

# Non-State Actors, Plight of Migrant Workers and Violation of Human Rights : States Responsibility of Due Diligence

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## **Introduction**

Millions of people migrate from one part of India to others for better opportunities. Several research indicate that “migration is in large part related to the broader global economic, social, political and technological transformations” and these issues intern largely affecting the ongoing policy issues.<sup>1</sup> The number of migration has rapidly increases at both the national and international level. It is estimated that among the 272 million people migrating globally, nearly two-third are labour migrants.<sup>2</sup> In terms of the source country, the highest numbers of migrants living abroad are from India and there number can be estimated around 17.5 million.<sup>3</sup> It can be said without any doubt that India is one of the top recipients of international remittance and that it has received USD 78.6 billion in the year 2018.<sup>4</sup>

While the number of International migration is enormous, the number of domestic migration is far more than the international figure. In India, the 2011 census report indicates that the total number of internal

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<sup>1</sup> IOM, “World Migration Report 2020” p. 1 (2020), available at: [https://publications.iom.int/system/files/pdf/wmr\\_2020.pdf](https://publications.iom.int/system/files/pdf/wmr_2020.pdf) (last visited on July 07, 2020).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.*, at 3.

migrants was approximately about 450 million.<sup>5</sup> One of the disturbing facts highlighted by World Migration Report was that India is also one of the top 20 countries having the largest number of domestic migrants.<sup>6</sup> Migrant labourers being vulnerable are more prone to exploitation. There are many studies which show how migrant labourers are subjected to sex trafficking or Labour trafficking.<sup>7</sup> The Constitution of India not only guarantees the right to move freely and settle in any part of the country as a part of the right to freedom<sup>8</sup> but also prohibits trafficking in person as well as forced labour.<sup>9</sup> But facts remain that despite constitutional guarantees peoples are enslaved and exploited day in and day out and migrant labourer being more vulnerable are subjected to most heinous offences. Large numbers of these offences against migrant labourer are being committed by non-state actors.

When non-state actors commit offences they definitely deserve prosecution and punishment. However, the reality remains that only in a small number of cases does the perpetrators gets prosecuted and in a much smaller number of cases do they get conviction. Undoubtedly, whether perpetrators are convicted or not the victim's human rights are always violated. The question which arises here is "Whether in cases where the human rights of the victim are violated that State can be held responsible for the same, due to failure of Due Diligence? This paper tries to explore how the state shall be held responsible for violation of human rights of migrant labourer even in those circumstances when offences are committed by non-state actors.

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<sup>5</sup> Ajay Dandekar & Rahul Ghai, "Migration and Reverse Migration in the age of COVID-19" 33 Economic and Political Weekly 19 (2020).

<sup>6</sup> *Supra* note 1 at Figure 11.

<sup>7</sup> Dr Sarfaraz Ahmed Khan, Transnational Sex-Trafficking: An Integrated Reparation Model (Thompson Reuter, 2019). See also Indrani Mazumdar & Neetha N, "Crossroads and Boundaries: Labour Migration, Trafficking and Gender" 55 Economic and Political Weekly 20 (2020).

<sup>8</sup> The Constitution of India, art 19.

<sup>9</sup> *Id* art. 23.

## **Violation of Human Rights of the Migrant Labourer : Gravity and Challenges**

Even though the process of migration brings positive changes and empower the person migrated but unsafe migration or lack of human rights-based migration may lead to violation of human rights, mainly the emigrant labourer at transit as well as at the destination.<sup>10</sup> Such violations of human rights can include “denial of civil and political rights” as well as “economic, social and cultural rights”.<sup>11</sup> In India during lockdown due to COVID 19, the National Human Rights Commission (NHRC) alone recorded around 2582 cases of “human rights violation in the month of April” indicating “rampant violation of human rights which left millions of migrant labourers in the lurch”.<sup>12</sup> The NHRC had sought “explanation from respective state authorities in most inhumane cases pertaining to starvation and death of migrant workers”.<sup>13</sup> The NHRC further added that “it is disheartening to know the plight of the migrant labourers, particularly women, children, old age people and the pregnant women falling prey to states' apathy”.<sup>14</sup>

In India, we have seen the pain and suffering of migrant workers during the lockdown period. However, in a pre COVID period also many studies has shown how the migrants' labourer is made bonded labour or migrate female being forced into sex trafficking.<sup>15</sup> Websites of

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<sup>10</sup> *Supra* note 1 at 1

<sup>11</sup> *Ibid.*

<sup>12</sup> Neetu Chandra Sharma, How corona virus turned into a humanitarian crisis for migrant workers' LiveMint, available at: <https://www.livemint.com/news/india/how-coronavirus-turned-into-humanitarian-crisis-for-migrant-workers-11590401718622.html> (Last Visited July 17, 2020).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Sidharth Kara, “Bonded Labor: Tackling the System of Slavery in South Asia” (Columbia University Press 2012). Dr Sarfaraz Ahmed Khan, “Transnational Sex-Trafficking: An Integrated Reparation Model” (Thomson Reuters 2019).

NGOs like Bachpan Bachao Andolan, Shakthi Vahini, Apne Aap, Women Worldwide and International Justice Mission are filled with case studies depicting the reality about the migrant labourers mostly how they have been exploited be it in the form of Sex Slavery or Labour Trafficking or otherwise.<sup>16</sup> Undoubtedly, there is ample evidence available to establish that migrant labourers are the worst sufferer and are subjected to human rights violation, by and large in the hands of non-state actors.

### **The Legal Framework to Regulate and Protect the Migrant Labourer**

The Constitution guarantees freedom of movement, right to life and liberty.<sup>17</sup> The right against exploitation is enshrined in our Constitution, i.e. it prohibits sex trafficking in human being, beggar and other similar forms of forced labour'.<sup>18</sup> The law relating to the protection of labour is available even since pre-independence days. At the time, when Constituent Assembly was in action to draft Constitution of India, the Factories Act<sup>19</sup> was used as a benchmark for the regulation of working condition of labour.<sup>20</sup> Minimum Wages Act<sup>21</sup> was enacted to ensure statutory minimum wages for the workers were provided. The Employees State Insurance Act<sup>22</sup> was enacted to provide health benefits including maternity and employment injury benefit to the workers. During the same time the Industrial Dispute Act<sup>23</sup> was enacted to create mechanisms to deal with an industrial dispute.

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<sup>16</sup> See for detail the following websites: <<https://bba.org.in/case-studies/>>; <<https://apneaap.org/>>; <<https://shaktivahini.org/>>; <<https://www.ijmindia.org/>> access 10 July 2020.

<sup>17</sup> The Constitution of India, art 19 and 21

<sup>18</sup> The Constitution of India, art 23

<sup>19</sup>The Factories Act, 1948 (ACT 63 of 1948).

<sup>20</sup> *Supra* note 7 at 1

<sup>21</sup> The Minimum Wages Act, 1948 (ACT NO. 11 OF 1948).

<sup>22</sup> The Employees' State Insurance Act, 1948 (Act No. 34 of 1948).

<sup>23</sup> The Industrial Dispute Act, 1947 (ACT 14 of 1947).

The Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act (ISMWA)<sup>24</sup> is the only legislation exclusively dealing with migrant labour. This act was enacted in the background of the exploitative practices prevalent in many parts of the country where labourer are recruited through contractors famously known as Sardars/Khatadars. These contractors take the labourer from different places and force them to work in extremely bad working condition and without compliance to labour laws.<sup>25</sup> A recent study found that contractor based coercive labour migration had colonial root and historical studies describe them as patriarchs or labour lord.<sup>26</sup> Nine main features were identified when the bill was placed the features are as follows:-<sup>27</sup>

- (i) It will apply to the establishment or contractor employees five or more inter-State migrant workmen;
- (ii) Such establishment need to register and require to obtain a licence;
- (iii) An Obligation on the contractor to furnish particulars in the prescribed form and to give a passbook to workmen;
- (iv) Specific guidelines on wages;
- (v) Entitlement of displacement allowance;
- (vi) Suitable amenities to the workmen such as ‘residential accommodation, adequate medical facilities, protective clothing’ etc.
- (vii) Appointment of Inspectors for effective enforcement of legislation;
- (viii) Workman rights to raise an industrial dispute;
- (ix) Deterrent punishments.

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<sup>24</sup> The Inter-State Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979. Hereinafter referred as ISMWA.

<sup>25</sup> Inter-State Migrant Workmen, Chief Labour Commission (Central), Government of India, available at: <https://clc.gov.in/clc/acts-rules/inter-state-migrant-workmen#INTRODUCTION> (Last visited on July 17, 2020).

<sup>26</sup> Lalita Chakravarty, “Emergence of an industrial labour force in double economy: British India 1880 – 1920”, IESHR, Vol. 15, No. 3. See also, *Supra* note 7 at 1

<sup>27</sup> *Id.*, at 25

It is pertinent at this point of time to look into the broader framework of ISMWA. Section 3 of the ISMWA provides for the appointment of registering officers while Section 4 provides for registration of establishment appointing migrant labourer as incorporated in this act.<sup>28</sup> If the registration is obtained by the establishment through misrepresentation and under certain other circumstances the registration may be cancelled.<sup>29</sup> Section 6 prohibits “employment of interstate migrant workmen without registration” in cases where ISMWA is applicable.<sup>30</sup> Chapter 3 of the ISMWA laid down detailed procedure for licensing of the contractors while Chapter 4 imposed duties and obligation of the contractors.<sup>31</sup>

When we look at Chapter 5 it provides for wages and other welfare measures for the migrant labourer apparently it gives satisfaction that legislation broadly covers the need of the migrant labourer. For example, Section 13 prescribed for wage rates and other conditions of service and mandate for ensuring that the wages shall not be below than minimum wages fixed by the appropriate authority.<sup>32</sup> Astonishingly clause (2) of Section 13 mandate that wages to inter-state migrant labourer shall be paid in cash only.<sup>33</sup> At the age when the whole country digitization is the new buzz word such mandate seems contrary to the interest of the labourer because any cash payment increases the chances of manipulation in documents. Section 14 incorporated provision for displacement allowance while Section 15 mandate for journey allowance.<sup>34</sup> Section 16 enlisted a large number of beneficial provisions

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<sup>28</sup> ISMWA, Section 3 and 4

<sup>29</sup> ISMWA, Section 5.

<sup>30</sup> ISMWA, Section 6.

<sup>31</sup> ISMWA, Chapter 3 and 4.

<sup>32</sup> ISMWA, Section 13 (1)

<sup>33</sup> ISMWA, Section 13 Clause (2). It provides as follows: “Notwithstanding anything contained in any other law for the time being in force, wages payable to an inter-State migrant workman under this section shall be paid in cash”.

<sup>34</sup> ISMWA, 1979, Section 13 and 14.

and facilities for migrant labourer covered under the act.<sup>35</sup> Section 17 imposes an obligation on the contractor to pay wages and other facilities as mentioned in Sections 14 to 16 and in case the contractor failed to pay, then the principal employer will be obligated to pay such amount under Section 18 of the act.<sup>36</sup>

Section 25 of the act prescribed punishment of up to one year for any contravention of the provision of the act either by the contractor or by the establishment.<sup>37</sup> While Section 26 of the act prescribed the punishment for up to two years in case the contravention is also not punishable under any other law.<sup>38</sup> Section 28 of the act imposes restrictions on the court from taking cognizance unless complaints filed by the inspector or other authorised person or sanction were given by the appropriate authority.<sup>39</sup> Any provision which imposes a restriction on prosecution encourages the culture of impunity. The limitation in respect of initiating the cases may be one of the prime reasons for which only small number of cases go to court. Thus, there lies a necessity to relook into the provisions of the act as it has itself become a limitation in the prosecution of perpetrators. In the pathetic case of *Re: Chopping of the*

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<sup>35</sup> ISMWA, Section 16 It provides as follows: Other facilities.—“It shall be the duty of every contractor employing inter-State migrant workmen in connection with the work of an establishment to which this Act applies,—

1. to ensure regular payment of wages to such workmen;
2. to ensure equal pay for equal work irrespective of sex;
3. to ensure suitable conditions of work to such workmen having regard to the fact that they are required to work in a State different from their own State;
4. to provide and maintain suitable residential accommodation to such workmen during the period of their employment;
5. to provide the prescribed medical facilities to the workmen, free of charge;
6. to provide such protective clothing to the workmen as may be prescribed; and
7. In case of a fatal accident or serious bodily injury to any such workman, to report to the specified authorities of both the States and also the next of kin of the workman.”

<sup>36</sup> ISMWA, Section 17 and 18.

<sup>37</sup> ISMWA, Section 25.

<sup>38</sup> ISMWA, Section 26.

<sup>39</sup> ISMWA, Section 28.

*Palms of two Migrants*, the honourable Supreme Court issued direction for proper implementation of the provisions of the ISMWA.<sup>40</sup> Whether it is the above stated case or any other the mere fact that migrants are being exploited is a great concern for the nation and the fact that the non-state actors are playing an active role in this calls for a strict action to be taken on urgent basis.

### **Violation of Human Rights of the Migrant Labourer by Non-State Actors and Due Diligence Obligation on the State**

While the violation of human rights of the migrant labour in the hands of non-state actors is an undeniable fact but the biggest challenge which arises and needs to be addressed immediately is the nature of actors who are responsible for such violation. There are many studies on Migrant Labor which have found that most acts of violation are committed by non-state actors. In such situations, the matter that comes to the forefront is the role of the non-state actors in such acts of violation as well as the role played by the state in such heinous acts owing to their failure of carrying out the Due Diligence responsibility of protecting human rights.

In the last few decades, one of the significant developments that have taken place in the human rights discourse is the recognition of non-state actors as the duty-bearers of protecting human rights. The traditional vertical application of human rights makes the State directly responsible for not only violation committed by the state machinery. It is safe to say that the State is also considered responsible when it fails to protect the right of individuals even though violation might have resulted

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<sup>40</sup> (2015) 17 SCC 217.

from the acts of non-state instrumentalities.<sup>41</sup> In other words, it amounts to a failure of the state due to the lack of Due Diligence. The second category, which is gradually gaining recognition throughout the globe, is the horizontal application of human rights.<sup>42</sup> It refers to the circumstances under which “protection of human rights can be invoked by an individual against the conduct of non-state actors”.<sup>43</sup>

The reason behind this is to impose an obligation on the State in such circumstances so that it does not remain a passive spectator, but instead “adopt measures, both preventive and remedial, in order to avoid the violation from occurring” and in case of violation, provide remedies for the same.<sup>44</sup> In other words, the violation of human rights shows a “failure of the State to discharge its obligation to protect” even though the violation may occur within private relationships.<sup>45</sup> There may be other circumstances when the multinational corporations can be held liable for the violation of human rights even though they are not ‘State’ within the strict sense of the term.<sup>46</sup>

The UN Human Rights Committee clarified that “positive obligations.....only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair

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<sup>41</sup> Brice Dickson, ‘The Horizontal Application of Human Rights Law’ in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: An agenda for the 21<sup>st</sup> Century* (Cavendish Publishing Limited 1999) 59. Brice Dikson though elaborated it as the diagonal application of human rights in a case where non-state actors are involved but in reality, it is also vertical application of human rights since it is a failure of due diligence.

<sup>42</sup> *Ibid.*

<sup>43</sup> Surya Deva, “Regulating Corporate Human Rights Violations: Humanizing Business” 149 (Routledge, New York, 2013).

<sup>44</sup> Olivier De Schutter, “International Human Rights Law: Cases. Materials, Commentary” 366 (Cambridge University Press, Cambridge, 3rd edn, 2019).

<sup>45</sup> *Supra* Note, 44 at 9

<sup>46</sup> Surya Deva, ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’ 1-57 *Connecticut Journal of International Law* 19 (2003).

the enjoyment of Covenant rights”.<sup>47</sup> It is further observed that there may be circumstances when the “State would be liable for the violation of human rights if it resulted because of the State either permitting or failing to take appropriate measures or to exercise Due Diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.<sup>48</sup>

Regional and International judicial bodies have also made state liable even when a violation was taken place by the act of non-state actors. For instance, one of the earlier cases of the Inter-American court was *Vélásquez Rodríguez v. Honduras*<sup>49</sup> where the court observed that the State was responsibility in respect of a violation of human rights by non-state actors. According to Court State may be held responsible;

Not because of the act itself, but because of a lack of due diligence to prevent the violation or to respond to it.....The same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized in the Convention.<sup>50</sup>

State's responsibility for the violation on human rights by non-state actors can be determined by the following two tests namely (a) failure of the State to fulfil the duty to protect human rights and (b) Due Diligence test.<sup>51</sup> *Danwood Mzikenge Chirwa* argued that “the duty of states to protect individuals or groups from violations of their human

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<sup>47</sup> UNHRC ‘General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) U.N. Doc. CCPR/C/74/CRP.4/Rev, para 4 (emphasis added) available at: <http://www1.umn.edu/humanrts/gencomm/hrcom31.html> (Last Visted on July 17, 2015).

<sup>48</sup>*Ibid.*

<sup>49</sup> (1989) 28 ILM 294.

<sup>50</sup> *Ibid.* (emphasis added)

<sup>51</sup>Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” Part III Melb.J.Int. Law Part 1 (2004)

rights by private actors is well established in International law. This duty entails an obligation to take such preventive measures as the enactment of the legislation, and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere”.<sup>52</sup> The liabilities of non-state actors for violation of human rights are also well recognized.<sup>53</sup> Accordingly, different categories of the non-state actor can certainly violate human rights, and to name a few - multinational companies can be held liable for the violation of human rights<sup>54</sup> or the private organized armed groups may also violate human rights.<sup>55</sup>

UN Guiding Principles on Business and Human Rights also provides that “states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”.<sup>56</sup> It also requires the States to take “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.<sup>57</sup> It also calls upon business enterprises to ‘respect human rights’ that implies an obligation to not contribute to “adverse human rights impacts through their own activities” and to “mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business

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<sup>52</sup> *Supra* note 51 at 7

<sup>53</sup> Jan Arno Hessbruegge, ‘Human Rights Violations arising from Conduct of Non-State Actors’ 11 *Buff. Hum. Rts. L. Rev.* 21 (2005)

<sup>54</sup> Surya Deva, ‘The UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?’ 10 *ILSA J. IB’L & COMP. L.* 493 (2004)

<sup>55</sup> Nigel S. Rodley, ‘Can Armed Opposition Groups Violate Human Rights?’ in K. E. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge*, (Martinus. Nijhoff, Netherlands 1993) 297, 306.

<sup>56</sup> UNHCHR, ‘Guiding Principles on Business and Human Rights’ (2011 United Nation), principle 1, 3, available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (Last Visited on July 17, 2015).

<sup>57</sup>*Id.* at 56 (principle 1).

relationships” even in circumstances when they have not directly contributed.<sup>58</sup>

In the India Context, the Constitutional law provide protection of certain Fundamental Rights against non-state actors as early as in 1950.<sup>59</sup> The reason for the incorporation of such Fundamental Human Rights protection was for the sole reason that non-state actors could infringe those human rights guaranteed under the Indian Constitution.<sup>60</sup> In cases of violation of human rights, along with the perpetrators being responsible for their acts, the State will also incur liability under human rights obligations both under International human rights law as well as under domestic Constitutional Jurisprudence.

## Conclusion

The inter-state migrant workers are the most vulnerable groups and require protection and support by the state. It can be a reason, that the High Commissioner of human rights issued a detailed guidelines in the light of COVID 19 for the state to provide protection and support to the migrant labourer which includes access to health facilities, goods and services; adequate support system and measures to address violence for the migrants living in camps or unsafe conditions; right to dissent work and social protection; and right to education.<sup>61</sup> These recommendation also corroborate with the fact that the state has a responsibility towards migrant labour.

The state responsibility towards migrant labour does not end by bringing legislation, rather it extends to the point of consistent

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<sup>58</sup> *Id.* at 56 (principle 11 & 13).

<sup>59</sup> Several articles of the Constitution of India guaranteed fundamental rights such as the prohibition of untouchability, forced labour, trafficking etc. See, *Supra* note, 43 at 9

<sup>60</sup> M. P. Singh, “Fundamental Rights, State Action and Cricket in India” 13 *Asia Pacific Law Review* 203, 204 (2005)

<sup>61</sup> OHCHR, Covid-19 and The Human Rights of Migrants: Guidance, available at: [https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance\\_COVID19\\_Migrants.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf) (Last Visited July 17, 2020).

implementation i.e. consistent effort by the state to ensure that all legislation, as well as social welfare mechanisms, reach to those vulnerable groups. In case of continuous exploitation of migrant labour of which state machinery is well aware, there is a failure of Due Diligence on the part of the state and hence the state is also responsible for violation of human rights. Inter alia, the state has an obligation to provide reparation to the victim even when the victimisation was that by non-state actors. The present legislation ISMWA needs to further strengthen and come up with more strong purity measures against the perpetrators and needs to empower the law enforcement agencies to take actions. This can only be possible if the offences under the legislation are made cognizable.