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Article

Business as Usual: A Comparative Rights-based Study for Quality Employment of Migrant Workers and Domestic Workers

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ABSTRACT

Labour law reforms are very much at the legislative discourse of the present Sri Lankan context. This paper examines two sectors, namely, migrant workers; the prominent source of foreign remittance and domestic workers; a sector of informal economy which remains unnoticed. Despite being crucial players of Sri Lankan economy, they have been subjected to partial neglect. This study incorporated the Black Letter Methodology and finds that these employees have been systematically discriminated, even in some instances against their own colleagues due to the factor of 'gender'. It is revealed that the Government has failed to provide workable solutions up to date. The author produces amendments and new laws which are justified by analyzing the existing statutory provisions, decided cases, international standards and further supported by selected foreign jurisdictions. The purpose of the research is to suggest practical legal solutions and in addition to highlight the fact that lack of necessary amendments amounts to fundamental rights violations and infringement of human rights. Although the existing knowledge contains several views of the above employment sectors, as per the knowledge of the author they refrain from analyzing the issues incorporating the fundamental rights, human rights and international standards altogether. Thus, the article emphasizes the crucial element of State obligation under international standards.

Introduction

Labour law reformation is an ongoing discussion, where the views of public, political, trade union and academic personalities would differ at many instances. The analysis contains two main parts within which four reforms are suggested. As suggestions are supported by a comparative analysis which is separately conducted per reform, the author first refers to the Philippines in terms of the first and third reforms due to its recent developments, its indication of a higher number of migrant domestic workers within the Asian region and because of the progressive laws introduced for domestic workers.

Indian jurisdiction will be examined for the second and fourth reforms, because despite being the largest democratic State of the world with a huge population, Indian has succeeded in allowing its migrant to vote. Thus, Indian is a State which shows progressive legal developments in prevention of harassment at workplaces. Further, Sri Lanka and Indian possess common grounds such as being developing countries, being actors of South Asian political and regional environment and other socio-cultural and legal reasons (for an example both countries refer to similar Penal Codes, except in term of India's recent amendments).

Limitations

This paper is limited to migrant and domestic workers upon four principal reforms due to the intention of the author to provide extensive analysis per reform highlighting both legal and practical implications. The author analyses only the related and ratified international conventions by SL, because only such conventions are considered as soft law of the State.

Literature Review

Firstly, in terms of migrant workers, in a Working Paper published by the International Labour Organization, the authors Dias and Jayasundere (2002) categorically states that both private and Governmental initiatives are necessary for protecting and assisting migrant workers, especially to secure them from abuse. The paper further highlights the fact that Sri Lanka does not possess distinguished laws for human trafficking mostly due to less number of reported cases. The paper even suggests voting for migrant workers but restricts the study only for the introductory idea and does not extend the parameters of the paper to analyze in terms of fundamental and

human rights and the possibility of introducing voting for migrant workers based on the existing Sri Lankan Election Laws.

Mendis (2023) in a chapter named 'Social Protection for Migrant Workers: A Legal Perspective' in the book of 'Social Protection for Unskilled Migrant Workers in Sri Lanka' views about migrant workers' rights, social protection and migrant law along with other concerns. The chapter states the contribution of the International Organization for Migration towards the positive impact of migrant workers. Additionally, it refers extensively to international conventions in support of migrant workers. In terms of social and economic perspective the entire compilation highlights the fact that irrespectively the migrant workers' large-scale provision for the annual remittance to SL, that they encounter numerous issues in their host countries. However, the book aims at producing contemporary South Asian studies rather than a country specific Sri Lankan study.

The article written by Wanninayake (2016) under the title 'Sri Lankan Women Migrant Workers and Role of Family and Kinship Networks' examines the female contribution along with the corporation of the kinship network within a family context. By predominantly highlighting the impact factor of female migrant workers, the article with statistics provides that the change of dynamics of migrant workers caused the change of the historical trend where the number of male migrant workers was high. However, from 1990s onwards female migrant workers are increasing and many of them serve as housemaids. Even though the article does not extend its scope to discuss reforms per se, this supports the argument that migrant workers related laws should be amended giving due regard to gender specific issues.

Secondly, the conference paper of Sarveswaran (2012) which is titled as 'Domestic Workers Rights in Sri Lanka- Work Like Any Other, Work Like No Other: Need for a Legislative Intervention' highlights that most of the domestic workers are females and children, so that they have been victims of various types of misconducts. The article analyses the applicability of the existing labour laws to the sector of domestic workers. Although the paper emphasizes the fact that problems of domestic workers extend to be an international concern and suggests that the existing law shall be amended, the author does not provide any specific recommendations as to the way in which the

amendments should be incorporated.

Defining what is domestic work the researcher Esufally (2015) commences the report titled 'Sri Lankan Domestic Workers: An Analysis of the Legal and Policy Framework'. The report analyses selected aspects of domestic workers including but not limited to payment of wages, hours of work, personal security, and dispute resolution. By analyzing the Sri Lankan law of selected aspects in connection with international conventions, the report is aimed at proposing reforms and recommendations.

In the article 'Just Like One of the Family: Domestic Violence Paradigms and Combating On-The-Job Violence Against Household Workers in the United States' written by Graunke (2002) published in Michigan Journal of Gender & Law draws readers' attention extensively from colonization to the modern world. The discussion has been developed to express the circumstances of female domestic workers with intersecting realities such as race, gender, poverty, and immigration status, where the author explains the experience of coloured women and the extent of abused encountered by female domestic workers. The article differentiates the status of domestic workers as per the societal changes. Although this article does not specifically focus on a Sri Lankan study, it allows the reader to understand the influence of surrounding and/or intersecting factors towards the employment of the domestic workers, especially female domestic workers.

Research Gap

As per the above literature review, it is apparent that even though knowledge is available on the topics of this relevant areas of law, namely, migrant workers and domestic workers, such researchers omit to extensively integrate the elements of fundamental and human rights to the analyses. Therefore, reforms or suggestions have not been justified or analyzed adequately in a right-based approach. If one expresses interest in adopting a right-based review, then fundamental rights of a State should be considered at its core. Further, the author suggests that it is essential to interpret the reforms in connection with fundamental rights, because it will place the rights of workers subject to constitutional recognition, then the Government bodies can be found liable and accountable for failures to protect, respect and ensure the rights of migrant and domestic workers.

Research Problem

Migrant workers and domestic workers seem to be neglected or rather paid less attention within the Labour law reforming discussions, regardless of their pivotal roles in Sri Lankan economy. These employees have been systematically discriminated even being victims of infringements of fundamental rights and human rights. Despite their traumatizing experiences, the Government has failed to provide effective legal solutions to ensure and uphold their rights.

Research Objectives

The prominent objectives of this research are to identify discriminatory situations encountered by migrant and domestic workers and to provide practical legal solutions based on a right-based approach. Additionally, it is intended to conduct a comparative analysis in reference to the selected jurisdictions.

Research Methodology

This research has utilized Doctrinal Research Methodology (also known as Black Letter Methodology) to analyze the identified research gap and deliver the findings which are the recommendations for law reforms. Relevant Sri Lankan laws and international conventions have been analyzed as the primary sources, whereas the author identifies research papers, articles and textbooks as relevant secondary sources. Further, the author has accessed official websites of relevant authorities and other available online materials as tertiary sources under Black Letter Methodology. It is understood that Black Letter Methodology is the most suitable methodology to be utilized in this legal analysis, because it allows the author to conduct desk-based research which involves the collection and examination of legal documents for critically analyzing the information that are available in primary, secondary and tertiary sources.

The Discussion

Part 1 - Migrant Domestic Workers

As per the Flow of Foreign Remittances to Sri Lanka 2015-2022 according to Workers' Remittances Statistics appears on the official website of the Central Bank of Sri Lanka, the total flow of foreign remittance to Sri Lanka in 2022 is 3789.40 million in United States Dollars which is one of the prominent earnings of the economy of SL.

Even though Sri Lanka has taken progressive measures to curb violations and illegal practices in the sector, daily issues encountered by foreign employees during various stages of employment demand sound reforms.

Padmakanthi (2023) states in her chapter 'Social Protection for Migrant Workers: The Case of Sri Lanka' of the book 'Social Protection for Unskilled Migrant Workers in Sri Lanka' that current labour laws are not applicable to migrant workers. Therefore, the Sri Lanka Bureau of Foreign Employment Act, No.21 of 1985, as amended by Act, No.4 of 1994 (hereinafter referred to as SLBFE Act) is the only existing legislation which touches upon every type of migrant worker.

The Sri Lanka Bureau of Foreign Employment (hereinafter referred to as the Bureau) which is involved in migrant worker registrations, recruiting agent approvals, and pre-departure training for migrant workers is a semi-government institution to control and guarantee the conditions such as dignity and security for foreign Sri Lankan employees. This was established under SLBFE Act, which is prominently dedicated to the mandate, powers, and functions of the Bureau. In addition, the Sri Lanka Foreign Employment Agency operates as the Government's recruitment agency and the Association of Licensed Foreign Employment Agencies to oversee the discipline of every stakeholder to promote ethical practices.

Section 15 of SLBFE Act outlines the objectives of the Bureau which are promptly connected to important concerns such as the status of workers, women domestic workers and provisions for formulating standards for and negotiating employment contracts (Dias & Jayasundere, 2002). This further extends to scrutinizing the credibility of documents provided to recruited Sri Lankan employees who are prepared to be departed overseas for work. To make certain that the employee is totally conscious of the terms and circumstances of the service, Section 40 states descriptive measures for the contracts between employees and overseas employers (Dias & Jayasundere, 2002).

According to Section 24(1), 'a person other than the Bureau is prohibited from the business of a foreign employment agency unless he is a license holder under SLBFE Act'. Additionally, a formal written approval must be obtained before publishing foreign employment opportunities under Section 37(1) of the same Act. The failure of licensed agencies to provide employees with valid contracts and provide the Bureau with required information amount to penal

liability (Dias & Jayasundere, 2002).

Regardless the fact that Sri Lanka has taken and in the process of taking precautions to guarantee the safety of Sri Lanka migrant workers, it is a known fact that despite all the legislative safeguards, migrant workers remain susceptible in a variety of situations, such as being exploited by private recruitment agencies, by becoming the targets of forging documentation businesses, or by being misdirected to circumvent the law. For example, when referring to SLBFE Act, its legitimate autonomy to avert illegitimate export of workers was questioned, because the situations where prosecution must be initiated under Section 62(2) are subject to the approval of the Secretary to the Minister under Section 62(3) (Dias & Jayasundere, 2002).

1.1. Recommendation - Establish and legalize monitoring and advocating mechanisms by reforming the existing SLBFE Act.

Migrant workers are exploited by private recruitment agencies' misconduct and due to the absence of regulatory mechanisms for local agents of recruiting agencies (also known as sub-agents). As per the National Labour Migration Policy for Sri Lanka which is done by the Ministry for Foreign Employment Promotion and Welfare (2018), the Bureau, for instance, is unable to hold unlicensed sub-agents responsible. It is crucial to implement a monitoring-advocating mechanism to mitigate such malpractices, because the State has the ultimate responsibility of protecting the workers and ensuring the quality of their employment.

The Code of Ethical Conduct for Licensed Foreign Agencies/Licensees 2013 standardizes the operations of recruitment agents and empowers the Association of Licensed Foreign Employment Agencies to issue warnings and recommend suspensions. This code can be presented as a tool for monitoring the operation of private recruitment agencies. Nevertheless, there are numerous agencies which are not members of the Association, where it is ambiguous as to the application of this ethical code.

On the other hand, although the ethical code is applied to registered agencies, it provides remedies not precautions. It is the same approach (remedial approach) as the SLBFE Act which also initiates actions against the cases of malpractices after it has happened. In such a case, though the agency's further operations shall cease, the victims may remain with or

without being adequately compensated for the losses they incurred. For example, if workers face life-threatening circumstances, as the famous case of Rizana (she died as a result of being victimized by malpractice during the recruitment process, where her documents were forged as to her age by her recruiter) no compensation can compensate for their loss of lives, abilities to themselves, and families.

Therefore, the manner and the way of conduct of the recruitment agencies in the pre-departure stages of migrant workers must be scrutinized by a monitoring panel before the workers are sent abroad. To verify that the correct procedures are followed in practice, the monitoring panel ought to call multiple reports and evidence while also having random visiting inspections at the agencies with the support of assigned representatives.

This may further discourage licensed agencies from approaching sub-agents to bypass the law. Further, as anyone values personal safety and the credibility of employment, prospective foreign employees would always think twice before depending on unlicensed agents to fulfil their desires. Then sub-agents may eventually lose their role and the registered agencies will be required to uphold ethical and legal standards.

As an advancement of this regulatory framework, a Foreign Advocacy Panel per country (host country) should be established to focus on migrant workers' issues, including the prospects. Priority of establishing advocacy panels should be given for the countries where the greatest number of Sri Lankan migrant workers are in employment. These advocacy panels must serve as home country-host country free legal clinics.

In terms of the home country (SL), a Domestic Advocacy Panel should be institutionalized by incorporating through legislative enactment and sub committees are required to be established regionally. Both regional sub committees and the principal domestic advocacy panel should be empowered by the SLBFE Act to act independently in the course of securing the best interest of the workers and to provide legal consultations. Further, the domestic advocacy panel requires to perform Alternative Dispute Resolution Mechanisms in reference to disputes where migrant workers are involved, if such subject matter comes under the purview of powers and/or duties of the panel and/or sub committees as will be specified by SLBFE Act.

The suggested Foreign Advisory Panel must be strengthened and extended to establish sub committees covering selected localities where a major number of Sri Lankan migrant workers reside. The embassy and/or the Sri Lankan Government representatives of the host country in collaboration with the Bureau are required to take the initiative to institutionalize these bodies for the support of Sri Lankans abroad. In this regard, the best example is the Philippines.

Migrant Workers and Overseas Filipinos Act 1995 (hereinafter referred to as Filipino Act 1995) in its Section 24 stipulates the position of Legal Assistant for Migrant Workers Affairs primarily responsible for overall coordination of all legal assistance services to be provided to both Filipino migrant workers and overseas Filipinos in distress. Importantly, the said Legal Assistant must prove legal competence with a minimum of ten years of experience as a legal practitioner and must not have been a candidate for an elective office in the last local or national elections (Filipino Act 1995, s. 4). This requirement aims at excluding political influence.

Further, it is a primitive necessity that a communicating mechanism should be implemented between these advisory panels and the embassies. The embassies of respective States are required to appoint a distinct officer to handle enquiries that would receive from these overseas panels.

It is also advisable that SLBFE Act must empower Local and Foreign Advisory Panels to address gender-responsive aspects, for example, protection from sexual and other forms of harassment in employment contracts, a point which is lacking to date. The example demonstrated by the Filipinos Act states that the State by recognizing the contribution of overseas migrant women workers and their vulnerabilities, shall apply gender-sensitive criteria in the formulation and implementation of policies and programmes (Filipino Act 1995, s. (2)(d)).

Nevertheless, the Sri Lankan Government may require limiting host country free consultation only for the workers who have registered with the Bureau due to the potential difficulties that may arise in practical implementation. This approach will influence the potential migrant workers to get themselves adhered to the compulsory registration with the Bureau and to follow the proper channel of migration rather than by-passing the law through sub-agents or illegal tricks. Then they are aware that adherence to regulations shall benefit them overseas with free of charge legal

consultation. Thus, the Sri Lankan Government can monitor the labour outflow more accurately.

Secondly, in instituting free legal clinics the Government can be guided by the United Nations International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter referred to as ICESCR) where under Article 2.2.1 provides that State parties individually and through international co-operation shall work towards the maximum of its available resources to ensure economic well-being while adopting legislative measures.

According to the Private Employment Agencies Convention (1997) 'worker' includes jobseekers of all categories except seafarers and the term 'private employment agencies' includes foreign agencies. Notably, the convention prohibits private employment agencies from receiving any direct or indirect payment from workers. To secure the interests of the workers, Article 8 imposes an obligation on the States to take measures within and outside its jurisdiction in agreement with other States to prevent fraudulent practices in recruitment, placement, and employment.

The Universal Declaration of Human Rights (1948) (hereinafter referred to as UDHR) directly supports the implementation of this reform as it expresses that everyone has right to work, right to leave any country and return to his/her own and everyone is equal before the law. Sri Lanka has a State obligation under the Universal Declaration of Human Rights (hereinafter referred to as UDHR) to assure that protection is ensured to all migrant workers within or outside Sri Lanka of that moment.

It is also stated that as the wording of Article 14(1)(g), 'freedom to engage by himself or in association with others' affirms a fundamental right to Sri Lankan citizen not only to be involved in such an employment, but also to form associations in exercising that right. Therefore, even migrant workers can form their own association and demand proper governmental assistance which reaches to the grassroots level through the process of their migrant employment (Wickramaratne, 2017).

Moreover, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) (hereinafter referred to as Migrant Workers' Convention) under Article 65(1) imposes State obligation to ensure that responsible authorities are in place to disseminate

information and educate potential migrant workers, migrant workers and their families.

1.2. Recommendation - Ensure the right to vote for the foreign migrant workers.

It is important to reform Sri Lankan laws relating to the area of Election parallel to SLBFE Act to enable the migrant workers to exercise their franchise. Even the National Labour Migration Policy for Sri Lanka developed in support of International Labour Organization recognizes the right of migrant workers to participate in the democratic decision-making processes of Sri Lanka (Ministry for Foreign Employment Promotion and Welfare, 2008). However, under the prevailing legal structure migrant workers cannot exercise their voting rights while they are employed overseas. An example would be India. The Representation of the People (Amendment) Act, No.36 of 2010 (this Amendment was inserted to the principal enactment Representation of the People Act 1950) of India allows a Non-Resident Indians to cast his/her vote by satisfying the required conditions.

Section 20A of the Representation of the People (Amendment) Act, No.36 of 2010 (hereinafter referred to as People Act 2010) provides that 'notwithstanding anything contained in this Act, every citizen of India who has not acquired the citizenship of another country (s. 20A(1)(a)) and who is absenting from his place of ordinary residence whether temporary or otherwise shall be entitled to be registered as a voter in the constituency in which his place of residence in India as mentioned in his passport (s. 20A(1)(b))'. Thus, every person registered as above shall be allowed to exercise his/her franchise for elections (s. 20A(3)).

India has successfully implemented this amendment as many countries have provided Non-Resident Indians with the opportunity of casting votes. For example, Singapore High Commissioner of India has published an official notice in their website regarding casting vote for Indian elections instructing the voters to be physically present in the polling station with original passport on the election day.

Although it may be argued that this is not a reform that requires additional attention, the author interestingly points out the grassroots truth is that Sri Lankan politicians are keen to address the challenges that their voters face when trying to secure seats in the Parliament. If Sri Lankan migrant workers are permitted to vote, their vote base and the votes of their families shall have a considerable impact on the election results. Hence, this will encourage migrant

workers to stand up for their needs and expectations which will be acknowledged by legislators and/or potential candidates.

Sri Lankan Government has the discretion to decide whether the voting is only for Parliamentary elections and Presidential elections or whether it should be extended to Local Authorities Elections. Since migrant workers are now unable to exercise their right to vote, lawmakers will become more concerned about the topic only if an unfortunate event has happened to a worker. When compared to other pressing issues like domestic abuse and child labour, migrant workers are marginalized back benches in terms of receiving adequate attention for issues relating to their employment.

This safeguards their fundamental rights as Sri Lankan citizens, guaranteed under Article 3 read with Article 83 of the Constitution even when they are abroad. This offers them a forum to be heard and influence policy-level decision-making. Similarly, Section 6(1) of International Covenant on Civil and Political Rights Act, No.56 of 2007 and the UDHR in its Article 21(1) provide that 'every citizen shall have the right and the opportunity to take part in the conduct of public affairs, either directly or through any representative' (the UDHR adds further as 'freely chosen representatives').

It is noteworthy that under women's rights the Convention on the Elimination of All Forms of Discrimination against Women (1979) (hereinafter referred to as CEDAW) in its Article 7 imposes the duty upon the State to take measures to eliminate any type of discrimination allowing the women to vote and to be voted.

India being a developing country and having the second-largest population has extended Indian citizens' voting rights. Thus, Sri Lanka can also initiate voting outside Sri Lanka by way of an Election (Special Provisions) Act while incorporating legislative measures to labour laws in parallel. For example, the Parliament adopted the Election (Special Provisions) Act, No.28 of 2011 for facilitating voters who are subject to disabilities to be accompanied by a person when voting. According to Election (Special Provisions) Act, No.14 of 2004 Sri Lankan migrant workers can use their passports in casting votes, because it is a 'valid identity document'. Thus, Sri Lankan Government can decide on the mode of voting whether it should be in-person, postal or any other.

In terms of voting the United Nations International Covenant on Civil and Political Rights (1966) (hereinafter referred to as ICCPR) in its Article 19(2) states that with right to freedom of expression, everyone shall have the right to receive information regardless of frontiers. This is important because voting requires dissemination of credible information. Importantly, Article 25 stipulates that every citizen shall have the right and the opportunity to vote without unreasonable restrictions.

The world is moving towards technologically advanced era, therefore the reason that the voters are not physically presented in polling booths will no longer be a justification and will amount to an unreasonable restriction which deprives Sri Lankan migrant workers from voting.

The Migrant Workers' Convention in its Article 41 states that migrant workers shall have right to participate in public affairs of their State of origin and to vote and according to Article 41(2) the State is required to facilitate the opportunity according to their legislations. Sri Lanka has ratified the above convention and as a State there is an obligation to safeguard Sri Lankan migrant workers' right to exercise franchise.

Part 2 – Domestic Workers in Sri Lanka

Other than the two pre-independence laws, the Registration of Domestic Servants Ordinance, No.28 of 1871 (amended in 1936) and the Chauffeur Regulation Ordinance, No.23 of 1912 which are now deemed to be outdated due to the drastic shifts of socio-economic conditions. Hence, domestic workers' contribution to the labour force has never been legally acknowledged. As provided below, in the unregulated economy, domestic labour continues to be practically unnoticed. Firstly, Employment of Women, Young Persons, and Children Act, No.47 of 1956 regulates instances for example dangerous occupations, children in entertainment, and hazardous occupations. Since domestic workers are not mentioned specifically, they cannot be covered by its application.

Secondly, domestic workers are included in the Industrial Disputes Act, No.43 of 1950 according to definitions of 'workman', 'industry', and 'industrial dispute'. The above Act under Section 48 stipulates that compensation, rather than reinstatement, is the appropriate remedy for wrongful termination of such employment. Further, as to the dispute arose whether a domestic worker could make an application to a labour

tribunal to recover balance or arrears of wages was answered affirmatively in both *Sirisena v Samson Silva* (1972) and *Wijedeera v Babyhamy* (1973) provided that the award is a just and equitable order by a Labour Tribunal.

As per literal interpretation of terms ‘workman’, ‘trade union’ and ‘trade dispute’ of Trade Union Ordinance, No.14 of 1935 noting expressly excludes domestic workers. Though the Industrial Disputes Act extends trade union rights of the workmen to domestic workers, ‘*as domestic workers are generally illiterate, simply employed at households and neglected by the society, trade union rights cannot be realistically exercised by them*’ (Sarveswaran, 2012).

Thirdly, ‘trade’, ‘trade or businesses’ under Wages Boards Ordinance, No.27 of 1941, Workmen Compensation Ordinance, No.19 of 1934, Maternity Benefits Ordinance, No.32 of 1939 and Factories Ordinance, No.45 of 1942 do not incorporate domestic service. As domestic workers are not considered as workers within shops and offices, Shop and Office Employees (Regulation of Employment and Remuneration) Act, No.15 of 1954 is also inapplicable (Sarveswaran, 2012).

Finally, there is no distinct law to prevent sexual harassment at the workplace. Thus, the application of Section 345 of the Penal Code is possible, but it offers only remedies not precautions.

Therefore, as per the evaluated labour laws, no legal instrument ensures inter alia social security scheme, working hours, safety, and health. The extent to which it is legally recognized is also disseminated among a few legislations.

The Sri Lankan Constitution in Article 14(1) recognizes the right of all citizens inter alia to engage in any lawful occupation. This constitutional protection covers domestic workers by affording the same constitutional recognition that has been given to other lawful economic activities. However, the lack of legislative reforms to address domestic workers' issues has undermined their ability to benefit from the fundamental rights to the fullest (Abeysekara, 2010).

2.1. Recommendation - Introduce laws for personal safety and security of female domestic workers.

This reform focuses on females, due to the practical reality that the female houseworkers face more abusive instances than males and because of the

detrimental social medical consequences that a female houseworker would face in comparison to her male counterpart.

Since there is no separate legislation to address harassment for female domestic workers, Penal Code provisions relating to offences affecting the body and life under Chapter XVI shall be applicable for the cases of physical violence/harassment relating to domestic workers.

Notably, such framework has been legalized under the Prevention of Domestic Violence Act, No.34 of 2005. It is stated that domestic workers face similar circumstances in violence, and the necessity is to introduce/extend the mechanism to female domestic workers (Esufally, 2015). Further, Graunke (2002) also emphasizes that there are several commonalities between domestic violence and violence against domestic workers in terms of the forms of abuse and exploitation such as employer's utilization of employee's dependency, and the sense of isolation to exercise power and control.

Secondly, unlike in the major focus of criminal matters under the Penal Code, which is imprisonment as a legalized form of retribution, it is more suitable in these matters to award compulsory compensation for the worker upon adjudication.

Though the option of criminal proceeding must also be ensured, compulsory compensation is suggested because, when it comes to many cases related to female domestic workers, many of them are above the legal age of consent. Thus, according to Sri Lankan criminal law consensual sexual relationship with the master, unless it is a mere submission, does not fall within the purview of rape or sexual harassment. On the other hand, due to the absolute imbalance of power, it is difficult to neatly draw a fine line between submission and consent. In some cases, the initial submission may lead to subsequent consent. Further, as they are intended to earn, compensation in civil cases is much preferred than criminal cases. Therefore, such female workers tend to recourse to civil actions in situations where they are treated as mistress or where the master refuses to financially assist and/or accept the child born into such extra-marital union. In *Dharmadasa v Gunawathy* (1957) the paternity of illegitimate child was the subject-matter and the court allowed the appeal from the master to be exempted from paying Maintenance ‘with some reluctance’.

In *Warawita v Jane Nona* (1954) Justice Sansoni dismissed an appeal against an order to pay maintenance by the master (defendant) for illegitimate children born to the domestic servant who had worked for the defendant and his family. Further, in *Wijedeera v Babyhamy* (1973) where the defendant refused to pay the salary, the court held that the applicant was a 'workman' within the meaning of the Industrial Disputes Act and the fact that she was a mistress could not prevent her from claiming relief as an employee.

When enacting labour laws related to this subject-matter, it is crucial to adopt a gender sensitive and subjective approach as per the circumstances of each case. For example, in *Roshana Michael v Saleh, OIC (Crimes), Police Station, Narahenpita and Others* (2002) (a fundamental rights case) the vulnerability of a domestic servant even within the law enforcing authorities is apparent, where the servant was assaulted by the police in the presence of her master. Similarly, in *Karunanayake v Karunasiri Perera* (1986) respondent had told the female servant not to tell his wife or anyone about the pregnancy and that they would look after her if any trouble arose. In both situations, the matrix of power has affected the victims in two different dimensions. Additionally, the above Saleh case is an explicit example that abuses, and ill-treatments are encountered by employees within the surrounding circumstances of their employment has a clear probability of amounting to fundamental rights infringements.

Therefore, as mentioned in above, it is essential to introduce labour laws for personal safety and security of female domestic workers while also incorporating gender-sensitive and semi-criminal framework in adjudicating matters. Hence, the employers found guilty against domestic workers can be prohibited from employing future domestic workers (Esufally, 2015).

Thus, India provides a commendable example. Though it is worded as 'Sexual Harassment of Women at Workplace', there is no doubt that Sri Lanka can alter the phase and reform labour laws as 'Harassment of Women at Workplace' where sexual aspects are also ingrained. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (hereinafter referred to as the Sexual Harassment Prevention Act) defines 'domestic worker' as a woman who is employed to

do any household work for remuneration... either directly or through any agency on any time basis (which includes temporary, permanent, part time or full-time basis), but does according to Section 2 it does not include any member of the family of the employer and 'workplace' includes a dwelling place or a house.

Further, according to the 'Handbook on Sexual Harassment of Women at Workplace' (2015) published by the Ministry of Women and Child Development, India the Sexual Harassment Prevention Act introduces two-tier complaints mechanisms, namely, Internal Complaints and Local Complaints Committees where 50% of female representation is required. According to Section 4(1) of the Sexual Harassment Prevention Act every employer of a workplace shall constitute an Internal Complaints Committee whereas per the Section 4(2) the Presiding Officer shall be a senior level female employee.

Interestingly, the Act under its Section 14 punishes for false/malicious complaint and false evidence indicating that these measures are not for unjust advancement and Section 15 states that mental trauma, pain, suffering and emotional distress, loss in the career opportunity and medical expenses of the victim should be taken into consideration along with financial status of the respondent when determining the compensation to be paid. Thus, Section 16 of the same Act prohibits the publication of details except for disseminating regarding the justice secured to any victim without disclosing private and details of the victim and witnesses.

Sri Lanka must also initiate labour law reforms to legally recognize the need of a proper legal protection to uplift the status of female domestic workers. As stated in the above-mentioned handbook, the first step to prevention of violence against working women is recognizing such violence.

In terms of the international instruments, firstly, the CEDAW under Article 11(f) prominently guides towards women empowerment requires the States to adopt all appropriate measures to eliminate discrimination against women in the field of employment while specifically advocating for right to protection of health and to safety in working conditions. Thus, Article 14(1) the convention requires to pay a special attention in issues concerning rural women in the non-monetized sectors of the economy. Thus, ICESCR also advocates for just, favorable, safe, and healthy working conditions.

Declaration on the Elimination of Violence against Women (1993) and UDHR respectively provides women to enjoy all the human rights along with the economic freedom. Thus, sexual harassment and abuse encounter by female domestic workers is identified as gender-based violence against women. One may propose an argument under fundamental rights Article 11 that sexual and other forms of harassment for women is an infringement of their right to be free from inhuman or degrading treatment whereas ICCPR reiterates that everyone enjoys right to personal security and dignity should be respected (Abeysekara & Samarasinghe, 2019).

2.2. Relationship - Ensure social security/insurance schemes for domestic workers.

When considering the social security schemes according to the Sections Section 5 and 7 of the Payment of Gratuity Act, No.12 of 1983, has expressly omitted the privilege to domestic workers as the Minister by way of Orders published in Gazettes have excluded domestic workers and/or domestic service from the application of Employees' Provident Fund Act, No.15 of 1958 and Employees' Trust Fund Act, No.46 of 1980. As Sarveswaran (2012) stated in his conference paper 'it is possible for them to claim gratuity from a labour tribunal after termination of their services as they are covered by the Industrial Disputes Act'.

However, numerous practical instances have warned domestic workers to be economically protected by labour laws. Covid 19 provides the best justification to this argument as its socio-economic effects have been especially severe for domestic workers. Domestic workers were compelled to stay home due to health regulations and it resulted in losing their employment and earnings. Those who remain employed were usually at a higher risk of contracting the virus, exposing not only themselves but also their loved ones.

As stated in the legal analysis, since these workers are not protected by any national labour legislation their own sicknesses, financial and health issues of the country may easily deprive them of occupation. For example, as the Maternity Benefits Ordinance does not safeguard the employment, a female domestic employer may be terminated from her job due to her pregnancy.

It is undoubtedly essential to include domestic workers at least to the minimum level of social security/insurance despite all kinds of barriers that

the Sri Lankan Government would encounter, because deprivation of lawful income is a motive to earn unlawfully. For example, once news reported that a father (fisherman and during the kerosene shortage) who caught stealing a milk powder packet had confessed that he could not bear the cries of his children anymore. Thus, by constantly ignoring the vulnerability of domestic workers, the Government should not promote crimes indirectly.

Providing domestic workers with sufficient social security/insurance is a human right as well as a necessary element of decent work (International Social Security Association, 2021) and countries are eliminating administrative, financial and legal barriers to benefit domestic workers either by amending or introducing legal mechanisms.

The Philippines is prominent among these nations, because according to the International Labour Organization the domestic enactment adopted by the Philippines in 2013 is regarded as a pioneering labour and social legislation that legally safeguards an estimated 1.9 million domestic workers (ILO Country Office for the Philippines, 2013).

The Domestic Workers Convention (2011) which Sri Lanka has not yet ratified, had served as the model for the Philippines' law.

The Philippines law under the Act Instituting Policies for the Protection and Welfare of Domestic Workers 2013 (hereinafter referred to as the Republic Act 10361), Section 2(d) requires the State to follow international conditions of workers and standards for Filipino domestic workers towards inter alia decent employment, income and enhanced coverage of social protection.

According to Section 30 of the Republic Act 10361 a domestic worker who has worked for at least one month is covered by the Social Security System, the Philippine Health Insurance Corporation, and the Home Development Mutual Fund with all benefits provided by law.

Then the security mechanism stipulates that the employer is responsible for making premium payments or contributions. However, the same Act under Section 30 stipulates that if the domestic worker receives a salary of Pesos 5,000 or more per month, he/she is required to pay the appropriate share of premium payments or contributions as per the legislation. Further, Section 40 makes any violation of the provisions of this Act punishable with a fine and the

aggrieved party has the option of filing an appropriate civil or criminal action.

This is a similar structure to the systems of Employees' Provident Fund and Employees' Trust Fund of SL. Therefore, Sri Lanka can also develop such a social security/insurance scheme by extending the existing Acts or newly incorporating labour legislation.

However, prior to implementation of the scheme, it is essential that the domestic workers get themselves registered with a system where the Government can investigate the database. The suggestion can be made to implement a registration procedure for domestic workers with the Grama Niladari or online where the burden lies with the employer to register his/her workers.

Thus, ICESCR in its Article 9 also emphasizes that States shall acknowledge the right of everyone to social security, which then definitely includes the labour force.

Primarily as Article 12(1) of the Sri Lankan Constitution (fundamental rights) all persons are equal before the law and shall be equally protected. One may argue that Gazettes ruling out few sectors including domestic workers from social security benefits amounts to infringement of fundamental rights.

The UDHR under Article 22 states that every person of a society has the right to social security whereas economic rights are considered as indispensable for one's dignity and the free development of personality. Thus, both national and international co-operation is encouraged. The CEDAW requires the States to ensure that females are not discriminated in terms of employment which as per the Article 11(1)(e) includes the right to social security. Moreover, as per Article 14 of the Migrant Workers' Convention, equal treatment inclusive of social security is required to be protected as a duty of the State.

It is essential that, all the labour law reforms relating to domestic workers security/insurance schemes be compulsory to be adhered, because it is indicated that voluntary schemes are unsuccessful in getting attention of informal sector such as domestic workers (International Social Security Association, 2021). In contrary, it legally compels the employers to value the legal and ethical framework of employer-employee relationship.

Conclusion

As per the illustrations drew from foreign jurisdictions, the world trend moves towards recognizing rights of employees beyond boundaries. To ensure quality employment and safeguard the rights of employees the author suggests that the Sri Lankan Government should incorporate the recommendations effectively, as the Government is vested with the authority to take the initiative. Thus, Sri Lanka is bound to act as per the ratified conventions under international standards.

In terms of fundamental rights, although one may argue that the enforceability of fundamental rights is restricted as Article 17 reads with Article 126 of the Constitution, the author argues that irrespective the probability of claiming a successful remedy upon infringement, the State is inherently under a constitutional obligation to ensure the protection of fundamental rights for the above selected sectors, because they are fundamental or the basics of a quality life and employment.

Future Research

Future researchers can examine either other key sectors of employment by utilizing the comparative right-based approach or propose advanced reforms for the same sectors. Moreover, research can be conducted by analyzing other prevailing conventions which are not ratified, but relevant to the subject-matter.

Competing Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and publication of this article.

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