

# **Regulating recruitment: labour and criminal justice responses in preventing trafficking in persons and migrant exploitation**

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## **Challenges of regulating recruitment: Insights from ILO research<sup>1</sup>**

### **1. The private recruitment industry**

Over the past three decades, the private recruitment industry, composed of private recruitment agencies (PrEAs)<sup>2</sup> and a vast network of sub-agents (also known as dalals, brokers and carriers in Asia), has grown dramatically. PrEAs and sub-agents link workers with employers, either across international borders or within the same country, often for a fee which is variously charged to workers, to employers, or to both. As the migration infrastructure in countries of both origin and destination has become increasingly complex, so have the activities of PrEAs and sub-agents become more multi-faceted. As well as mediating job placements, recruiters increasingly provide other services as well - processing exit and immigration documents, arranging transportation and accommodation, negotiating employment contracts, arranging for insurance and access to credit, providing pre-departure orientation and other training, and facilitating medical screening. Some recruiters also partner with, have financial interests in, or even own related businesses such as training or medical centres, or insurance firms. While seemingly growing everywhere, it is in Asia that PrEAs and sub-agents are most integral to the labour migration process, and where very few women and men migrate without having recourse to the services of a recruiter.

The private recruitment industry has been a long-standing concern of the ILO. The Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and their Recommendations contain provisions on

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<sup>1</sup> This research was undertaken as part of Work in Freedom, a collaborative programme of the ILO, DFID and other partners. It aims to prevent 100,000 women and girls from South Asia (India, Nepal and Bangladesh) from being trafficked into domestic work and the apparel industry in selected Middle Eastern destination countries. The research was led by Dr. Katharine Jones, and fieldwork was conducted by Leena Ksaifi (Jordan and Lebanon), Human Development Research Centre (HDRC), (Bangladesh), and Dr. Abdur Rafique (India and Nepal). The full research findings will be published and disseminated by ILO in 2015. Additional information from law and policy baselines conducted by Alix Nasri, Dr. Geeta Sekhon, Dr. Ram Krishna Timalena and Abdullah Al Hasan also contributed to this discussion paper.

<sup>2</sup> Defined by C. 181 as "any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks; (c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment." (Article 1).

recruitment across or within national borders. The Private Employment Agencies Convention, 1997 (No. 181) sets out basic standards for the operation of the industry, and has been ratified by 28 governments to date. In June 2014, the International Labour Conference (ILC) adopted a Protocol to the Forced Labour Convention, 1930 (No. 29), which specifies that measures to be taken by governments for the prevention of forced labour shall include: “protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process.” Other recent standards - the Work in Fishing Convention, 2007 (No. 188), and the Domestic Workers Convention, 2011 (No.189) - include clauses on recruitment.

In response to growing international concern about human and labour rights violations linked to abusive recruitment practices<sup>3</sup>, in 2014 the ILO launched a Fair Recruitment Initiative (ILO-FAIR).<sup>4</sup> This initiative is being implemented in close collaboration with representatives of employers’ and workers’ organizations, governments, the private sector and other key stakeholders. Its strategy has four aims, namely: (i) to strengthen global knowledge on national and international recruitment practices; (ii) to reinforce laws, policies and enforcement mechanisms in line with Convention No. 29 and other standards; (iii) to promote fair business standards and practices; and (iv) to foster social dialogue and partnerships, and promote good practices within the industry and beyond.

In implementing the first objective, the ILO has engaged in a number of research projects aimed at identifying how to address fraudulent and abusive recruitment practices. These include a review of the business models used by recruiters to deploy young women from South Asia (India, Nepal and Bangladesh) as domestic workers in Jordan and Lebanon; this study was based on in-depth analysis of almost 200 qualitative interviews conducted over a 12 month period. The ILO has commissioned research on recruitment in Brazil and Paraguay, and in South East Asia. The ILO is also working with the Global Knowledge Partnership on Migration and Development (KNOMAD) to explore recruitment costs and fees.

This discussion paper presents findings of ILO research on the recruitment of domestic workers to first, review how recruitment is regulated in the five countries involved in Work in Freedom (Jordan, Lebanon, India, Bangladesh and Nepal), highlighting emerging insights into monitoring and enforcement. Second, the paper takes the example of recruitment fees to explore how regulation impacts on recruitment business models. Finally, it highlights some key challenges for governments in regulating cross-border recruitment.

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<sup>3</sup> See ILO, 2009 *The Cost of Coercion*, which highlights abusive recruitment practices such as: deception about the nature and conditions of work, confiscation of passports, deposits and illegal wage deductions, debt bondage linked to extortionate recruitment fees, threats if workers want to leave their employers, and in some instances physical violence.

<sup>4</sup> The initiative is currently supported by the UK Department for International Development, the US State Department and Department of Labor and Foreign Affairs, Trade and Development Canada.

## **2. Regulation and monitoring mechanisms of private recruitment**

Recruitment industry regulation establishes the legal status of recruitment businesses, the terms and conditions of their operation, what fees they can charge and to whom, and who is allowed to be a company director. In all five countries covered in this study, a recruitment business must apply for and be granted a license to operate. In Jordan and Lebanon, licenses are restricted to recruitment in the domestic work, and other household jobs, sector, and so agencies cannot legally recruit for other sectors<sup>5</sup>. All five countries require PrEA owners and directors to be *citizens* of the country in which the PrEA is domiciled, or for a citizen to hold majority ownership. In Bangladesh and Nepal, key informants believed that this provision aims to prevent ‘dummy’ PrEAs being established and controlled by foreign employers or PrEAs. Owners of PrEAs in all five countries are also required to submit to a criminal records check to ensure they do not have a previous conviction, especially in relation to recruitment and / or trafficking for forced labour. Jordan does not allow PrEA license-holders to also own travel agencies, hotels, restaurants, massage parlours or beauty salons, in order to mitigate the risk of trafficking for sexual exploitation.<sup>6</sup>

Legislation in India and Bangladesh explicitly defines sub-agents as ‘illegal’ recruiters.<sup>7</sup> In other words, a vast proportion of the recruitment industry in these countries, upon which migrant workers depend, is operating outside the legal framework. In a radically different approach, Nepal offers the option for licensed PrEAs to nominate up to ten sub-agents who, upon payment of a deposit, also receive a license to operate. Sub-agents can work with only one PrEA, which then becomes legally liable for their action.<sup>8</sup>

In addition to being subject to the laws which govern other business activities (e.g. payment of tax), PrEAs are also regulated by legislation and rules which stipulate which origin and destination countries they can recruit from and for, as well as for which jobs. For instance, as mentioned earlier, PrEAs in Jordan and Lebanon can only recruit domestic workers and other household staff. PrEAs in Lebanon have, in the past, been subject to an annual ceiling on the number of migrant women they can recruit (200). PrEAs in Nepal, Bangladesh and India face restrictions on the destination countries to which they can send workers. These same countries all operate restrictions (often colloquially referred to as ‘recruitment bans’) on women less than a specified age being recruited for work deemed as low skilled,

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<sup>5</sup> See Regulation no 89/2009 Organising Private Recruitment Offices for Domestic non-Jordanian workers and organising regulation for specialised offices operating in recruitment and employment of non-Jordanian domestic workers and Lebanon Order 1/1 2011.

<sup>6</sup> See Regulation no 89/2009 Organising Private Recruitment Offices for Domestic non-Jordanian workers and organising regulation for specialised offices operating in recruitment and employment of non-Jordanian domestic workers.

<sup>7</sup> See Bangladesh Overseas Employment and Migrant Act 2013 and associated Rules, and India 2009 Emigration (Amendment) Rules.

<sup>8</sup> Foreign Employment Act, 2007, (Act No. 18 of 2064) and Associated Rules of 2008.

including domestic work.<sup>9</sup> By contrast, Bangladesh explicitly licenses a small number of PrEAs – currently 28 are active – to recruit women for work overseas. According to one informant, these PrEAs are ‘specially selected’ by the authorities and go through an enhanced process of scrutiny prior to being awarded licenses, with the aim to better protect women migrants from recruitment abuses.

Interviewees across the five countries indicated that, although they regard the legislation as clear, there are several challenges in its implementation, three of which are summarised here. First is the lack of monitoring by state authorities. PrEAs reported few inspections, and very limited follow-up regarding requirements for PrEAs to report on an annual basis. In short, there was little evidence of specialist structures or staff tasked by the authorities to monitor the compliance of licensees with the regulations.

Second, PrEAs in all five countries are required, as a condition of receiving their license, to deposit an escrow with the authorities, which can in theory be used, in the case of wrongdoing by the agency, to compensate migrant workers and/or to pay a fine. These amounts vary from 6,000 USD (India) to 55,000 USD (Nepal). However, several PrEA interviewees stated that they regard the occasional imposition of fines from their escrows as a cost of doing business rather than as a real deterrent.

Third, interviewees also noted that, despite the clarity of laws regarding sub-agents, PrEAs in the origin countries continue to rely on sub-agents because they do not have branch offices outside the capital cities, and especially not in the rural source areas of most migrant women. Sub-agents represent a low-cost method of recruitment for PrEAs, and also a means to avoid a certain amount of regulatory oversight.

Despite the general lack of legal enforcement, the research found that PrEAs’ activities are far more closely monitored through their on-going recruitment processes. In the case of women migrating through regular channels – i.e. where there are no ‘recruitment restrictions’ in place – authorities carefully scrutinise the documents submitted by PrEAs, including the domestic worker standard employment contract. Authorities include those responsible for granting emigration clearance in the origin countries, involving at times labour attachés based in overseas diplomatic missions, as well as the destination country immigration authorities. Several positive examples were found in which labour attachés had identified abusive or illegal practices by PrEAs and had taken appropriate action. This monitoring function applies only to regular migration, however; where the migration takes place through an irregular channel, without the correct exit or immigration procedures being followed, the authorities have no opportunity to take such action.

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<sup>9</sup> For reason of brevity, the legislation in each of the countries regarding female recruitment is not summarised here. The ILO has commissioned a study of the impact of restrictions on female recruitment from Nepal, currently being conducted by the Global Alliance Against Trafficking in Women (GAATW).

### **3. How regulation impacts on recruitment business models: The example of fee-charging by PrEA**

According to ILO standards (C. 181, Article 7), CIETT<sup>10</sup> and other PrEA Codes of Conduct and some national legislation, no fees should be charged to the job-seeker/migrant worker; only employers are liable to pay such fees for sourcing workers using the services of a PrEA. Nonetheless, in practice, this research found widespread fee-charging by PrEAs to employers and to migrants, or to both. In turn, PrEAs may themselves be charged fees by their business partners, and / or by government officials. Fees comprise the actual costs incurred in the recruitment and migration process (e.g. visa processing, training, medical testing, airline flight) as well as a “margin” accruing to the fee-charger.

Jordan and Lebanon prohibit PrEAs from charging recruitment fees to migrants. Further, the bilateral agreement concluded between Jordan and Bangladesh in 2012 regarding the recruitment of domestic workers stipulates that employers must pay the full cost of recruitment. The same stipulation is included in the standard employment contracts which should be used for domestic workers in Jordan and Lebanon.

By contrast, national legislation in the origin countries, Bangladesh, Nepal and India, allows PrEAs to charge fees to migrants within certain parameters. Bangladesh allows fees up to 1080 USD for men and up to 260 USD for women migrants; Nepal allows fees of approximately 800 USD (variable according to the destination country); and India allows up to the equivalent of 45 days’ wages in the destination country, up to a maximum of 334 USD.

However, the research found that, regardless of the regulations in place, women domestic workers recruited from South Asia into Jordan and Lebanon do, in reality, pay significant recruitment fees, whether prior to migration or through salary deductions once in employment. For instance, PrEA interviewees in Bangladesh reported charging domestic worker recruits between 770 USD and 2,000 USD dependent on the destination country, the job, and the type of visa obtained. Bangladeshi sub-agents also admitted charging women fees of between 300 and 1000 USD for their services, some of which they hand over to the PrEA responsible for the recruitment. Interviewees in Bangladesh also disclosed that PrEAs and sub-agents may, in addition, collect fees from women on behalf of pre-departure training centres, medical centres, travel agents, and sometimes insurance companies.

Resting with this example, there is a clear conflict between national law in Bangladesh (which allows fee-charging to workers), and ILO standards, the standard employment contract and the 2012 bilateral agreement between Jordan and Bangladesh (which do not).

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<sup>10</sup> The International Confederation of Private Employment Agencies (CIETT)’s position is that, as a business to business (B2B) transaction, employers and not workers should pay for recruitment/placement services. CIETT’s current member federations include very few PrEAs specialising in cross-border recruitment.

PrEAs in Bangladesh regard themselves as operating in compliance with national law. For as long as this situation prevails, PrEAs are likely to continue to charge fees to migrant domestic workers, despite the provisions of the standard employment contract and the bilateral agreement, which cannot be enforced in Bangladesh.

None of the PrEAs interviewed in Jordan and Lebanon said they charged any fees to workers. However, other respondents disclosed that, if a Bangladeshi woman is not able to pay her recruitment fees in advance of travel, she is required to sign a 'promissory note' agreeing to repay her debt through salary deductions in the destination country. Sometimes, it was said, PrEAs in the destination countries 'purchase' this debt and, through this mechanism, are able to bypass national regulations prohibiting fee-charging to workers.

Another set of issues was around the monitoring of the actual recruitment fees paid by workers, regardless of what national legislation states about the legality of such fees. The research was unable to identify any effective mechanisms by which state authorities in any of the countries concerned could *monitor* what recruitment fees have been paid to PrEAs. In the case of non-restricted recruitment in Nepal, for instance, PrEAs must submit to the authorities receipts of fees paid, which must be compliant with the limits established by law, in order to gain emigration clearance. However, several PrEA interviewees admitted to regularly forging such receipts.

In sum, despite the existence of regulation to prohibit fee-charging, migrants still in practice pay them. The research identified at least two important barriers to effective implementation of regulations prohibiting fees. First, as long as there is an inconsistency between national legislation and other instruments (supposedly) governing migration, PrEAs which charge fees to workers in countries of origin can still maintain compliance with domestic legislation regardless of what is stated in either bilateral agreements or destination country law or regulation. The second is the lack of effective monitoring and enforcement mechanisms regarding fees. Without well-functioning statutory monitoring systems, it is left to migrant workers themselves to complain about being charged recruitment fees. As much previous research has highlighted, there is little incentive to do so, given that the likely consequence is that the worker will either be prevented from leaving the origin country to take up the job or be deported from the destination country.

#### **4. Challenges for governments in regulating cross-border recruitment**

The research identified a number of challenges for governments in regulating recruitment, including:

- How to build their own capacity to monitor and enforce compliance by the private recruitment industry?
- How to bring about the effective elimination of fee-charging to migrant workers, given that this practice is so firmly entrenched in the current recruitment business model?

- How to effectively regulate sub-agents given their vast number, geographical spread and integral role in the recruitment process?
- How to establish corporate liability in order that one or more recruitment businesses can be effectively sanctioned in the event of fraudulent or abusive practice?
- How to empower migrant workers so that they are themselves able to bargain the terms and conditions of their employment and migration?
- How to make employers in destination countries liable for, or take responsibility for, the actions of the PrEAs whose services they use?
- How to resolve the jurisdictional gaps between origin and destination countries and gaps in international law regulating transnational business relationships?

While there is considerable knowledge and consensus on what is wrong with the existing recruitment model for cross-border migrant workers, there is far less on how the problems can be corrected, whether through regulatory or other means. Yet good practices are emerging, involving innovative solutions to long-standing problems. This workshop provides a forum for such practices to be shared, discussed and built upon in the future to bring about a genuinely fair recruitment system for all.