

SOUTH ASIA WOMEN'S FUND
MOVING WOMEN



A STUDY
BY
GEETA RAMASESHAN

A Critical Overview
of
The Law and Policies on Trafficking in Sri Lanka

About South Asia Women's Fund(SAWF):

SAWF is a Colombo based regional women's Fund, committed to supporting women-led interventions to enhance and strengthen access to women's human rights and countering violations thereof. It has worked closely with partners to support human rights in the context of conflict, identity, socio-economic deprivations and in relation to violence against women. In its present phase, it is committed to supporting the emergence of a regional human rights movement, which would address national and regional concerns. Its work is focused on developing a regional mandate that is informed by national realities, and is responsive to the rights and needs of the individual woman. The organisation, currently works in Bangladesh, Nepal, India, Pakistan and Sri Lanka.

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Trafficking in Sri Lanka

A Study by South Asia Women's Fund (SAWF)

By :

Geeta Ramaseshan

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FOREWORD

Trafficking is a critical issue, which impacts women's abilities to access all their human rights, especially related to economic betterment. The region is home to countries that have been seen as source, transit and destination, for the women who are moved through false promises and are trafficked for the purposes of forced and coercive labour and other forms of exploitation, including commercial sexual exploitation.

The situation is compounded by the abject poverty the women struggle against, given the inequitable distribution of developmental dividends, increasing levels of human deprivation, and lack of economic opportunities. The absence/ineffectiveness of mechanisms for safe migration, control on women's agency and gender-based discrimination have been catalytic in the increase of violation of passage and movement, rendering them even more vulnerable to trafficking. The issue has emerged as a critical concern for women particularly in India, Bangladesh, Nepal, and Sri Lanka who have very little in the name of shared support systems for the moving women.

Frequent upheavals in the political dynamics amongst these neighbouring countries have proven not only to be restrictive for free movement across the borders, but have augmented illegal, irregular, forced and unprotected movement including recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons- especially women. Also, as in case of India, other than cross-border trafficking, there has been increase in trafficking of women and children within the country for the purpose of debt bondage, forced labour, sexual exploitation and forced marriage.

However, limitation and variation in understanding and approaches taken to address trafficking is also visible amongst the groups working on the issue. Use of human rights perspective and framework to deal with trafficking is still at a nascent stage in the region. While the existing definition of trafficking is extremely broad, its limitation is in not outlining with clarity the rights of the victims and survivors. Furthermore, its understanding is limited to commercial sexual exploitation, with very little attention being paid to other forms of exploitation.

Differing understanding on approaches and perspective has also lead to tension between groups. For instance while responding to women and trafficking, as in addressing child trafficking, some groups have prioritized rescue and protection, consequences of which have rarely been explored. On the other hand, sufficient attention has not been paid to the intersection between migration for better life opportunities and trafficking for labour exploitation, and role of sending or receiving states towards ensuring protection from such exploitation. Neither is the value of such work recognized by the receiving states.

In the given context, it is imperative to pay more attention to the inter-sectionality of issues within trafficking and examine trafficking through a human rights lens. A perspective on issues such as the right to safe movement, consent, etc. must be strengthened amongst key actors at various levels. Definition of survivor is also to be understood in keeping with various contributory factors and contextual situation. Clearly she, as survivor, has to be the focus, not only while contributing her voices and experiences into discourses or discussions, but in designing policies, strategies, programmes, laws, interventions, activities, monitoring, evaluation and research so as to draw upon survivors real needs, realities, experiences, etc.

SAWF's programme on Right to mobility supports women rights organisations in Bangladesh, Nepal India and Sri Lanka to implement the rights based approach in addressing issues related to enhancing women's right to mobility. ***Trafficking as such is not viewed as a separate issue but as a violation of women's right to movement.*** A three-pronged strategy encompassing capacity building, advocacy and promoting implementation of the rights based programmes at different levels (ranging from sub-regional and grassroots), is being implemented to ensure effective translation of right based approach on the ground. The supported interventions would contribute in identification of issues, strengths and challenges in the International normative standard as well as regional and national legal frameworks.

The programme focuses on nuanced interpretation and increased application of relevant International normative standards/instruments. As there are several measures taken by State in all the four countries as well as at the regional level, this analytical assessment of legal and policy provisions as well as institutional and non-institutional arrangements in Sri Lanka had to be undertaken. This is in continuation to the 2012 SAWF study, *A critical overview of international and regional normative standards and frameworks in trafficking of women in Bangladesh, India and Nepal*. This would not have been possible without *Geeta Ramaseshan*, a brilliant lawyer, renowned women's rights activist and a dear friend! I would also like to thank *Foundation For A Just Society* for its support this past year. We hope it is a resource for all those who work to support women's decision-making in relation to their lives, journeys and destinations.

Tulika Srivastava

Executive Director

South Asia Women's Fund

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EXECUTIVE SUMMARY

This is a study on the laws and policies related to trafficking in Sri Lanka, and their usage and impact on women. The study provides an analytical assessment of legal provisions and judicial processes that are available as a preventive measure, or which can be accessed to claim justice for trafficking survivors, and analyses the strengths and challenges in Sri Lanka on concerns relating to trafficking.

It also examines the ability of the legal framework to provide justice for survivors of trafficking. Specific recommendations are provided on the basis of the above work, to enable advocacy for a legal and policy framework that supports women's right to movement.

The study is not a critique of the Sri Lankan system but seeks to provide critical inputs for improvement and strengthening concerns in problematic areas of trafficking. The study is divided into five chapters. The *first chapter* deals with the definition of trafficking under International standards, the legal system in Sri Lanka and its obligation under various international covenants. The *second chapter* details with the de jure situation starting from the Constitutional provisions to other legislative measures. The *third chapter* deals with the de facto situation relating to trafficking. The *fourth chapter* analyses the findings of the problems and concerns in Sri Lanka. The *fifth chapter* relates to recommendations.

Sri Lanka is a source country for migration as people in Sri Lanka seek employment abroad. Being party to many conventions on labour, it also has strong systems in place for the organised sector. The constitutional provisions deal with trafficking at various levels and the State has a comprehensive definition of trafficking under the criminal law. It has made major reforms in law in this area through modifications in the Penal Code in 2006 covering different forms of trafficking.

However, the domestic laws do not provide much assistance to the large number of women who are trafficked outside the country. There is a lack of adequate data and case laws on the issue, making it difficult to study the application of the law and policies on the ground. The lack of access to legal services, shelter homes, compensatory mechanisms, different languages in the legal system, and absence of witness protection programs are some of the critical concerns, which need to be addressed, along with protecting and securing the rights of trafficked women both within and outside the country. Officials of the criminal justice system

need to be trained to understand the nuances of this complexity clearly and not simply treat it as a crime control process. An interdisciplinary approach needs to be applied to tackle these concerns; criminal procedure and socio economic schemes, along with other relevant departments of the government need to be engaged with.

Sri Lankan migrant women in other countries need special protection which has to be impressed upon in bi-lateral processes and treaties. Access to legal services is a must and the victim must not be treated just as a witness. There is also a need for other processes such as shelter homes, rehabilitation and opportunities to seek employment in the host country. In the region there is a need for joint processes with other States that would include training and interaction with organisations working on different sides of the borders. The study thus, looks into these concerns and provides recommendations in this regard.

METHODOLOGY

The research methodology for the report used a secondary literature review method. Background material including statutes, reports, UN documents, legal studies and research papers were studied and analysed in this regard. Some of the references and sources also refer to the Constitution of Sri Lanka, the domestic laws of Sri Lanka and policy statements.

CHAPTER ONE: DEFINITION OF TRAFFICKING UNDER INTERNATIONAL STANDARDS, THE LEGAL SYSTEM IN SRI LANKA AND ITS OBLIGATION UNDER VARIOUS INTERNATIONAL COVENANTS

Background of the legal system in Sri Lanka and its obligation under the Convention for the Elimination of All forms of Discrimination against Women (CEDAW)

Sri Lanka has a parliamentary democracy with a combination of the presidential system. The legal system is largely based on common law with traces of Dutch law in the civil laws. The family laws apply on the basis of one's own religion as is common in the South Asian region. Since Sri Lanka follows the common law tradition, judicial precedents have legal sanction in the application of the law.

Sri Lanka ratified CEDAW in 1981 and acceded to the optional protocol to CEDAW on 15th October 2002, along with Bangladesh, Nepal and Maldives in the region.¹ Additionally Sri Lanka has also acceded to other international conventions and has ratified the Convention concerning forced or compulsory labour (1930) and the Abolition of Forced Labour Convention (1957).

Understanding trafficking

One of the concerns in the region is on the definition of trafficking. According to the International Human Rights Law Group and the Foundation against Trafficking in Women:

All acts and attempted acts involved in the recruitment, transportation within and across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt

¹ CEDAW, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Chapter IV: Human Rights.

bondage for the purposes of placing or holding such person, whether for pay or not, inservitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.

This definition focuses on identifiable elements of the crime, in order to distinguish cases of trafficking from other acts, such as undocumented migration.

According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime,

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs².

Three elements are focused under this definition. First, trafficking is seen as an intentional action. Second, the means of recruitment is considered to be exploitative and third, the purpose for which the person is trafficked is relevant to treat it as a crime.

The SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution 2002 defines trafficking in the narrow framework of prostitution and does not address other forms of trafficking. While it includes the moving, selling, or buying of a person, it does not include their recruitment, labour, transfer or receipt that does not form a part of the buying or selling process.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, Article 3(a)

Under Article 6 of the CEDAW convention, States are required to take all appropriate measures including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.

In relation to these, Sri Lanka has taken the essential ingredients of all the three definitions into developing a comprehensive understanding of trafficking, which deals with several themes such as prostitution, sexual exploitation, child labor, bonded labor/ indentured labor/ pledging of persons for labor and immigration/ emigration and so forth.

CHAPTER TWO: THE DEJURE POSITION

The Constitutional Guarantees in Sri Lanka

The Constitution of Sri Lanka guarantees equality before law and equal protection of the law. The Constitution also prohibits discrimination. However special provisions can be made for the advancement of women, children and disabled persons and these cannot be held as discriminatory.³ The constitution also recognises the freedom of movement of citizens subject to reasonable restrictions.⁴ The constitution further has a set of directive principles of state policy that guide the governance of the state for the establishment of a just and free society.⁵ In addition to this, guarantees under the Legal Aid Commission of Sri Lanka established by the government seek to provide legal aid for migrant workers and women and children with the mandate of providing access to justice for all.⁶

The table below extracts the relevant Provision from the Sri Lankan Constitution.

Article	
12 (Right to equality)	<p>(1) All persons are equal before the law and are entitled to the equal protection of the law.</p> <p>(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds:</p> <p>Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:</p> <p>Provided further that it shall be lawful to require a person to have sufficient knowledge of any language as a qualification for any such employment of office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.</p>

³ Article 12 (1) (2) and (4) of the Democratic Socialist Republic of Sri Lanka

⁴ Article 14 and 15.

⁵ Article 27

⁶ www.legalaidcommission.com for a detailed analysis, see “the legal aid sector in Sri Lanka, searching of sustainable solutions, mapping of the legal aid services in Sri Lanka,” Asia foundation, <http://asiafoundation.org/resources/pdfs/SriLankaLegalAid.pdf>

	<p>(3) No person shall, on the grounds of race, religion, language, caste, sex or any one such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.</p> <p>(4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.</p>
<p>14 (Freedom of Speech, assembly, association, movement, etc.)</p>	<p>(1) Every citizen is entitled to -</p> <ul style="list-style-type: none"> (a) the freedom of speech and expression including publication; (b) the freedom of peaceful assembly; (c) the freedom of association; (d) the freedom to form and join a trade union; (e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching; (f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language; (g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise; (h) the freedom of movement and of choosing his residence within Sri Lanka; and (i) the freedom to return to Sri Lanka. <p>(2) A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognized by paragraph (1) of this Article.</p>
<p>15 (Restrictions on fundamental Rights)</p>	<p>(1) The exercise and operation of the fundamental rights declared and recognized by Articles 13 (5) and 13 (6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph “law” includes regulations made under the law for the time being relating to public security.</p> <p>(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.</p>

	<p>(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony.</p> <p>(4) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (c) shall be subject to such restrictions as may be prescribed by law in the interests, of racial and religious harmony or national economy.</p> <p>(5) The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (g) shall be subject to such restrictions as may be prescribed by law in the interests, of national economy or in relation to -</p> <p>(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and</p> <p>(b) the carrying on by the State, a State agency or a public corporation of any trade, business,, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.</p> <p>(6) The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy.</p> <p>(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph " law " includes regulations made under the law for the time being relating to public security.</p> <p>(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12 (1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.</p>
27 (Directive Principles of State Policy)	(1) The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include -

- (a) the full realization of the fundamental rights and freedoms of all persons;
- (b) the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life ;
- (c) the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities ;
- (d) the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal ;
- (e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good;
- (f) the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka ;
- (g) raising the moral and cultural standards of the People, and ensuring the full development of human personality ; and
- (h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.

(3) The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka.

(4) The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralizing the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.

(5) The State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the People of Sri Lanka, including the racial, religious, linguistic and other groups, and shall, take effective steps in the fields of teaching, education and information in order to eliminate discrimination and prejudice.

(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

(7) The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State.

(8) The State shall ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.

(9) The State shall ensure social security and welfare.

(10) The State shall assist the development of the cultures and the languages of the People.

(11) The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.

(12) The State shall recognize and protect the family as the basic unit of society.

(13) The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.

(14) The State shall protect, preserve and improve the environment for the benefit of the community.

(15) The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations.

The Penal Code of Sri Lanka

The code defines various categories of offences and provides for their punishment. It was amended in 2006 defining trafficking and making it a specific offence. Under the provision, besides buying or selling of persons, instigation, facilitation, recruitment, transportation or harbouring for prostitution or sexual exploitation is an offence punishable with a minimum sentence of two years and with a maximum of twenty years.⁷ Threats, fraud, inducement, coercion, or exploitation of the vulnerability of the persons would be an offence. The definition

⁷ Section 360 C.

is very exhaustive, is gender neutral, and is protectionist towards the victim/survivor besides being punitive towards different categories of perpetrators. It also clearly identifies the elements of the crime, takes note of the different classification of the acts, the intentional nature of the act and its exploitative feature. In its content it has absorbed most of the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons and has combined the ingredients of the definition formulated by the International Human Rights Law Group and the Foundation against Trafficking in Women (STV) making it one of the most progressive provisions on trafficking in the region. Trafficking of women is however treated as a separate offence along with other categories of offence including organ transplant. The provisions have many nuances that would require law enforcement authorities to be well trained in the same as it is a very exhaustivelist and the different categories make the collection of evidence gathering complex.

The table below extracts the relevant Provisions from the Sri Lankan Penal Code.

Article	
358A (Debt bondage, serfdom, forced or compulsory labour, slavery and recruitment of children for use in armed	<p>(1) Any person who shall be guilty of an offence.</p> <p>(a) subjects or causes any person to be subjected to debt bondage or serfdom ;</p> <p>(b) subjects or causes any person to be subjected to forced or compulsory labour ;</p> <p>(c) subjects or causes any person to be subjected to slavery ; or</p> <p>(d) engages or recruits a child for use in armed conflict,</p> <p>(2) Any person who is guilty of an offence under paragraph (a), (b) or (c) of subsection (1), shall on conviction be liable to imprisonment of either description for a term not exceeding twenty years and to a fine. Where the offence is committed under paragraphs (a), (b) or (c) of subsection (1) in relation to a child or where the offence is committed under paragraph (d) of subsection (1), be liable to imprisonment of either description for a term not exceeding thirty years and to a fine.</p> <p>(3) In this section -</p> <p>"debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not</p>

	<p>set - off against the debt and the length and nature of those services are undefined;</p> <p>"forced or compulsory labour" means all work or service which is exacted from a person under the threat of any penalty and for which such person has not offered himself voluntarily, except-</p> <p>(a) any work or service exacted by virtue of any law for the time being relating to compulsory military service in relation to work or service of a purely military character ;</p> <p>(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;</p> <p>(c) any work or service exacted from any person as a punishment imposed by a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to be or placed, at the disposal of private individuals, companies or associations;</p> <p>(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic of epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;</p> <p>(e) minor services of a kind which, being performed by the members of the community in the direct interests of the said community, and thereby considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services;</p> <p>"serfdom" means the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person whether for reward or not and is not free to change his status ;</p> <p>"slavery" means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised; and</p> <p>"child" means a person under eighteen years of age.</p>
360C (Trafficking)	<p>(1) Whoever-</p> <p>(a) buys, sells or barter or instigates another person to buy, sell or barter any person or does anything to promote, facilitate or induce the buying, selling or bartering of any person for money or other consideration;</p>

(b) recruits, transports, transfers, harbours or receives any person or does any other act by the use of threat, force, fraud, deception or inducement or by exploiting the vulnerability of another for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any law ;

(c) recruits, transports, transfers, harbours or receives a child or does any other act whether with or without the consent of such child for the purpose of securing forced or compulsory labour or services, slavery, servitude or the removal of organs, prostitution or other forms of sexual exploitation, or any other act which constitutes an offence under any law,

(2) Any person who is guilty of the offence of trafficking shall on conviction be punished with imprisonment of either description for a term not less than two years and not exceeding twenty years and may also be punished with fine and where such offence is committed in respect of a child, be punished with imprisonment of either description for a term not less than three years and not exceeding twenty years and may also be punished with fine.

(3) In this section,-

"child" means a person under eighteen years of age ; "forced or compulsory labour" has the same meaning as in section 358A;

"slavery" has the same meaning as in section 358A; and

"exploiting the vulnerability of another" means impelling a person to submit to any act, taking advantage of such person's economic, cultural or other circumstances."

THE LABOUR LAWS OF SRI LANKA

The labour laws are a blend of colonial legislation as is in the region, to which amendments have been made from time to time. While the legislation offers a framework and structure for the protection of workers and prosecution of employers who violate labour standards within the country, such protections are not available for those who are employed abroad. While this is a problem with all countries whose nationals seek employment outside their nations, the problem is acute here since there is a large population that migrates out of the country in search of employment.

The case of Rizana Nafeek

Rizana Nafeek, a domestic worker from Sri Lanka, was charged with smothering an infant of her employer in 2005 within two weeks of her arrival in Saudi Arabia. She was seventeen years old when she committed the offence. Her parents alleged that her date of birth was altered in the passport by employment agents so that she could be shown as a major. A confessional statement was obtained from her in Arabic, a language that Nafeek did not know. Nafeek was charged with murder while she claimed that the baby had choked accidentally on a feeding bottle.

Nafeek gave a statement subsequently where she stated, *“The madam came home at about 1.30 p.m. and after having seen the infant, she assaulted me with slippers and hands and took the infant away. Blood oozed from my nose. Thereafter police came and took me into their custody. I was assaulted at the police station too. They assaulted me with belt and coerced me for a statement stating that I had strangled the infant [...] In these circumstances, I under duress placed my signature on the written paper they gave to me. They took me to another place and asked a question, as I was virtually in a state with loss of memory and in fear and frightened mood, I had happened to tell them that I strangled the infant.”* [Asian Tribune, September, 2013. <http://www.asiantribune.com/node/64506>]

Nafeek was sentenced to death in 2007. The President of Sri Lanka made two appeals to the King of Saudi Arabia asking for her pardon. Leading personalities including Prince Charles and various human rights groups also appealed to the Saudi Government but it was of no avail and Nafeek was beheaded for the offence in 2013. Nafeek was a minor and her execution was a violation of the Convention of the Rights of the Child. Her pre trial and trial processes where her statement was recorded under coercion when she did not know what she was signing, and the proceedings that were conducted in a language not known to her are all in violation of the rights under the International Convention on Civil and Political Rights.

Even though the study does not address the issue of migration and labour, an understanding of the existence of these laws and mechanisms is relevant as they have a link to trafficking. For example, an illegal entry into the country would be governed by the immigration laws, while monies made from trafficking could be considered as from illegal activities. Again in the case of women trafficked abroad there could be violation of foreign employment regulations. Sri Lanka has progressive labour regulations that addresses all issues of employment with

specific reference to women and children,⁸ and is party to many international labour codes, but as indicative in Nafeek's case, violations such as declaration of false age continue to occur.

The Immigrants and Emigrants Act, 1949

This act provides for an elaborate mechanism to regulate the entry and exit of non citizens into Sri Lanka. This includes the requirement of visa, work permits, and other such requirements. The Act treats as offences and penalizes those bringing persons into Sri Lanka in contravention of the Act.⁹ Persons who enter and work illegally can be also be penalized. However in view of the penal code making trafficking an offence the person trafficked would be considered a victim and the interplay of these two statutes would be relevant to consider the rights of a victim that would include her right to stay and pursue the criminal justice system without the fear of being deported or leave the country and come back when required for the trial process.

The Employment of Women, Young Persons and Children Act, 1956

This Act considers certain kinds of work as hazardous.¹⁰ The statute has different ages with reference to various categories of work. It prohibits night shifts for those under eighteen years.¹¹ For those who are in apprentice or vocations the Act has an exemption where the Minister can permit the employment of young persons between 7 PM to 11 PM of those young persons in the age group of 16 to 18 years.¹² Employment of children below 15 years is prohibited on ships while a register of names of young persons below sixteen years has to maintained by the master of the ship. A child can be employed by the parent or guardian in light horticultural or agricultural work or traditional work carried by the family after school hours.¹³ The Act has a positive prohibition of children being employed during school hours that would prevent them from accessing education.¹⁴ The Act further prevents children from participating in entertainments where the performance is charged monetarily.¹⁵ Young persons below eighteen years are prohibited from participating in any performances that can endanger life or limb.¹⁶ No child below sixteen can be trained to take part in performances that

⁸ The labour code of Sri Lanka 2004. http://www.labourdept.gov.lk/web/images/PDF_upload/index_edit_2010_july_15.pdf

⁹ Section 45 A http://hrcls.lk/PPF/Library_Domestic_Laws/Legislations_related%20to_Migrants_Workers/1948%20No%2020%20Immigrants%20and%20emigrants.pdf

¹⁰ <http://www.ilo.org/dyn/travail/docs/1648/Employment%20of%20Women%20amendment.pdf>

¹¹ Section 2 (1)

¹² Section 3

¹³ Section 14

¹⁴ Section 17.

¹⁵ Section 18

¹⁶ Section 19

are dangerous in nature.¹⁷ In the context of women, they cannot be forced to work night shifts. A written sanction has to be obtained from the labour commissioner by every employer. No woman who has worked from 6 AM to 6 PM can be asked to work on the night shift for the same day. The employer is bound to give additional wages, and have female wardens to see to their welfare. It is mandatory to have adequate restrooms and refreshments. The maximum period to which she can work in a night shift is for ten days in a month.¹⁸ However these conditions do not apply if her job is managerial or technical in nature or if she is employed in health and welfare issues, or is in a family undertaking.¹⁹

Sri Lanka Bureau of Foreign Employment Act, 1985

This Act regulates foreign agencies that provide employment in Sri Lanka. The Act seeks to promote and develop employment opportunities outside Sri Lanka for its citizens. In the process it also seeks to assist licenses in the negotiation of terms and conditions of persons seeking employment with persons abroad.²⁰ It regulates the business of foreign employment agencies that recruit Sri Lankan nationals outside the country.²¹ These agencies are required to obtain licenses to conduct the business of recruitment of persons outside Sri Lanka and set standards for the contracts of employment. In this process, the Board under the Act can enter into agreements with various foreign authorities, employers and employment agencies. Other functions include formulating and implementing a model contract for employment that ensures fair wages and standards of employment and examining the authenticity of documentation issued to those who recruit persons going abroad for employment. The Act seeks for the provision of an Information Data Bank that will indicate the flow of nationals outside Sri Lanka.²² There is also a provision for the establishment of a Workers' welfare fund and for providing rehabilitation to those who require it. Overall the focus is towards providing all kinds of assistance to those who seek employment abroad and to curb trafficking on the basis of false promises made by agents to persons desperate to seek a job outside the country, who are unaware of the correct procedures.

The statute requires the agencies to be registered before the Bureau of Foreign Employment and provides for a method of licensing foreign agencies operating in the country so that the

¹⁷ Section 20

¹⁸ Section 2 A

¹⁹ Section 2 B.

²⁰ Section 15 a and d

²¹ Section 15 e

²² Section 25 f, g, h, i, j and l

²³ http://www.commonlii.org/lk/legis/num_act/slbofea21o1985420/

migration of Sri Lankans abroad is regularised and operated with transparency and accountability.²³ The Bureau constituted under the Act seeks to consolidate all issues relating to migration under one head in order to address not just trafficking but also issues of fair wages, working conditions and other related rights of workers. In that process it is all encompassing. The Act has also been amended in 2009. According to the Ministry of Labour and Labour Relations, low skilled workers and female domestic workers constituted the largest number of migrant workers (65 percent) and were migrating mostly to the Middle Eastern countries. However there seems to be a decline in female migrant workers due to the policies pursued by the Government to enhance skills and develop opportunities within the country.²⁴ A harmonious construction of the objects of the Act and trafficking as is elaborately defined under the penal code, would serve as a valuable tool to prosecute those foreign agencies that indulge in acts contra to the objects contained in this statute and can be a preventive and protective measure.

Prevention of Money Laundering Act, 2006

Under this Act any income and property derived from unlawful activity is an offence invoking stringent punishment. Though the statute does not specifically state the term trafficking, since it is an offence under the penal code, any income derived from it could be considered as money laundered inviting freezing of accounts, forfeiture and sentencing.²⁵

The Brothel Ordinance and the Vagrancy Ordinance

The Brothel Ordinance and the Vagrancy Ordinance, two ordinances of colonial origin, criminalise many acts in what is considered prostitution and vagrancy. The brothel ordinance of 1889, provides for the suppression of brothels. Any person who keeps or manages the management of a brothel commits an offence. The Act also makes it an offence if a landlord knowingly rents the premises for the running of the brothel where there is “habitual prostitution.” In the same way, a tenant or occupier who runs a brothel commits an offence.

²⁴ Recent trends and polices on labour migration in Sri Lanka, presented by WJLU Wijayaweera Secretary, Labour and labour relations ministry. <http://www.adbi.org/files/2014.01.28.cpp.sess3.4.wijayaweera.labor.migration.sri.lanka.pdf>

²⁵ <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39864395.pdf>

²⁶ <http://srilankalaw.lk/revised-statutes/volume-i/188-brothels-ordinance.html>

²⁷ Section 3(b)

²⁸ Section 3(b) <http://www.srilankalaw.lk/revised-statutes/volume-viii/1342-vagrants-ordinance.html> the provision is defined as follows; every common prostitute wandering in the public street or highway or in any place or public resort and behaves in a riotous or indecent manner is deemed to be idle and disorderly.

²⁹ Section 7 (1) (a) of the Vagrants Ordinance.

Under this statute, while soliciting is not an offence, the provisions of the Vagrancy ordinance causes a different problem.²⁶ The ordinance to consolidate the law relating to vagrants of 1842 makes it an offence if a person behaves riotously or disorderly in public streets. Under the ordinance, any “common prostitute” wandering in the public street or highway, and behaving in a riotous or indecent manner, is deemed as an idle and disorderly person.²⁷ Though sex work is not an offence,²⁹ soliciting is an offence under the Vagrancy ordinance. The offence of soliciting is specific where any person in or about any public place solicits for the purpose of committing an act of illicit intercourse or indecency commits an offence.³⁰ In the context of trafficking two provisions of the statute would have significance: a person who knowingly lives wholly or in part on the earnings of prostitution and a person who systematically procures persons for the purpose of illicit or unnatural intercourse commit an offence. Such persons are “considered rogues” and the provisions are gender neutral in this regard. The ordinance provides for punishment of 6 months and enhanced punishment for a period not exceeding two years if the offence is repeated; the penal code with its amendments provides for a more exhaustive method in the context of punishment. However, since they are of the nineteenth century, they do reflect the biases of the colonial systems in their understanding of vagrancy and prostitution.

³⁰ Section 9 (1) a and b.

CHAPTER THREE: THE PROBLEM OF TRAFFICKING IN SRI LANKA AND THE DEFACTO POSITION

Sri Lanka is a source country for migration; large numbers of people in Sri Lanka seek employment abroad. Out of a population of approximately 20 million³¹, 1.7 million Sri Lankan nationals were estimated to be migrant workers overseas, with about 200,000 people leaving annually for the purpose of employment.³²

Given the large population seeking overseas employment, Sri Lankan migrants are vulnerable to trafficking. This vulnerability was intensified by the internal conflict in the country, which resulted in a lot of displacement and migration. The main problem for citizens employed overseas is that they are not afforded protection under Sri Lankan law, which puts trafficked persons in an extremely precarious position. Any protection, if at all, would depend on the laws of the country of employment, and the situation could become critical for women who become victims of trafficking.

The Trafficking in Persons Report 2012 considers Sri Lanka as a tier 2 country. According to this report, Sri Lanka is primarily a source and, to a much lesser extent, a destination country for men, women, and children subjected to forced labor and sex trafficking. Sri Lankan men, women, and some children (16 to 17-year olds) migrate to Saudi Arabia, Kuwait, Qatar, the United Arab Emirates, Jordan, Bahrain, Lebanon, Iraq, Afghanistan, Malaysia, and Singapore to work as construction workers, domestic servants, or garment factory workers. Some of these workers, however, subsequently face conditions of forced labor including restrictions on movement, withholding of passports, threats, physical or sexual abuse, and threats of detention and deportation for immigration violations. Before their departure, many male migrant workers go into debt to pay high recruitment fees imposed by unscrupulous licensed labor recruitment agencies and their unlicensed sub-agents. These agencies and agents also commit recruitment fraud by engaging in contract switching: defined as the promising of one type of job and conditions but then changing the job, employer, conditions, or salary after arrival. Women migrating abroad for work generally are not required to pay recruitment fees in advance, although many report paying off such fees through salary deductions. Some Sri Lankan women are promised jobs or began jobs as domestic workers, mainly in Singapore or

³¹ Trafficking in Persons Report 2012. <http://www.state.gov/j/tip/rls/tiprpt/2012/index.html>

³² Shadow report to CEDAW. While the report does not have much information on trafficking it considers it as a matter of concern.

Jordan, but were forced into prostitution. A small number of Sri Lankan women are forced into prostitution in the Maldives. Internally-displaced persons, war widows, and unregistered female migrants remained particularly vulnerable to human trafficking.

In 2011, Sri Lankan trafficking victims were identified in Egypt, Poland, and the United States. Within the country, women and children are subjected to sex trafficking in brothels. Boys are more likely than girls to be forced into prostitution in coastal areas for domestic child sex tourism.

In addition, there are reports of children being subjected to bonded labor and forced labor in dry-zone farming areas on plantations, and in the fireworks and fish-drying industries. Some child domestic workers in Colombo, generally from the Tamil tea-estate sector of the country, are subjected to physical, sexual, and mental abuse, nonpayment of wages, and restrictions of their movement. A small number of women from Thailand, China, and countries in South Asia, Europe, and the former Soviet Union may be subjected to forced prostitution in Sri Lanka.³³ The problem is often compounded due to the lack of sex disaggregated data of trafficked persons.³⁴

The Trafficking in Persons report indicates that trafficking is outward flowing, though there are instances of women being trafficked into Sri Lanka, and is related to promises of employment resulting in women being forced into sex work.

However, according to the report the government took strong preventative efforts, including the convictions of two labor recruitment agents who committed fraudulent recruitment offenses, and enhanced inter-ministerial coordination through monthly meetings. However according to the report, there were also instances of officials not understanding trafficking as a distinct issue but confusing it with prostitution.

The CEDAW committee in its concluding comments to Sri Lanka has raised a concern about the low rate of conviction on trafficking and the lack of protective measures and safe homes for victims of trafficking. It has also stressed the need for a witness protection programme. To address the concerns of women outside the country, it has stressed the need to ratify the protocol to prevent, suppress and punish trafficking in persons especially of women and children supplementing the UN Conventions against Transnational Crime.

³³ Trafficking in Persons Report 2012. <http://www.state.gov/j/tip/rls/tiprpt/2012/index.html>

³⁴ Shadow report to CEDAW. While the report does not have much information on trafficking it considers it as a matter of concern.

CHAPTER FOUR: FINDINGS ON THE PROBLEMS AND CONCERNS IN SRI LANKA

- Sri Lanka's definition on trafficking is in consonance with international standards, but during the course of this study no case was available that related to the conviction of persons on trafficking.
- Offences under the Criminal law are offences against the State. The law is stringent in punishment but the victim is treated only as witness in the process. The rights of victims in terms of rehabilitation, such as compensatory schemes, alternate modes of employment etc. are not available in the criminal laws.
- While the criminal justice process is stringent in its approach, there is no witness protection program. Since victims are usually from impoverished and poor families, they would be disadvantaged in the absence of protective measures such as safe homes and witness protections, thereby denying them effective legal remedy.
- One of the core problems relate to the fact that women from Sri Lanka are often trafficked into other countries where their position becomes very difficult as they are governed by the domestic law of the host country.
- There is a low rate of conviction in trafficking. Studies for the research indicate that among law enforcement officials this is partly due to the difficulty in identifying trafficking and the lack of knowledge on the formal identification of "trafficking cases." Though amendments have been made in the Penal code since 2006, internal trafficking is often not clearly understood and trafficking is seen as one that is beyond national borders.
- Trafficked women in conflict areas, in addition to the problems stated above, often find that the proceedings are not in a language known to the victim.
- Legal services and legal aid are not always available nor are they used for recourse by trafficked women.
- Under the Vagrancy Act soliciting is an offence. But sex work is distinct from trafficking though many trafficked women would be in sex work. The difference between trafficking and sex work is often not clearly understood.
- The lack of sex disaggregated data results in lack of information in this area.
- The shadow report and other reports do not give a clear indication on trafficking.

CHAPTER FIVE: RECOMMENDATIONS

- Establishing awareness raising programmes on trafficking in areas with large populations of migrant labour and vulnerable communities; access to information, including understanding of criminal laws, labour laws and related processes, could act as a preventative measure in addition to safety and security measures already in place.
- The programmes should be run in the local languages of the areas in which they are held.
- Easy accessibility and availability of shelter homes for those who could be vulnerable to repeat trafficking, and to those who want to pursue legal remedy.
- The shelter homes could also offer schemes for alternate generation of incomes.
- Since the trial process takes some time, women in the legal process often become susceptible to pressure or threats from the perpetrators. There must be an effective witness protection program in place.
- Sri Lanka has a strong criminal law to punish offenders. In the context of persons who are agents who recruit on fraudulent offers of employment or who charge excessive commissions, criminal law and violation of labour law standards could be used in conjunction so that there is a mechanism of compensation also available to the victim from such agents.
- An enabling environment must be developed whereby law enforcement officers are easily approached by the victims without apprehension.
- In the context of law enforcement officers, there must be improved efforts to investigate and prosecute suspected trafficking offenders.
- Training programmes for police officers, lawyers and judges, apart from including materials in law and investigation, must include the nuances of the differences between internal migration, trafficking, sex work and sexual abuse/assault. The training must be interdisciplinary in its approach to address issues of trafficking both as a crime control as well as a violation of human rights. Rescue and rehabilitation must be conducted using a gender sensitive approach.

- There must be a clear understanding among law enforcement machinery including police, prosecutors and judges on the identification of cases on trafficking as distinct from migrant work, sex work, and sexual assault and their overlapping in certain situations. This is very important when identifying a victim of trafficking.
- Victims of trafficking who might themselves be guilty of certain offences such as obtaining fraudulent visas, passports, age certificates and other documents must be treated sympathetically by the enforcement agency, as such violations on the part of victims may make them not seek legal recourse out of fear of having violated a law.
- There must be facilitation and speedy repatriation of foreign trafficking victims and they should not be obligated to remain in the foreign country if they choose to initiate legal proceedings. There must be services available for them to come back from their countries to depose in the case.
- The lack of specific information on trafficked women needs to be addressed. These are essential so that there are systematic procedures for identifying trafficked victims and referring them to shelter and care homes. There must be creation of awareness and training among all persons at all stages including source, demand and transit in trafficking.
- There has to be a better coordination between the countries in the South Asian region which does not have the comprehensive definition of trafficking that Sri Lanka has.
- There must be joint investigations of cases in the region as well as with other states when criminal syndicates are involved across borders.
- The countries of the region must have joint training among officials at the mid and lower levels so that a better understanding of concerns emerges in this area.
- Even though the survivor would be a witness, s/he must have effective legal aid and legal assistance in the language known to her/him both at the pre trial stage and trial stage. There is a necessity to offer foreign trafficking victims temporary immigration or residency status.

- In cases of trafficked young persons and children, a multi-sectoral integrated approach that addresses education, health and safe environment could be considered.
- There could be regional grids of non-governmental organisations working in the area of trafficking that are linked to each other and who could work in conjunction across borders.
- Special mechanisms are required to address women who are trafficked outside Sri Lanka.
- Special policies must focus on the former conflict zone areas where women would be more vulnerable to trafficking.
- More research required to fill the data gap and case laws on trafficking, which could in turn inform better application of laws and policies on the ground.

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