

Protection of the Female Domestic Migrant Workers: Concerns, Challenges and Regulatory Measures in Sri Lankan Context

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Abstract

Female Population as a percentage of the total in Sri Lanka was last reported at 50.66 in 2012. With the introduction of the concept of open economy to the country in 1977, new means of earning were integrated into the (traditional) economic process that existed. As a result, Sri Lankan females got more opportunities to enter into the economic process under the unskilled labour category especially in Middle Eastern Countries such as Jordan, Kuwait, Lebanon, Qatar, Saudi Arabia and UAE. From 1977 to date, there has been a gradual increase in women who leave the country to obtain domestic jobs in the above mentioned countries. Today Sri Lankan females migrate at a large scale as domestic workers to Middle Eastern Countries as well as Western Countries especially to European Countries, making it the highest and most stable source of foreign currency inflow to the country. In 2011, the total foreign remittance received from migrant workers was increased by 25% which was 5145 million USD and the female migrant domestic workers should be appreciated for their contribution of 75% out of the said amount. Though it contributes to the economic stability of the country it also led to create many social issues which seriously affect the Sri Lankan society. Family breakdown, increase in the offence of incest and increase in juvenile delinquencies are some of the issues. More critically, these females have to face many problems such as lack of social and occupational security, lack of recognition, wage discrimination and difficulties in access to justice. This could be considered as serious violation of their rights as humans and employees. The empirical data reveals that during the last three decades there were many instances reported that Sri Lankan female domestic workers had to undergo a wide range of hardships including refusal of payments, violating the term of employment contract, physical and mental abuse, sexual harassments, rape and torture that led to disability or even death. Sri Lanka, as a member State to many international treaties which declared standards to protect the civil and economic rights of the people should have a responsibility to adopt a strong policy, international agreements and national laws which align with the international standards to ensure the protection of the rights of these workers. Though Sri Lanka has enacted some national laws and adopted a policy, the rights of the female domestic migrant workers are still violated massively. Therefore, the present study intends to critically evaluate the contemporary national laws and existing policy in relation to the protection of the rights of Sri Lankan female domestic migrant workers and make suggestions to strengthen the prevailing policy and laws. This objective will be achieved by testing the following hypothesis; the gap between the international standards and the national laws and the weak policy adopted by Sri Lanka led to violate the rights of the female domestic migrant workers. Relevant information from books, treaties, statues, journal articles and websites are referred as secondary sources and information and statistics gathered by relevant authorities are used as primary sources to complete this research.

Keywords: national laws, international treaties, and rights of female domestic migrant workers

1. Introduction

The total foreign remittance received from migrant workers has rapidly increased during the last two decades. The female migrant domestic workers should be appreciated for their large contribution to the national economy. However, female migrant domestic workers are more vulnerable to criminal victimization than the other (skilled labour or professional) migrant workers. This vulnerability leads to an increase in the criminal victimization against them day by day. Physical and mental abuse, sexual harassment, rape and physical torture that lead to disability or even death are common criminal offences which are committed against them by their foreign employers.

Religious and racial discrimination, lack of freedom of movement, association and expression, social stigma and unequal economic treatment are some other victimization they have to face during the period of their employment. All these victimizations amount to the serious violation of their rights as human beings. In some instances, these females also commit crimes due to their vulnerable situations. The applied legal proceedings in the host countries against those cases are also highly debated. Therefore, protection of female domestic migrant workers especially their rights and a review of the role of law is of utmost importance in this regard.

Efforts were taken by the international community to provide human rights protection to migrant workers all over the world by introducing many international conventions. These conventions cover the large number of females who migrate for work, especially for domestic work and their families too. Sri Lanka is a member State who ratified almost all such instruments and also enacted several national laws to protect these people who largely contribute to the economy of the country.

In such a scenario, the empirical evidence reveals that female domestic migrant workers who fall into the category of either unskilled or low skilled are subject to a high level of violation of human rights including labour rights and sexual harassment, abuse and torture at their work places. Therefore, the present study intends to critically evaluate the contemporary national laws and existing policy in relation to the protection of the rights of Sri Lankan female domestic migrant workers and make suggestions to strengthen the prevailing policy and laws. This study will include a discussion on relevant international conventions too. The aforesaid objective of this research will be achieved by testing the following hypothesis; the gap between the international standards and the national laws and the weak policy adopted by Sri Lanka led to violate the rights of the female domestic migrant workers.

The paper consists of four main parts to analyze the said issues. The first part deals with the scenario of Sri Lankan females in labour migration which consists of more emphasis on the statistics of temporary departure of females in Sri Lanka for domestic work to Middle-East Countries, reasons for such migrations and the problems faced by these females. Then the discussion moves to a review of the International Standards with regard to the protection of the domestic migrant women workers. The third part is a critical analysis of the National Laws which carries the main findings of the study. The final part concludes the paper with the suggested legal remedies as one solution for this problem.

2. Female Labour Migration in Sri Lankan Context

Migration is the movement of people from one place to another in order to find work or better living conditions. It is estimated that approximately 215 million of people of the global population migrate today from one country to another for various reasons including education, seeking asylum, business and employment etc. With the introduction of open economy in 1977, people of Sri Lanka also found new pathways for earning money making unskilled or low skilled domestic employment in foreign countries as the most accessible one.

Today, foreign employment is a stable foreign currency inflow to Sri Lanka. According to the statistics of the Central Bank, Sri Lanka's remittances were US \$ 5.2 Billion in 2011 and increased to US \$ 6 Billion in the first half of 2012. It formed 8.2% of the GDP. These figures were expected to be further increased in 2013 which was succeeded. Annually, Sri Lanka sends 265,000 migrant workers approximately (out of 20 million population) to Middle East, European Union Countries, Western Europe, Far East Asia Countries, North and Central America, Australia and New Zealand, South East Asian Countries and South Asian Countries for various employments but mostly as domestic workers. This is 17% of the workforce of Sri Lanka which supports to earn over 35% of the country's foreign exchange.

In the beginning of 1980s, many females from poor and low income classes started to migrate temporary to foreign countries with the expectation of a good salary to overcome their poverty and working in dignified condition as domestic workers. Therefore, it is pertinent to discuss the definitions of domestic work and domestic worker. Work performed-in for household/s means domestic work and any person engaged in domestic work within an employment relationship is called a domestic worker. According to the statistics published by the Ministry of Foreign Employment in Sri Lanka, most departures for foreign employment consist of female domestic workers or in other words housemaids. From 1996 to 2005, except in 1999 and 2003, it was more than 50% of the total departure for foreign employment. From 2006 to-date, the percentage of domestic migrant workers is between 40% and 49% out of the total foreign employment. In the year 2011, the percentage significantly decreased and it was 36%. From 1996 to-date, out of the total female migrants, 90% consists of domestic workers (housemaids) and many of them are employed in Middle-East Countries.

The increase in female migration for employment especially as domestic workers attribute to many negative issues. They are vulnerable to a high risk of labour exploitation, sexual harassment and abuse, rape, torture which leads to disability or loss of their lives. They have to face various forms of unexpected hardships after their arrival in the country of employment including unpaid wages. Many female domestic workers are mothers who have at least one child. These children are also vulnerable to various forms of violence inside or outside the home. One of the findings of a research carried out by the author last year, titled 'Violence against Children and Ensuring the Justice for Child Victims through Human Rights and Penal Laws Perspectives: Sri Lankan Experience' was that female migration for foreign employment (especially domestic work in Middle East countries) attributes to the increase in the rate of juvenile delinquency.

With all these problems, the rate of women labour migration is still relatively high. Females are seeking opportunities in the foreign labour market to achieving a few goals such as up lift the living condition of the family including their children's education or siblings' education and overcome social problems hindrance.

3. Global Concerns and International Human Rights Law

As said earlier, female domestic migrant workers are vulnerable to various forms of abuse which could be correctly considered as human rights violations. Therefore, they are also entitled to complete protection from those abuses under human rights law. Mainly, the issues relating to migrant domestic workers occur between the individuals in two countries (between an employment agency company or employer and the employee). The specific nature of these abuses necessarily calls for inventions of international law especially the international human rights law in considering the redress for those victims. Although international human rights law provides a wide range of standards to protect human rights of the people, by these standards alone, it is hard to address and cover all the aspects of abusive experiences that are faced by female domestic migrant workers. However, there are some core principles, such as non-discrimination and equal protection of the law adopted by the international human right law through the international instruments which compel the member States to enact national laws to provide legal protection to these women. The International Covenant on Civil and Political rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and International Convention on the protection of the rights of All Migrant Workers and Members of their Families (MWC) are significantly relevant. Among these international instruments, Migrant Workers Convention is the most noteworthy as it provides explicit and extensive human right protection to migrant workers all over the world.

Since the majority of the violence/abusive activities that are faced by the female domestic migrant workers are committed by the non-State actors such as employers and recruitment agencies, it is important to acknowledge and discuss (briefly) the ways in which the human rights framework has evolved to respond to abuse that is committed by individuals/private entities other than State. First, human rights treaty law was never designed with the sole objective of preventing abusive activities committed by the State. Those instruments were introduced affirmative duties of the State to ensure the basic (subsistence) rights of the people such as right to food, shelter, health, economy and education (e.g. standards in ICESCR). Second, those treaties included affirmative duties of the State in the private sphere against the violence/abusive activities committed by individuals against women under domestic violence (e.g. standards in CEDAW). The next question arises whether a particular State is bound to protect the rights which are guaranteed and secured by the international conventions with regard to non-citizens including (female domestic) migrant workers. The basic human right norms which are enshrined in the conventions are equally applicable to any human being, irrespective to the ratification of the treaty or enabling domestic statute in a particular country or their status (e.g. standards ICCPR). Therefore, it is reasonable to state that the international treaty law norms and standards should be extended to protect any human being including non-citizens (migrant workers) anytime irrespective to their status.

In a close scrutiny, it is demonstrated that the international standards which adopted the core principles of non-discrimination (definition for discrimination – CERD and CEDAW) and equal protection before the law do not draw any distinction between men and women (Articles 3 ICCPR, Article 3 ICESCR, Article 1& 3 CEDAW) as well as citizens and non citizens (Article 2 ICCPR, Article 2(3) ICESCR, Articles 1(2&3) CERD - *Zaid Ban Ahmed Habassi vs. Denmark* CERD Communication 10/1997) or domestic workers and skilled labour/professionals (Article 2 ICCPR,).

More significantly, MWC explicitly includes non-discrimination and equal protection standards into the convention to protect migrant workers that are extended to the protection of the female domestic migrant workers.

Further to the above said standards, there are several other significant protective standards in international treaty law that provide protection against exploitative terms of work and employment contracts for female domestic migrant workers including equal rights in employment (Article 11 (1) CEDAW), fair wages (Articles 7(a) & 2 ICESCR), reasonable hours of work and working conditions (Article 5 (e) (i) CERD), rest, holidays with pay, and remuneration for public holidays etc... (Article 7(d) ICESCR, Article 25 CMW)).

International Labour organization (ILO) treaties also guaranteed many protections for migrant workers including female domestic migrant workers pertinent to employment contract, wages, and terms of work, reasonable working conditions, and holidays with pay. Some of them are: Migration for Employment Convention –Revised 97 of 1949, Minimum Wage Fixing Convention 131 of 1970, Protection of Wages Convention 95 of 1949, Recommendation 100 on the Protection of Migrant Workers (Underdeveloped 1955) and Protection of Wages Recommendation (Nno.85 of 1949).

Increase in number and the brutality of violent activities pushes the States either to ratify the International Conventions especially CMW or enact national laws aligning with the standards guaranteed by the Convention.

4. Evaluation of the National Frame Work

Sri Lanka has ratified the CMW in 1995 and also she has ratified all (8) fundamental Conventions, two Governance Conventions (this is out of four) and thirty Technical Conventions (this is out of 177) of the ILO. Out of forty Conventions ratified by Sri Lanka, of which thirty-one are in force, nine Conventions have been denounced later. Sri Lanka has endorsed the ILO Multilateral Framework on Labour Migration. Further, Sri Lanka is a member State to the international treaties mentioned in the previous chapter of this paper.

Prior to 1980, administration of labour migration was governed by the Fee Charging Employment Act No. 37 of 1956. The Act empowered the Commissioner of Labour to supervise the agencies involved in recruitment of workers for local and foreign employment. In 1980, a new statute, the Foreign Employment Agency Act No. 32 was enacted to govern the rising needs of the foreign employment industry in the face of stable and better flow of Sri Lankans for foreign employment. This Act was repealed by the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985. The Sri Lanka Bureau of Foreign Employment (SLBFE) (Section 3, Part I of the Act), the main regulatory body for labour migration was established under this Act with long term objective and responsibilities to develop and manage the entire industry. Currently, Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 is the main legislative enactment passed by the Parliament to govern this sector. In 1994 (Act No 4 of 1994) and 2009 (Act No 56 of 2009) amendments were introduced to the Act. The Association of Licensed Foreign Employment Agencies (ALEFA) was established (section 54, Part VIII of the Act) to regulate foreign employment agencies which are registered with the Association, ensuring and enforcing best ethical practices for foreign employment trade by strict disciplinary control. Sri Lanka Foreign Employment agency established under the Companies Act is the only State owned agency, a subsidiary of Sri Lanka Bureau of Foreign Employment which recruits people in foreign employment.

Apart from section 15 (m) of the Act which says ‘undertake the welfare and protection of Sri Lankan employed out side Sri Lanka as one of the objectives of SLBFE’ there is no single provision containing the main Act or the Amendments to stipulate the rights which are guaranteed by the international instruments especially the CMW and ILO Conventions or remedies for the violation of their rights. This could be identified as a fundamental weakness of the Act. New laws should be introduced to protect the human and labour rights of migrant workers including female domestic migrant workers throughout the process of migration from the country of origin to hosting country.

Part IV of the Act sets out legal provisions to prevent carrying on a business of a foreign employment without a license issued under the Act. Prior to 2009 every licensee should become a member of ALFEA, registering with ALFEA (section 54 (3) – part VIII of the Act) established under section 54 (1) of the Act. According to the Amendment introduced in 2009 (section 8 of Act No. 56 of 2009), it is not compulsory. The new Amendment creates an unhealthy situation in the industry especially in maintaining the ethics and disciplinary control of the foreign employment recruiting agencies. Neither the Act nor the Amendments have a single provision to include the sub agents who directly deal with these women and the agencies, which is another demerit of the Act.

Trafficking is one of the related issues of labour migration which adversely affects female domestic migrant workers. Although 1985 Act or its Amendments did not pay any attention to this issue, the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005 passed by the Parliament to address the issue directly within the country as well as to give effect to the provisions of SAARC Convention. Under the Act, trafficking is recognized as a heinous crime corresponding with severe punishments. The law relating to extradition has been enhanced by this Act. Nevertheless, none of the legislations set out a single provision relating to rehabilitation of the women who faced abusive/violent activities by their employers.

In this background, the National Labour Migration Policy was developed in 2008 by the State which is a pioneering initiative taken in the South Asian Region with regard to the protection and promotion of the welfare of migrant workers and their families. The policy is developed in three sections. In other words the policy is developed to achieve three main goals namely; good governance and regulation, protecting and empowering migrant workers and migration and development in the labour migration industry.

Signing Bilateral Agreements with hosting countries (with Qatar signed in 2008 with Kuwait signed in 2012 and with Oman to be signed shortly), signing Memorandum of Understanding with hosting countries, (with Saudi Arabian Government), promoting social protection schemes with hosting countries, (with UAE, Kuwait & Qatar governments) introducing new insurance schemes for migrant workers paid by the employers in the hosting countries (with Jordan and negotiations are taking place with Saudi Arabian Government) some initiatives have been taken under this policy to protect the female migrant workers including female domestic migrant workers.

Since there are no alternative livelihoods/employments, especially for female domestic migrant workers, after returning to the country of origin (Sri Lanka), these women are forced to re-migrate. Though the Act does not have any provision to institutionalize the aftercare and reintegration service to protect the socio economic rights of returnee migrants, a reintegration policy was developed in 2006 to address this issue by the SLBFE. However, this has not been effectively implemented.

The dispute between the migrant worker or his/her family member and the recruiting agency (section 44 of the Act) with regard to the term of the employment contract, there is no strong legal provision stipulated in the Act (other than an action instituted in the competent District Court) against the recruiting agency who deliberately avoids the inquiry.

Introduction of a minimum age limit for potential domestic migrant workers who wish to be employed in Saudi Arabia could be viewed as violation of mobility and economic development. Further, this restriction may be analyzed as gender discrimination against females and un-equal treatment for poor uneducated young females. This minimum age restriction is not an effective protection as it does not prevent any form of violence committed by the employers in hosting countries against women who are above the stipulated age limit.

5. Conclusion

Over the years, foreign employment has generated significant inflows of remittance and played as a safety control device for local unemployment. Overseas migration has opened-up employment opportunities for many women, who may not have been previously active in the local labour force. Vulnerability of female domestic workers who migrate under unsafe conditions is a major issue, despite all the measures and safeguards that were introduced by the State since 1980.

Sri Lankan migrant workers, who are employed overseas, including female domestic migrant workers, are not covered by the national labour law sphere. Thus the SLBFE Act is only a primary piece of legislation applying to Sri Lankan workers migrating for overseas employment. However, the State cannot escape from its responsibility towards the migrant employees including female domestic migrant workers. The State should provide adequate and effective protection for these women and their families too. Enacting and implementing laws towards their protection is one possible way of safeguarding their needs and rights. Therefore, strong national laws which align with international human rights treaties standards, laws which govern the bilateral agreements with receiving/hosting countries to protect them from various forms of violence and laws which provide socio economic welfare of these workers may undoubtedly play a great role in protecting this group of people who contribute to the economic development of the country.

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