestic Violence Among Asian Indian Immigrant Women in the United States”, (2017) Loyola University University Chicago <[https://ecommons.luc.edu/cgi/viewcontent.cgi?article=4698&context=luc\\_theses](https://ecommons.luc.edu/cgi/viewcontent.cgi?article=4698&context=luc_theses)> accessed 25 May 2020

<sup>124</sup> Leslie Dellon, “Government takes surprising position to preserve H-4 work Permits – For Now”, (May 13, 2020) Immigration Impact <https://immigrationimpact.com/2020/05/13/h1b-worker-spouse-h4-lawsuit/#.XuwsBUUzbIU>

<sup>125</sup> ‘Service Voter & Overseas Voter’ (Election Commission of India) <<https://eci.gov.in/voter/service-overseas-voter/>> accessed 4 June 2020.

In contrast, Philippines through the Overseas Absentee Voting Act of 2003 (RA9189) allows overseas citizens to participate in elections through personal voting, postal voting and, specifically in the case of citizens in Singapore through automated voting.<sup>126</sup> However, in order to be eligible to vote one must not have acquired naturalised citizenship of another country, nor should one have been acknowledged as “immigrant” or permanent resident of another country, effectively excluding Filipino marriage migrants in Singapore, whose PR status excludes them from exercising voting rights in Singapore as well. The former category of citizens may be allowed to vote if they fulfil all conditions for re-acquiring Philippine citizenship including one year of residence in the country; while the latter may also be allowed to vote if they file an affidavit expressing their intention to return and resume residence in Philippines no later than 3 yrs from the approval of their application for voter registration. In both the above instances, tedious voter registration procedures and requirements, prevent most migrant workers from participating in elections. Filipino WMWs feel the disproportionate burden of it due to their inability to meet registration costs, or avail of time required for the registration from work.

While complexities with domicile, legal status, and occupational conditions have prompted setting up of local solidarity networks for larger community of immigrants in receiving countries, the Filipino experience in specific presents an exemplary case of emerging women-centric transnational citizenship. Confronted with a combination of gendered nature of social reproductive labour in transnational settings, the resulting exploitation, limited access to legal protections in both host and home countries and multiple barriers to influencing formal political decision-making processes, WMWs are increasingly depending on transnational solidarities for strengthening collective bargaining against home and host states. As alternate cultural and political communities, they operate based on vociferous critique of the Philippine authorities for their collusion with exploitative neoliberal global agendas, and cross-border collective responsibility for fellow workers. Filipino WMWs in Singapore benefited from the strength of transnational mobilisation through Migrante International, an umbrella organisation of Filipino domestic workers’ solidarity groups that successfully lead the protests around Flor Contemplacion’s prosecution and compelled the Philippines government to initiate reforms on labour export that had previously been in demand by WMWs, including ratification of ICRMW and enactment of RA 8042.<sup>127</sup>

<sup>126</sup> Glenda Tibe Bonifacio, *Pinay on the Prairies: Filipino Women and Transnational Identities* (UBC Press 2013).

<sup>127</sup> Robyn Rodriguez, ‘Domestic Insecurities: Female Migration from the Philippines, Development and National Subject-Status’ (2005) Working paper 114, The Centre for Comparative Immigration Studies, University of California, San Diego

The example of Migrante International is particularly significant for three reasons. First, it depicts how migration propels the formation of transnational political communities with unique subjectivities irrespective of legal barriers to universal suffrage and exercise of freedom of expression. Advocacy on behalf of Flor Contemplacion was conducted in the context of Singaporean government having curtailed NGO activities since 1987, thereby limiting support and advocacy for migrant worker rights within the country.<sup>128</sup> Despite some improvements, there are still no known “cause-related” formal associations or unions or associations led by migrant workers in Singapore due to regulations requiring governing bodies of such organisations to include Singaporean citizens as majority, and the Trade Union Act forbidding/restricting foreigners from forming their own unions or participating in protests.<sup>129</sup> Second, it shows the importance of women’s presence in the labour market as primary workers in order to benefit even remotely from political rights in both host and home countries, since government’s draw connections between remittances and the need to protect the image of state in global markets.<sup>130</sup> In comparison, majority of Indian women are known to start their lives in USA with considerably less political power than their male counterparts as H-4 visa holders hence hold less negotiating power.<sup>131</sup> Third and most importantly, it shows the potential value of recognising voices from transnational communities in international policymaking.

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<sup>128</sup> Supra n.101

<sup>129</sup> Supra n.112

<sup>130</sup> Supra n.126

<sup>131</sup> Supra n.105

### 3 Chapter III:

#### **Conclusion - Opportunities in addressing regulatory gaps**

Although it is evident that international labour recruitment lacks a corresponding set of comprehensive binding norms, it would be incorrect to state that no attempts have been made to persuade minimum standards on states. In 2020 the IOM adding to the existing plethora of recommendations and guideline on migrant workers, introduced yet another set of guidelines specifically for international labour recruitment, calling upon states to strengthen recruitment regulation, monitor recruitment costs, develop effective licensing mechanism for RAs based on the IRIS standards, etc. While facially comprehensive, it continues to make references to “compliance with international standards” and “internationally recognised human rights” without identifying them specifically or attempting to bridge its key contentions. Procedurally, by expecting individual states to strengthen domestic accountability frameworks and engage in cross-jurisdictional dialogue for monitoring labour recruiters and RAs, it fails to take into account the public-private nexus that is often operational in recruitment practices seen in both Philippines and India, and fledging at the international level. Changing dynamics in business practices and governance are therefore rendering regulation of the kind offered by IOM entirely collaborative and as value-based self-surveillance systems. Yet, as more human rights abuses occur, the more apparent is the failure of self-regulation by states within the peculiarities of the neoliberal world.

Some of the evident and apparent shortcomings of the existing legal frameworks are, first the inability to address the definitional fluidity and inter-linkages between migration channels and objectives or end results of migration. Seen in both cases of India and Philippines, social and economic mobility is triggered through various other formal channels of temporary contract workers, marriage migration, family re-unification and studentship. To obliterate them from definitions and thereafter statistics under-estimates their potential contribution to global economy and influence in socio-political environment. Second, the inability to address emerging challenges to human rights due to jurisdictional shortcomings and fragmented application of universal values and norms. Third, the under-regulation of non-state actor roles in an economic environment that promotes accumulation of wealth on the false presumption of perfect competition.

Considering the above challenges, it would be prudent to note that developments in other areas of international law have already acknowledged the changing patterns of governance, moving

from a state-centric society to a larger global order. Discussions and debates around the creation of the International Criminal Court during the 1990s have already embodied international regime formation, with the resultant creation of an institution that surpasses the requirement of state consent in investigation of violations and allows individuals to be held directly liable for actions irrespective of state jurisdiction.<sup>132</sup> In this context Cherif Bassiouni argues that international law is essentially an outgrowth of treaties and agreements, that cannot be merely a reflection of existing national standards, but a response to changing circumstances.<sup>133</sup> Bassiouni's arguments in favour of a Convention on Crimes Against Humanity offer the perfect opportunity for the international community to overcome the current impasse in terms of strengthening regulation on migration and upholding universal human rights norms irrespective of the diversity in legal systems and variance in undertakings. This is specifically since his proposition includes, judicial responses to several identified acts that not only find source in existing national and international standards but have been subjects of discussion and some consensus among global actors since several decades. These include "crimes against humanity" as inhumane acts against a group such as enslavement and deportation even without the presence of specific intent; and, other inhumane practices causing injury to body and health which may not be considered as "grave breach" yet demonstrate systemic pattern, etc. Juxtaposed against the significant forms of exploitation witnessed against WMWs, these standards would have addressed issues of forced labour, debt bondage, trafficking and other forms of sexual abuse qualifying as acts that are specific to heightened vulnerabilities of women as migrant workers. Lastly, in instrumentalising these standards through a procedural framework he argues for universal jurisdiction accompanied by non-application of statute of limitations. Bassiouni's arguments would favour supra-national oversight on trade and migration due to the basic fact that trade liberalisation has already taken us to a point of unacknowledged global governance system which is being implemented through proliferating of bi-lateral, regional and multi-lateral instruments and institutions. While not necessarily adhering to the traditional value system of the human rights regime, they do influence economic relations and by extension human relations and patterns of abuse.

Beyond the proposition of supra-national oversight, as Robyn Magalit Rodriguez notes, systems of labour brokerage and the resultant reconfiguration of migrant citizenship is probably

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<sup>132</sup> Eric K. Leonard, *"The Onset of Global Governance: International Relations Theory and the International Criminal Court"*, (Ashgate 2005)

<sup>133</sup> Supra n.33



both necessary for developing states to subsist in international trade markets yet mitigate the job insecurities emerging out of precarious employment conditions.<sup>134</sup> For these purposes and to strengthen existing best practices in labour recruitment, it is proposed that multi-lateral initiatives shift focus from the management aspect of labour recruitment, leaving it as subject of domestic law-making, to creating gender-responsive consensus on key areas such as: common definitions of migrants and migrant workers; common minimum standards on skills classification; common principled standards on equal pay for equal work & equal treatment of migrant workers with domestic workers; and lastly, common minimum standards on immigration requirements such as quality of national documents that impact visa stratification.

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<sup>134</sup> Robyn Magalit Rodriguez, *Migrants for Export: How the Philippines State Brokers Labor to the World* (University of Minnesota Press 2010), 144

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