

# Road to Hell: Discrimination to Migration to Trafficking of Women?

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## INTRODUCTION

In the recent times, the question has arisen as to whether there could be a possible link between voluntary migration and human trafficking.<sup>2</sup> This raises the interesting question as to what necessitates people to migrate in search of greener pastures. Could there be a possible connection between inequality and migration? Could that link somehow pave way for human trafficking? In the Sri Lankan context the right to equality remains guaranteed by way of constitutional provisions and it leads one to re-evaluate the right to equality in order that the above questions are answered.

In this paper, the author seeks to examine the possibility of establishing the argument that the lack of equality towards women, irrespective of constitutional and other guarantees, makes genuine female empowerment a distant dream<sup>3</sup>. Does female migration establish the fact that females seek opportunities for empowerment and / or liberalisation from their legal, cultural, societal and economic bonds? In light of the questions raised, the paper seeks to explore whether the lack of policies for the protection and enhancement of equality for women is what leads to unsafe or illegal migrations that make women fall prey to human trafficking.

## DEFINITIONS

The first internationally accepted definition for trafficking was rendered by Article 3 (a) of United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>4</sup> The broad definition refers to recruitment<sup>5</sup>, transportation, transfer<sup>6</sup>, harbouring and receipt of persons which is done through any mechanism such as abduction or duress which effectively vitiates

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<sup>2</sup> Randall Akee et al, *Transnational Trafficking, Law Enforcement, and Victim Protection: A Middleman Trafficker's Perspective*, Journal of Law and Economics, Vol. 57, No. 2 at p. 349, Kay B. Warren., *Troubling the Victim/ Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration*, Indiana Journal of Legal Studies, Volume 19 Issue 1, (2012), Nazli Avdan., *Human Trafficking and Migration Control Policy: Vicious or Virtuous Cycle?*, Journal of Public Policy, Volume 32 Issue 3 (2012), Tom Cahill, *Human Trafficking in Ireland*, The Furrow, Volume 50 Issue 4 at p. 238 (2009), For a contrary opinion see: Rhacel Salazar Parreñas et al, *What is Human Trafficking? A Review Essay*, accessed at <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/10.1086/664472> on 9<sup>th</sup> October 2014.

<sup>3</sup> For purposes of this paper, the author limits the analysis to the connection between inequality to women and migration of women that is resultant

<sup>4</sup> See also Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments and Recommended Practices*, United Nations, New York, 2003, at p. 3.

<sup>5</sup> See *Maria Divina Altagracia Mejia v MGC*, UNODC No: CR1002 which is a case on recruitment for the purpose of sexual exploitation.

<sup>6</sup> See for instance the case *Proceso No 33882*, UNODC No: COL 019 which is an instance in which threat and use of force had been used for the purpose of transfer.

consent. The statement of purpose in Article 2 specifically refers to the protection of human rights and reaffirms the affirmative action adopted by the United Nations Organization for the protection of women and Children.<sup>7</sup> The reference made to recruitment, transportation and transfer in the definition is wide enough to encapsulate recruitments, transportations or transfers that are committed under the guise of providing employment opportunities to women abroad. It is, therefore, clear that the Protocol leaves room for interpreting *unsafe* migration as being a mechanism that can be abused for the purpose of the commission of the crime of human trafficking.

This definition is applicable to Sri Lanka as Sri Lanka became a signatory to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime on 13<sup>th</sup> December 2000<sup>8</sup>. The aspect that would be most relevant from this definition to the concept that is developed in this paper is in respect of women who are recruited for an employment and then are coerced, forced or threatened in to becoming a victim of trafficking.

Migration has been understood to mean various different concepts to different scholars ranging from environment induced migration (also known as climate migration)<sup>9</sup> to brain drain<sup>10</sup>. This paper discusses neither aspects as the limited length does not permit a comprehensive analysis of the same and nor does it relate to the thesis that the author argues for. This paper explores labour migration as a possible initiator of human trafficking. Part I Art 2 (1) of International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families 2003 defines a '*migrant worker as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national*'. In the context of this paper migration would carry the meaning stated above.

## **BACKGROUND**

The issue of trafficking has an dishonourable past and, even in the contemporary era where there are many attempts to effectively uplift human rights and standards of life, this issue of human trafficking continues to plague the world. Irrespective of many local and international laws that are in place, human trafficking continues in its crooked, cursed long path. In a context where many Asians migrate supposedly seeking greener pastures, the problem of human trafficking has become even more vital a question. While it is accepted that there are many methodological challenges in empirical studies in human trafficking, this should not be considered a barrier to any attempt or mechanism that is adopted for the purpose of eradicating this ignoble crime against humanity.

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<sup>7</sup> See Article 2 (a) of United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

<sup>8</sup> However, Sri Lanka is yet to ratify this Convention.

<sup>9</sup> Sireesha V. Chirala, *Acclimating to Climate Change: Filling the International Policy Void for Environmentally Displaced People*, Houston Journal of International Law, Volume 35 Issue 2 (2013) at p. 359, Katrina Miriam Wyman, *Responses to Climate Migration*, Harvard Environmental Law Review, Volume 37 Issue 1 at p. 167 (2013)

<sup>10</sup> Ayelet Shachar, *Recruiting 'Super Talent': The New World of Selective Migration Regimes*, Indiana Journal of Global Legal Studies, Volume 20, Issue 1 at p.21 (2013), Lisa Lieman, *Should the Brain Drain be Plugged? A Behavioral Economics Approach*, Texas International Law Journal, Volume 39 Issue 4 at p. 675 (2004)

In light of the reported incidents, mainly from Sri Lanka and elsewhere in the developing world, this paper seeks to establish the notion that gender discrimination leads to migration thus leading to the possibility of human trafficking. Although this is a topic which ought to have been analysed in its general scope – to assess the violations of rights of both males and females – due to limitations of length, the analysis is limited to the assessment of trafficking of women. An attempt is made in this paper to connect the shortcomings in the legal provisions that perpetuate discrimination against women which force women to seek liberalisation through unsafe migrations which, in turn, lead to trafficking in women.

The first part of the paper provides references to various contexts in which discrimination against women occur in Sri Lanka. This includes an analysis of the right to equality with specific references to various Acts and legal provisions which could be interpreted to the detriment of the right to equality. This is followed by the second part of the paper which is an attempt to theorise the framework of right to equality with reference to philosophies of law, rights and morality. The third part of the paper establishes how inequality leads to migration. The fourth part of the paper comprises of an analysis of human trafficking in a broader context with evidence of how migration leads to human trafficking followed by a brief analysis of the possible means of addressing the issue of human trafficking.

## **I. DISCRIMINATION IN THE SRI LANKAN CONTEXT – THE BITTER REALITIES**

Discrimination against women is largely prevalent in the Asian societies and it is opined by many scholars that such discrimination could be a direct product of the socially constructed patriarchal culture and the social and religious norms of the Asian region.<sup>11</sup> Even ratification of the Convention for the Elimination of all forms of Discrimination against Women (CEDAW) by some Asian states seems to have been incapable of renouncing some of the age old traditions which enjoy the status of overriding some fundamental provisions of the constitutions of those countries<sup>12</sup>.

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<sup>11</sup> See Prof. Preet Rustagi, 'Situation of Women in South Asia: Some Dimensions', <[www.cwds.ac.in/researchPapers/SituationofWomeninSouthAsia-preet.pdf](http://www.cwds.ac.in/researchPapers/SituationofWomeninSouthAsia-preet.pdf)>, 2010, (accessed 24<sup>th</sup> of February 2014); Alda Facio and Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, IWRAW Asia Pacific Publications, Malaysia, 2009 at p. 13; Prof. Savitri Goonesekera, 'Social Transformation, Gender Inequality, and Violence Against Women in Contemporary Sri Lanka', <<http://www.kln.ac.lk/units/cgs/pdf/CGSUKOratioFinal.pdf>>, 2012, (accessed 25<sup>th</sup> February 2014).

<sup>12</sup> The text that follows contains a comprehensive analysis of some such instances from Sri Lanka. For examples from other Asian countries see, Aman A. Cheema and Ashish Virk, *An Assessment of Right to Elementary Education for a Girl Child in India: A Review of International and National Law*, Law, Social Justice and Global Development Journal, Volume 16 (2011) accessible at <http://www2.warwick.ac.uk/fac/soc/law/elj/ugd> accessed on 9<sup>th</sup> October 2014, Gita Gopal, *Gender and Economic Inequality in India: The Legal Connection*, Boston College Third World Law Journal, Volume 13, Issue 1 (1993) at p. 63, Ishara Mahat, *Women's Development in Nepal: The Myth of Empowerment*, The Fletcher Journal of International Development (2003) accessed at <http://fletcher.tufts.edu/Praxis/Archives/~media/Fletcher/Microsites/praxis/xviii/Mahat.pdf> on 9<sup>th</sup> October 2014, Suresh Mehata et al, *Inequalities in the Use of Family Planning in Rural Nepal*, BioMed Research International (2014) accessed at [downloads.hindawi.com/journals/bmri/2014/636439.pdf](http://downloads.hindawi.com/journals/bmri/2014/636439.pdf) on 9<sup>th</sup> October 2014, Sheikh Kabir Uddin Haider, *Dimension and Intensity of Gender Inequality in Bangladesh: An Overview*, Journal of Research in Peace, Gender and Development, Volume 2, Issue 10 (2012) at p. 203

The references made thereto in this paper are purely indicative of some of the major instances of violations of women's right to equality and are not meant to appear as a comprehensive analysis of the same. In this part of the paper, the author seeks to briefly analyse the existing legal provisions which discriminate women in relation to, for instance, in employment, marriage, divorce, rights in relation to property, right to vote and the responsibility of bringing up of an illegitimate child. While it is no way argued that this is a comprehensive analysis of the aforementioned forms of discrimination what is sought to be established in the context of this paper is that there is discrimination against women in all walks of life and such discrimination leads to women being discontent with the existing law. It is argued that such discontentment encourages women to seek for measures outside this jurisdiction in order to escape disempowerment and discrimination. In this regard, it is suggested that some such women seek foreign employment or seek to migrate thus at times, falling prey to human trafficking. It is therefore argued that the lack of effective implementation of right to equality subsequently results in women becoming victims of human trafficking.

Subsequent to the ratification of CEDAW, the Sri Lankan government has adopted several measures to protect and advance the rights of women. The adoption of the Women's Charter, the establishment of the National Women's Committee and the proposed Women's Rights Bill are some of the measures adopted by the then government. While the Women's Rights Bill never became a reality, the Women's Charter remains in the status of the proverbial white elephant. It was alleged that the enactment of the Women's Rights Bill would enable women to have more sexual freedom and liberty, particularly in respect of abortions, and that such liberalisation would result in the breach of the sanctity of marriage.<sup>13</sup> In light of the failure to enact the Women's Rights Bill, the natural turn would be towards the Women's Charter. However, as was mentioned earlier, the Charter is similar to a declaration thus lacking justiciability.<sup>14</sup> Although the protection of the women's right to equality remains a central focus of all governmental policies, laws and regulations, they have failed to reach the status of enforceability. The existence of the contradictory customary laws and the non-enforceability of some of the women's right thus contribute to the continuation of acts of discrimination against women.

Article 12 (4) of the Constitution enables the legislature to draft laws for the '*advancement of women, children and disabled persons*'. Such provisions for affirmative action should be looked at with favour. However, the continuing existence of Article 16 of the Constitution which states that '*all existing written law and unwritten law shall be valid and operative*' irrespective of any inconsistency with the provisions of the Fundamental Rights Chapter is an outright derogation of the individual rights and liberties afforded by the Fundamental Rights Chapter of the Constitution. Susan Williams argues that the drafters of constitutions should be mindful '*in designing every provision of a constitution*' as each provision has an

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<sup>13</sup> Sunil Abeyssekara, 'Dark Side of the Women's Rights Bill', <<http://www.thesundayleader.lk/archive/20040725/issues-3.htm>>, 25<sup>th</sup> of July 2004, (accessed 25<sup>th</sup> of February 2014).

<sup>14</sup> See in general in this regard, Bhavani Fonseka, 'Women's Rights Bill 2004 – A Commentary', Moot Point - Centre for Policy Alternatives, Volume 7, 2003 – 04 at p. 35.

impact on equality and how it affects women in general.<sup>15</sup> Arguably this stance is unswervingly applicable to Article 16 and how it *restricts* the rights of women thereby causing discrimination. The effect of this Provision was justified at the time of its introduction with reference to customary laws which are diverse in nature. Although the initial objective may have been the protection of the customary laws, whether such customary laws should be allowed to override the fundamental rights is a moot question<sup>16</sup>. Especially, in matters which are considered sensitive and debatable such as women's rights and liberties, one must question whether customary laws and principles which undermine equality ought to be allowed to prevail. It is submitted that the consequences of such discrimination compel women to seek liberty elsewhere thus making migration – legal or otherwise – an option.

Among the many forms of '*implied discriminations*' against women, social discrimination in the form of a patriarchal society and '*legalised discrimination*'<sup>17</sup> against women in the form of plural legal systems take prominence. The terms implied discrimination and legalised discriminations have been coined for the purpose of facilitation of this analysis. In the context of this paper, implied discrimination refers to the so-called protective mechanisms that are adopted for the benefit of women. For instance, the legislations that are in place for the protection of women who work at night have contributed to more discrimination as opposed to enhancing female empowerment or protection.<sup>18</sup> For instance, Section 2 A (2) (b) of the Employment of Women, Young Persons and Children's Act as amended<sup>19</sup> (hereinafter EWYPCA) states that '*the written sanction of the Commissioner of Labour should be obtained by every employer, prior to the employment by him of women to work after 10 p.m at night*'. While this piece of legislation should be appreciated as a progressive step in the process of affirmative action, the fact that it causes an inconvenience to employers when the need arises to employ women at night should be identified as a factor of economic oppression against women. Moreover, the discrepancies that are prevalent in terms of the payments made to men and women are presented as a contributory factor which leads to low participation of females in the work force of Sri Lanka<sup>20</sup>.

The difference between horizontal equality and vertical equality has been judicially recognised in Sri Lanka in the case of *C.W. Mackie & Co., Ltd. v Hugh Molagoda, Commissioner-General Of Inland Revenue And Others*<sup>21</sup> where it was stated that '*in order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things:*

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<sup>15</sup> Susan H. Williams, 'Gender Equality in Constitutional Design: An Overview for Sri Lankan Drafters', Asanga Welikala (eds), *The Sri Lankan Republic at 40*, CPA Publications, Colombo, 2012 at p. 821.

<sup>16</sup> A detailed analysis of this argument is tendered by Ms. D. Samararatne in her doctoral Thesis (unpublished Thesis).

<sup>17</sup> By '*legalised discrimination*' the author refers to legally accepted provisions which have a discriminatory effect on women.

<sup>18</sup> See 'EFC Submission on Review of Labour Legislation in Sri Lanka', <<http://www.empfed.lk/Labour%20Law/EFC%20SUBMISSIONS%20to%20Secretary%20to%20Treasury.pdf>>, 2008, (accessed 28<sup>th</sup> February 2014).

<sup>19</sup> Act No 47 of 1956.

<sup>20</sup> As at 2011, the labour participation rate of females amount to 26.20% while the male participation rate is at 49.20%. Statistics accessed at Indexed Mundi, <<http://www.indexmundi.com/facts/sri-lanka/labor-participation-rate>>, 2011, (accessed 25<sup>th</sup> of February 2014).

<sup>21</sup> [1986] 1 Sri LR 300.

- *that he has been treated differently from others,*
- *that he has been differently treated from persons similarly circumstanced without any reasonable basis*<sup>22</sup>

The reference to the category of ‘*similarly circumstanced*’ persons is an express recognition of vertical equality and the principle of vertical equality is also portrayed in Section 2B of the EWYPCA. Provision 2A is explicitly made inapplicable to women:

- holding responsible positions<sup>23</sup>
- employed in health and welfare<sup>24</sup>
- engaged in industrial undertaking of a family business.<sup>25</sup>

However, the Act fails to define what is meant by ‘*responsible positions*’ in the context of the Act thereby enabling one to propose the notion that such differentiation between ‘*responsible positions*’ and ‘*non-responsible positions*’ leads to further discrimination of women dependent on class, caste or education. The resulting position is that the provisions which were drafted for female empowerment contribute to the further dismantling of female empowerment thus forcing some such women to opt for – what may be called in instances such as these – drastic decisions.

Women who neither hold ‘*responsible positions*’, nor work in the health and welfare sector nor have family businesses to turn to may find it difficult (or even impossible) to be recruited by a fairly well paying employer in Sri Lanka. This is especially so when the woman concerned has received little or no formal education. While the maintenance of a distinction between different categories of people will be identified as an enhancement of equality through the recognition of vertical equality, the damage that it does through the concept of *rational discrimination* ought to have been realised by the drafters of legal provisions.<sup>26</sup> It is submitted that the socially constructed *rational discrimination* amongst females who hold *responsible positions* and those who do not hold such positions create a further pressure on women belonging to the latter category thus forcing them to seek empowerment outside the scope of the application of such laws, policies and social norms.

The fact remains that such discrimination does not occur only in terms of obtaining employment and working at night. ‘*Gender – wage – gap*’ is another issue that plagues Sri Lanka. What the concept indicates is that men and women, who are performing the same task in the same company / field are paid differently. Women employed in all sectors, i.e., agricultural<sup>27</sup>, industrial<sup>28</sup> and service sectors<sup>29</sup> fall prey

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<sup>22</sup> At p. 301.

<sup>23</sup> Section 2 B (a).

<sup>24</sup> Section 2 B (b).

<sup>25</sup> Section 2 B (c).

<sup>26</sup> The term *rational discrimination* appears in Edward J. McCaffery, ‘Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change’, The Yale Law Journal, Volume 103, 1993 – 94 at p. 595. In the context of his article, McCaffery refers to the concept of *rational discrimination* in relation to efficiency of males and females. The concept has been referred to by way of analogy by the author of this paper.

See also in general in this regard the argument tendered by Susan H. Williams, ‘Gender Equality in Constitutional Design’, *supra* (n. 5) at p. 821.

<sup>27</sup> See Daily Mirror Archives, ‘Women at Work: Sri Lankan Women Suffer Significant Wage Inequality in the Workplace’, <<http://archives.dailymirror.lk/sections/supp/w@w/18032007/12.asp>>.

to this unavoidable plague which probably is a product of the patriarchal society. Whether the gender-wage-gap has reduced over time remains to be questioned.<sup>30</sup> However, one can justifiably reach the conclusion that such discrepancy as regards payments contribute to the impoverishment of women.

According to contemporary standards, no state is capable of maintaining the local laws without any influence from international laws. Sri Lanka shares the same fate. Hence, the movement for effective equality has also drawn from international conventions such as the CEDAW and the International Covenant on Civil and Political Rights (hereinafter ICCPR). Article 6 of the CEDAW seeks to suppress trafficking in women and to criminalise exploitation of women as prostitutes.<sup>31</sup> It encourages the state parties to take appropriate measures including the introduction of legislation for the same. Regrettably, no amendment has yet been made to the Vagrants Ordinance<sup>32</sup> which seeks to penalise the victims (the prostitutes who are exploited) as opposed to the offenders (exploiters / traffickers). In other words, prostitutes are arrested under this Ordinance and no specific penalty has been proposed to penalise traffickers of women.<sup>33</sup> However, H.A.G. De Silva J, in *Chandra Jayasinghe v Mahendra and Others*<sup>34</sup> where a woman appealed to the Supreme Court alleging a violation of her right to equality as she was arrested for 'loitering at night', writing for the Supreme Court of Sri Lanka held that a person who is deemed to be a vagrant under the Ordinance in the opinion of the Magistrate could be penalised with or without hard labour. Although it was found that the Magisterial order contained the irregularity of not specifying the period of detention, the Court held that such irregularity does not invalidate the warrant for detention.<sup>35</sup> Hence, her application was dismissed without costs after De Silva J stated *obiter* that 'Magistrates who issue such warrants of detention should be careful to see that the provisions of the law are complied with...'.<sup>36</sup> It is submitted that the terms 'loitering at night' and 'opinion of the Magistrate' are extremely vague and have the capacity of violating the right to equality. However, in this matter, the Court did not undertake to examine such aspects in detail.

Section 9 of the Vagrants Ordinance which is termed as 'punishment of certain classes of incorrigible rogues' states that 'every male person who is proved to live with, or to be habitually in the company of a prostitute... [will] be deemed to be

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2012, (accessed 27<sup>th</sup> of February 2014). See also Aphichoke Kotikula and Jennifer Solotaroff, *Gender Analysis of Labour in Sri Lanka's Estate Sector*, The World Bank Publications, Sri Lanka, 2006.

<sup>28</sup> International Labour Organization, *Equality at Work: Tackling the Challenges, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO Publications, Geneva, 2007 at p. 20.

<sup>29</sup> *Ibid.*

<sup>30</sup> See in general in this regard, Dilani Gunewardena, 'Reducing the Gender Wage Gap in Sri Lanka : Is Education Enough?', 2004, <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN027229.pdf>>, (accessed 27<sup>th</sup> of February 2014).

<sup>31</sup> 'State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women' - Article 6 of CEDAW.

<sup>32</sup> No 4 of 1841.

<sup>33</sup> See Section 3 (1) (b) of Act No 4 of 1841.

<sup>34</sup> [1987] 1 Sri LR 206.

<sup>35</sup> *Ibid.* at p. 209.

<sup>36</sup> *Ibid.* at p. 206.

*knowingly living on the earnings of prostitution*.<sup>37</sup> Although it is *deemed* as living on the earnings of prostitution, this Section does not lay down a mechanism through which such exploiters could be penalised. The only provision which can be construed as having the legal capacity of penalising males who ‘*cause seduction or prostitution*’<sup>38</sup> is one which imposes a ‘*fine not exceeding hundred rupees*’ and / or impose a term of imprisonment of six months.<sup>39</sup> However a woman who may be arrested ‘*with or without warrant*’<sup>40</sup> maybe liable for conviction ‘*with or without hard labour*’ for a period of fourteen days.<sup>41</sup>

In addition to the provisions that could be interpreted to the detriment of Article 12 in the field of employment and social practices, such discriminations also take place in relation to family law which has thrived on the existence of the plural legal system of Sri Lanka. For instance, the Thesawalamai law, which is a territorial and a personal law applicable to Malabar inhabitants of the Jaffna province, contains some such discriminations against women.<sup>42</sup> Moreover, the Matrimonial Rights and Inheritance (Jaffna) Ordinance<sup>43</sup> states that women cannot dispose of their property without the written consent of their husband except by will. Without doubt, it could be stated that such restrictions would naturally make women feel disempowered within the local framework.

In addition to the discriminations against women that exist in the employment sector and in law criminalising victims of sexual exploitation, certain levels of discriminations exist against women in terms of marriage and divorce as well. The Muslim Law of Sri Lanka does not directly stipulate a minimum age for marriage which in certain extreme circumstances can lead to child marriages. This has been considered as a violation of the child’s rights and women’s rights.<sup>44</sup> In its Report to the Global Movement for Equality and Justice in the Muslim Family, Muslim Women’s Research and Action Forum (MWRAF) refers to the concept of a *wali* (guardian) of a child who is authorised to give a girl child under the age of twelve in

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<sup>37</sup> Section 9 (2); see also in this regard cases decided under the Brothels Ordinance No 5 of 1889 as amended such as *Abeykoon et al v Kulathunga* [1950] 52 NLR 47 (whether a woman who is kept in a Brothel can be regarded as assisting the management of the Brothel within the meaning of Section 2 (a) of the Brothels Ordinance); *Agnes Nona v Palipana* [1969] 72 NLR 431 (the fact that proper material in the circumstances of each case ought to be considered before an accused is sentenced to a term of imprisonment); *Danny v Sirinimal Silva, Inspector of Police, Police Station Chilaw and Others* [2001] 1 Sri LR 29 (whether men and women who engage in sexual intercourse can be arrested under the Brothels Ordinance) and *Rosalin Nona et al v Perera* [1946] 47 NLR 523 (where it was argued that the proof of [guilty] state of mind is necessary in order to establish that the accused was assisting in the management of a Brothel. However, proof of ‘intention’ is not specifically required when sentencing a prostitute / night loiterer under the Vagrants Ordinance).

<sup>38</sup> Marginal note to Section 11.

<sup>39</sup> Section 11 (1).

<sup>40</sup> Section 3 (2).

<sup>41</sup> Section 3 (1) For a detailed analysis of the other laws which affect right to equality of women and children see in general Professor Savitri Goonesekera, *Child Labour in Sri Lanka : Learning from the Past*, International Labour Organization Publications, Switzerland, 1993.

<sup>42</sup> Section 3 of the Thesawalamai Code.

<sup>43</sup> No 1 of 1911.

<sup>44</sup> Savitri Goonesekera and Harini Amarasuriya, *Emerging Concerns and Case Studies on Child Marriage in Sri Lanka*, UNICEF Publications, Sri Lanka, 2003 at p. 18; See also Chulani Kodikara, ‘The National Machinery for the Protection and Promotion of Women’s Rights in Sri Lanka’, <[http://www.ilo.org/dyn/travail/docs/1676/National\\_Machinery\\_Sri\\_Lanka\\_-\\_Chulani\\_Kodikara.pdf](http://www.ilo.org/dyn/travail/docs/1676/National_Machinery_Sri_Lanka_-_Chulani_Kodikara.pdf)>, 2008, (accessed 27<sup>th</sup> of February 2014).



marriage.<sup>45</sup> The consent of the Muslim bride is also a contentious issue as the law does not provide for the obtaining of her signature to indicate her consent.<sup>46</sup>

The Kandyan law of divorce compels the wife to establish incest and gross cruelty along with adultery.<sup>47</sup> The need to establish adultery, incest and gross cruelty simultaneously imposes an unfair burden on the woman thus compelling her to take extreme options such as seeking to migrate in order to escape from a bad marriage. Such measures then become the ultimate fall from grace for women. Under Muslim Law of divorce too, the woman is reduced to a status below the man. While the woman has to state her reasons for divorce the man is allowed to obtain a divorce without stating his reasons for intending to dissolve the marriage.<sup>48</sup>

In relation to illegitimate children (except for illegitimate children under Muslim law),<sup>49</sup> Sri Lanka adopts the general stance that the mother bears custody. In custody disputes over illegitimate children, there is a tendency to award such responsibility to a single mother.<sup>50</sup> Perhaps this is with reference to the concept that '*a mother makes no bastard*'. The fact that the custody of an illegitimate child lies with the mother has been affirmed in the case of *Premawathie v Kudalugoda Aratchie*<sup>51</sup> by reference to Roman Dutch Law principles. The author opines that this is discriminatory against women in three ways. Firstly, it thrusts the responsibility of bringing up the child solely on the woman. Secondly, in matters of inheritance, the child only succeeds to the property of the mother. Thirdly, the societal perceptions regarding a single mother can also be considered to be discriminatory. As per the Matrimonial Rights and Inheritance Act, illegitimate children only inherit property of their mother.<sup>52</sup> While there are separate legal provisions which are discriminatory in relation to acquisition of and dealing with property, this further creates injustice in connection to the law of succession.

By virtue of Article 4 (e) of the Constitution Sri Lankan citizens who are above the age of 18 are granted the right to vote.<sup>53</sup> Although the aforementioned provision is

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<sup>45</sup> MWRAF, 'Report to the Global Movement for Equality and Justice in the Muslim Family', <<http://www.musawah.org/sites/default/files/SriLanka-report%20for%20Home%20Truths.pdf>>, 2008, (accessed 27<sup>th</sup> of February 2014). See page 1 of the report.

<sup>46</sup> *Id.* See also the report in general for the lacunas in law which arise due to the Quazi not being legally required to inquire into the consent of the woman for polygamy of the husband or the capacity of the husband to treat all women alike in a polygamous marriage. The bride is not required to sign the marriage registration forms.

<sup>47</sup> Section 32 (b) – the dissolution of the Kandyan Marriage can be obtained [o]n the following ground: '*adultery by the husband coupled with incest and gross cruelty*'.

<sup>48</sup> See for instance Sections 27, 28 and the Second Schedule to Muslim Marriage and Divorce Act No 13 of 1951 as amended.

<sup>49</sup> Rose Wijesekera, 'Chapter 4', International Development Law Organization (eds), *Guidebook on the Rights of the Child in Sri Lanka*, International Development Law Organization, Italy, 2007.

<sup>50</sup> See in general in this regard Sharya De Soysa, 'Custody Disputes between Parents and Third Parties – An Evaluation of the Sri Lankan Law', University of Colombo Review, 1985 at p. 121.

<sup>51</sup> [1970] 75 NLR 398.

<sup>52</sup> Matrimonial Rights and Inheritance Ordinance No 15 of 1876 as amended. Section 33 – '*illegitimate children inherit property of their intestate mother, but not that of their father or that of the relatives of their mother...*'.

<sup>53</sup> '*The franchise shall be exercisable at the election of the President of the Republic and of the members of Parliament, and at every referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the registry of electors*' – Article 4 (e) of the Constitution.

specifically applicable to Presidential and Parliamentary elections and referendums, in view of the equality provision of the Fundamental Rights Chapter it would be safe to assume that men and women should be allowed to vote for any public office without discrimination based on one's gender. If women are considered to have the right to vote for the highest authorities of the government, all sub categories of elections held for the purpose of appointing a public official should also grant the same right to women. Although not directly considered as a justiciable law, the section on Political and Civil Rights of the Women's Charter states that females should be allowed to 'vote in all elections' and engage in the public, private and the political life of the country.<sup>54</sup> In addition, Article 7 of the CEDAW also seeks to achieve equality for women in terms of their interaction with the public and political lives of the states.<sup>55</sup>

Despite the existence of all laws, policies and international standards that have been drafted for the purpose of enhancing equality for women in terms of their participation in the public and the political life of the country, the Vihara and Devalagam Act (Buddhist Temporalities Act) prevents female Divisional Secretaries from voting to appoint the *diyawadana nilame*.<sup>56</sup> With reference to the employment laws that were analysed in this paper, the author wishes to consider females who are holding the designation of a Divisional Secretary to be holding a *responsible position*. However, Section 40 of the Act states '*no person shall be entitled to be a member of the advisory board or to be a member or to nominate a member of the Atamasthana Committee or to be a trustee or to vote at the election of a trustee of a temple unless he is of the male sex, unless he is a Buddhist by religion and unless he has completed his twenty first year*'.

Buddhism that was preached by Lord Buddha was in no way sexist. How such sexism crept in to the law still continues to be a puzzle as the history bears evidence that the tooth relic of Lord Buddha was brought to Sri Lanka by a woman named *Hemamali* who allegedly brought it to Sri Lanka hidden in her hair for its protection. The author finds this socially constructed sexism to be disturbing as Buddhism was not meant to be interpreted as a sexist philosophy. If the tooth relic of the Lord Buddha can be brought by a woman, the author is at a loss to understand why a female cannot vote for the appointment of a public official (albeit religious) to the post of *Diyawadana Nilame*.<sup>57</sup>

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<sup>54</sup> Section 2 (i) (a) – '*The state shall take all appropriate measures to eliminate discrimination against women in Public and Private Sectors, in the political and public life of the country, and ensure to women, on equal terms with men, the right, to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies*'.

<sup>55</sup> Article 7 of CEDAW: '*State parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular shall ensure to women, on equal terms with men, the rights to: (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) to participate in non-governmental organizations and associations concerned with the public and the political life of the country*'.

<sup>56</sup> See the Vihara and Devalagam Act (Buddhist Temporalities Act) No 19 of 1931.

<sup>57</sup> See in general in this regard Kishali Pinto – Jayawardene, 'Focus on Rights' accessed at <<http://www.sundaytimes.lk/050508/columns/focus.html>>, 2001, (accessed 27<sup>th</sup> of February 2014). See also Rajitha Weerakoon, 'Why Can't Women Vote at Elections of Nilames', The Sunday Times, <<http://www.sundaytimes.lk/120812/plus/why-cant-women-vote-at-elections-of-nilames-8392.html>>, 11<sup>th</sup> August 2012, (accessed 27<sup>th</sup> of February 2014).

The supposed search for greener pastures thus, ends in the adoption of unsafe or illegal mechanisms in the quest for foreign employment. The author is of the view that the term *unsafe migration* is more applicable than the term illegal migration as many of the women who seek foreign employment are unaware of the legal status of the agencies that undertake the provision of foreign employment. Although their ignorance of the law cannot be considered a defence, their lack of *mens rea* to commit the offence of illegal migration could function as a defence.<sup>58</sup> It may hence be unfair to state that women who seek empowerment due to the inherent inequality of the legal and social system voluntarily opt for illegal migration. Lack of knowledge and experience on the part of such women create an environment which is abundant with opportunities for misuse.

In addition to the discriminatory provisions of the law that have been analysed above, the approach of the judiciary to the interpretation of rights has also been restrictive in scope. When the right to non-discrimination of women was raised in respect of the rights granted by the ICCPR, the court rejected the argument stating that ‘*provisions of the Constitution and of other law, including decisions of the Superior Courts of Sri Lanka give recognition*’ to the rights recognised in the ICCPR.<sup>59</sup> In reaching the decision, the Court held that it could not be argued that the ‘*provision of Article 16 (1) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law*’.<sup>60</sup> It is respectfully submitted that this proposition is erroneous in that it makes an unjustified assumption that Article 16 (1) is only indicative of Personal Laws and that women could perhaps be discriminated *only* through Personal Laws. As has been pointed out with references to employment law and criminalisation of prostitution etc, it has been amply substantiated in this paper that there are various other forms of law through which discrimination against women creep into the legal, social, cultural and economic spheres.

In the above regard, Article 2 of the ICCPR *inter alia*, plays an important role as it requires the state parties to the Convention to ‘*undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*’<sup>61</sup>. The list of issues dated 23<sup>rd</sup> of April 2014 drafted by the Human Rights Committee, in paragraph four, requires Sri Lanka to provide detailed information and measures taken ‘*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,*

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<sup>58</sup> The author is thankful to Dean of the Faculty of Law, University of Colombo, Mr. V.T. Thamilmaran for suggesting the inclusion of the possibility of introducing the defence that is argued for in this paper.

<sup>59</sup> SC Ref No 01/2008 also electronically accessible at <<http://www.nation.lk/2008/03/30/special3.htm>>, 2008, (accessed 27<sup>th</sup> February 2014).

<sup>60</sup> *Id.*

<sup>61</sup> Art 2 (1) ICCPR

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Paragraph 4 (b) of the same calls on Sri Lanka to 'eradicate those customs and practices which are harmful and prejudicial to women...'.<sup>62</sup> Sri Lanka provided its responses to the list of issues raised by the Human Rights Committee at its 112<sup>th</sup> Session which commenced on the 7<sup>th</sup> of October 2014<sup>63</sup> of which the author is incapable of commenting prematurely.

Although the CEDAW has been ratified by Sri Lanka and equality is considered as a fundamental right, it is clear that in many contexts various forms of discriminations against women still continue to exist. As was mentioned at the commencement of this section, this analysis is meant to appear as indicative and explanatory of some of the important areas in which discrimination against women exist in Sri Lanka as opposed to presenting it as a comprehensive analysis of *all* discriminatory laws of Sri Lanka. What this analysis then proves is that '*legislation is but merely a tool and that the impact or effectiveness of that tool depends on the manner in which the legislation is interpreted and enforced*'.<sup>64</sup> Unless amendments are made to these archaic, Victorian or even draconian laws, it will not be possible to prevent unsafe or illegal migration which leads to human trafficking. Hence, it is suggested that measures be taken for amending the archaic laws which can be interpreted in disfavour of right to equality of women. Unless such amendments are immediately adopted, Sri Lanka will not be able to prevent women's migration and the dark mark that it leaves on the state when some such women fall prey to human trafficking.

## II. THEORISING THE FRAMEWORK OF RIGHT TO EQUALITY

In a pragmatic sense, it could perhaps be argued that inequality that arises through provisions being interpreted by the society in a manner which was initially '*unintended*' cannot be prevented at any cost. However, the Rawlsian argument in favour of the 'original position' which could hypothetically give rise to a utopian state is worthy of analysis specifically in relation to women's right to equality in a traditionalist patriarchal society. According to Rawls, justice is nothing but fairness.<sup>65</sup> What he proposes is that the drafters of laws ought to be under the '*veil of ignorance*'<sup>66</sup> as it creates a '*device of representation for the case of liberal societies*'.<sup>67</sup>

It can justifiably be stated that what Susan Williams suggests in her work is an expansion of the original position first argued for by John Rawls. This is directly relevant to the argument presented by the author of the paper as regards the link that

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<sup>62</sup> List of Issues accessible at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fLK.A%2fQ%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fLK.A%2fQ%2f5&Lang=en)

<sup>63</sup> At the time of writing, the 112<sup>th</sup> Session was in progress and hence the author is incapable of commenting in detail on some aspects which may be relevant to the issue at hand due to the non-availability of materials. The reports that the Committee is expected to take up during this session are accessible at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=811&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=811&Lang=en)

<sup>64</sup> D. Samararatne, PHD Thesis (unpublished) at p. 109 on file with author.

<sup>65</sup> John Rawls, *A Theory of Justice*, Revised Edition, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1971 at p. 3.

<sup>66</sup> *Ibid* at p. 11.

<sup>67</sup> John Rawls, 'The Law of Peoples', *Critical Inquiry*, Volume 20, No 1, 1993 at p. 44.

exists between inequality, migration and human trafficking. As the drafters of law are neither in an original position nor are mindful of all consequences that could arise from such provisions, it leads to the presumption that the equality provisions and affirmative actions in favour of women do not become truly effective, especially, in contexts where there are cultural, employment or socially constructed discriminations against women. What is noteworthy in this setting is that even if Rawlsian legislators incorporate non-discrimination into constitutions and other enactments those laws would be interpreted in a context which is far from the Utopian state that Rawls argues for. If the Rawlsian theory is to bring further justice for women, a ‘*deconstructivist*’ approach should be adopted for the purpose of removal of existing cultural norms, societal notions, presuppositions on gender and ideological underpinnings pertaining to law. However, the tragedy rests in the fact that the right to equality for women is not interpreted in such a ‘*deconstructivist vacuum*’ thus forcing one to come to terms with the bitter reality that the constitutional right to equality and affirmative action in a plural legal system, which is comprised of diverse cultural norms, look at women through a culturally – approved – discrimination – prism.

What then should be the theoretical approach to right to equality? The theory of utilitarianism suggests that minimizing of pains and maximising of pleasures would lead to balanced human satisfaction.<sup>68</sup> However, the problem lies in the fact that the utilitarian theorists mock the concept of natural rights and Fenwick argues that this opposition has arisen due to the legal positivism that is believed in by utilitarian theorists<sup>69</sup>. Furthermore, the theory of utilitarianism differs from the Rawlsian theory as the former accepts inequalities provided that the benefits exceed the costs. It then is clear that a utilitarian approach to the right to equality ought not to be adopted as there is no real benefit that can be achieved through all the discriminatory laws and policies that have been analysed in this paper.

A utilitarian approach ought to be adopted restrictively in circumstances where it is possible to maximise happiness of a majority even if it is disadvantageous to a minority. This principle, though smacks of tyranny of the majority, is adhered to by theorists of utilitarianism. However, utilitarianism stands valueless when applied to its importance as a theory to limitation of women’s rights since such limitations do not lead to a greater benefit as argued for by the theorists of utilitarianism. Moreover, for these theorists, ‘*a legal right only exists if there is a specific ‘black letter’ provision guaranteeing it*’.<sup>70</sup> It is doubtful as to the extent with which one can agree with this proposition when faced with the grim reality that the mere existence of a ‘*black letter*’ provision is insufficient for the effective protection of rights and liberties.

The above analysis refers briefly to the existing philosophical and political thoughts regarding the right to equality. Although a consensus cannot be sought in respect of

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<sup>68</sup> See Daniel Berthold, ‘The Golden Rule in Kant Utilitarianism’, <[http://webcache.googleusercontent.com/search?q=cache:vLW\\_Sndy2FwJ:www.bard.edu/iat/newsletters/IATNewsletter/documents/Thursday\\_April17.pdf+&cd=5&hl=en&ct=clnk&gl=lk](http://webcache.googleusercontent.com/search?q=cache:vLW_Sndy2FwJ:www.bard.edu/iat/newsletters/IATNewsletter/documents/Thursday_April17.pdf+&cd=5&hl=en&ct=clnk&gl=lk)>, 2008, (accessed 27<sup>th</sup> of February 2014).

<sup>69</sup> Helen Fenwick, *Civil Liberties and Human Rights*, 3<sup>rd</sup> Edition, Cavendish Publishing Ltd, London, 2002 at p. 8. For a detailed analysis of civil liberties through various philosophical perspectives see in general *Civil Liberties and Human Rights*.

<sup>70</sup> *Id.*

theorising amongst the myriad of such philosophical ideologies, for the purposes of analysis, the theory of a '*tolerant society*' may be adhered to.<sup>71</sup> Rawlsian argument in favour of the '*veil of ignorance*' theory, in spite of its weaknesses, can be used in creating a tolerant society. Hence, in the context of this paper, since the argument is in favour of '*functional equality*', it is submitted that a tolerant society would lead to a '*tolerant democracy*' in which females do not have to seek empowerment by migrating due to the lack of employment opportunities and other social pressures. The term *functional equality* has been used for the purposes of this analysis to refer to equality that would, in its strict sense, be used for the implementation of the right to equality to men and women without deriving restrictions of social norms or cultural discriminations.

It may perhaps be better to approach right to equality through the *morality of law* rather than through Rawlsian original position, legal positivism or the theory of tolerant democracy. Lon Fuller describes what he terms as the *morality of aspirations* as '*the morality of the good life, of excellence and the fullest realization of human powers*'.<sup>72</sup> This theory is used by the author in proposing that excellence and realization of human power in the Asian context could be enhanced through the effective implementation of the right to equality that could empower women. It is also proposed, perhaps with a naive sense of idealism, that migrations that end in human trafficking and victimization of women in many forms could be eradicated through the achievement of morality of aspirations.

Lon Fuller further states that '*today opposition to laws purporting to compel religious or political beliefs is rested on the ground that such laws constitute an unwarranted interference with individual liberty*'.<sup>73</sup> This argument can be compared well with the argument of the author in this paper that the restriction of liberty of women, through many perspectives, constitutes an unwarranted interference. The fact that religion and even political beliefs can contribute to the restriction of individual liberty is identified by Lon Fuller in his work. According to the most basic norms of individual autonomy one may adhere to the foundationalist approach in stating that those whose liberty or autonomy is violated would have a natural tendency to seek options to escape from such oppressions.

As was mentioned elsewhere in this paper, discrimination against women may not be present directly in the Constitutional provisions although that may be the case as regards the societal norms. In the contemporary academic world where there is much appreciation of legal positivism, it might even be provocative to propose that the perception of equality should be viewed through the lens of natural law. The Sri Lankan problem is not the law but the way that it is interpreted by many parties of the civil society. Out of this, the *moral authorities* of each caste, sect, religion and legal system play a role in re-shaping equality to be interpreted in a narrower sense thus affecting female empowerment.

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<sup>71</sup> *Ibid.* at p. 6.

<sup>72</sup> Lon L. Fuller, *The Morality of Law*, Revised Edition, Yale University Press, New Haven and London, 1969 at p. 5.

<sup>73</sup> *Ibid.* at p. 79.

### III. INEQUALITY TO MIGRATION

Perhaps it is quite argumentative to propose that inequality leads to migration which ends up in females becoming victims of human trafficking. To some, it may even seem a far-fetched argument. However, it is hoped that the structure adopted in this paper would guide the reader through the logical development of the aforementioned argument.

It has been established that population distribution, human settling and migration are attributable to, *inter alia*, unequal distribution of wealth and income.<sup>74</sup> This has also been explained with the example drawn from the EWYPCA that the laws that are drafted for the protection and enhancement of women could ultimately be interpreted in a disempowering manner. Hence, it can justifiably be established that impoverishment, inequality in wealth and income distribution and discriminations in obtaining work can lead women to seek employment outside Sri Lanka.

Another factor of discrimination as has been evidenced in this paper is the gender – wage – gap or the gender – pay – gap. Even in circumstances where women have been able to obtain employment opportunities, the amount of work that they do may not be sufficiently compensated through the payments. Especially in unisex employments, there seems to be a trend of maintaining a gender-pay-gap in Sri Lanka in all sectors as has been evidenced elsewhere in this analysis.

When faced with such circumstances, it is the natural tendency of any human being to look for more satisfying options. Migration and seeking employment abroad might then seem a justifiable and a fair option to these women who are oppressed in many ways than one. Especially when impoverished and lacking the required information and education, migration attempts by such women could translate into disastrous circumstances.

In addition to discriminatory employment laws, the means by which women are victimised through aspects of criminal law such as the Vagrants Ordinance was explained elsewhere in this paper. M. Cristina Alcalde has also propounded that women may flee, or migrate to avoid sexual discriminations which take place in many forms.<sup>75</sup> Thus, the author's proposition that inequality leads to migration can be justified with reference to laws and policies on sexual violence and sexual exploitation of women as well.

At the 59<sup>th</sup> Session of the UN General Assembly, Ms. Carolyn Hannan – Director of the Division of the Advancement of Women – made a statement on women, development and migration.<sup>76</sup> In her statement she too states that inequalities could lead to migration. World Survey on the Role of Women in Development Report

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<sup>74</sup> Terry Hain, 'Resource Distributions and its Consequences', <<http://geography.about.com/od/urbaneconomicgeography/a/Resource-Distribution-And-Its-Consequences.htm>>, 2011, (accessed 27<sup>th</sup> of February 2014).

<sup>75</sup> See M. Christina Alcalde, 'Migration and Class as Constraints in Battered Women's Attempts to Escape Violence in Lima Peru', <<http://lap.sagepub.com/content/33/6/147.abstract>>, 2006, (accessed 27<sup>th</sup> of February 2014).

<sup>76</sup> Carolyn Hannan, '59<sup>th</sup> Session of the General Assembly – Second Committee', <[http://webcache.googleusercontent.com/search?q=cache:t\\_xN9w88-LAJ:www.un.org/womenwatch/daw/documents/ga59/CH-89b-stmt.pdf+&cd=3&hl=en&ct=clnk&gl=lk](http://webcache.googleusercontent.com/search?q=cache:t_xN9w88-LAJ:www.un.org/womenwatch/daw/documents/ga59/CH-89b-stmt.pdf+&cd=3&hl=en&ct=clnk&gl=lk)>, 2004, (accessed 27<sup>th</sup> of February 2014).

*'focuses on women and international migration and presents key issues on labour migration, family formation and reunification, rights of migrant women, refugees and displaced persons as well as trafficking of women and girls'*<sup>77</sup> which justifies to a certain extent the stance adopted by the author in relation to the link that exists between inequality, migration and human trafficking.

It would perhaps be justifiable to propose that breakdown of families and the discriminations prevalent in the law of divorce in Sri Lanka could also lead to women becoming migrant workers. Although the aforementioned Report is comprehensive, it ought to have taken into consideration the possibility of female migration occurring as a direct result of discriminatory legal provisions pertaining to divorce, property, inheritance and custody of children with special emphasis on the Asian context. Regrettably, so far, this has only been done through an implied analysis.

Gender relations and gender hierarchies coupled with a *'Victorianly – Patriarchal'* society could without a doubt suppress female empowerment. Human trafficking and sufferings experienced by Sri Lankan women abroad pose a barrier in a developmental perspective as well. Hence, legal empowerment of women ought to be achieved through an effective implementation of the right to equality which could lead to psychological empowerment of women. From the perspective of community psychology, Brian D. Christens proposes that psychological empowerment ought to be considered *'as an orientation and targeted outcome for community development efforts'*.<sup>78</sup> The inverse argument could be said to be that when psychological empowerment is lacking, community development also stalls behind. This can directly be connected to the argument put forth by the author that the utilitarian approach – to make a patriarchal society (which may not even constitute the majority of the society as has been argued for by the theorists of utilitarianism) happy – is not effective when applied to the right to equality of women. Disempowerment would thus lead women to lose trust in the legal system, customs, societal practices and even in religious faith. Such depression undoubtedly leads to extreme measures which is why it is proposed that women in such circumstances could become victimized by sexual exploiters and human traffickers.

Human Trafficking has become the modern, yet unspoken, form of slavery in the Asian context and it is associated with migrations. This could perhaps be considered as a foundationalist premise for the purposes of this paper. Some fall prey to this shameful act of human trafficking through legal migration while some are victimised when attempting to migrate illegally.<sup>79</sup> Irrespective of the mechanism used for illegally detaining the preys, trafficking ought to be considered as one of the most heinous crimes.

Prior to formulation of any policy for the prevention of this organised crime, it is important to assess and evaluate the reasons associated with unprotected migration that contributes largely to human trafficking. It has been suggested that *'low*

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<sup>77</sup> *Ibid.*

<sup>78</sup> Brian D. Christens, 'Targeting Empowerment in Community Development: A Community Psychology Approach to Enhancing Local Power and Well-Being', *Oxford Community Development Journal*, Volume 47, Issue 4, 2012 at p. 538.

<sup>79</sup> See Leslie Holmes (eds), *Trafficking and Human Rights: European and Asia Pacific Perspective*, Edward Elgar Publications, Northampton, USA, 2010, at p. 4.



*employment prospects and lack of opportunities*<sup>80</sup> coupled with ‘*discrimination of women*’ act as trigger factors which encourage migration.<sup>81</sup> In this light, many factors such as the legal systems prevalent in Asian countries, cultural practices and the general attitude towards women need to be assessed. Despite the states becoming parties to the CEDAW, at times, discrimination in terms of marriage can still be seen in the Asian context.<sup>82</sup> For instance, in Bangladesh there are marriage laws which are discriminatory and even though the country has been prompted by activists and interested parties alike, progressive laws on the same are yet to be adopted.<sup>83</sup> Similar issues can be found in Thesawalamai law, Kandyan Law and Muslim Law in respect of disposal of matrimonial property, marriage and divorce as has been explained elsewhere in this paper.

It is also to be noted that certain employment opportunities are not available to women and that, much discrimination still exists against women in the fields of education, politics, health care, employment and the like.<sup>84</sup> Most women are employed in ‘*low status, low skilled and low paying jobs*’<sup>85</sup> when compared to the male counterparts who possess similar qualifications or status of life. This is a reality that is prevalent in most of the Asian countries. Just as Sri Lanka has provided for right to equality under Article 12 of the Constitution, the Indian Constitution provides for right to equality mainly through Article 14 (equality before the law) and 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) irrespective of which acts of discrimination occur against women in both countries. However, how far these rights are protected in both Sri Lanka and India are questionable<sup>86</sup>.

Although the average daily wages for the informal private sector for both men and women in Sri Lanka have gradually increased over the years, there is yet a

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<sup>80</sup> A. K. M. Masud Ali, *Research on Trafficking in Persons in South Asia* cited in Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany*, VS Research, Wiesbaden, 1<sup>st</sup> Edition, 2009 at p. 92.

<sup>81</sup> Sally Cameron and Edward Newman, *Trafficking in Humans: Social, Cultural and Political Dimensions*, United Nations University Press, Hong-Kong, 2008 at p. 2 which states that ‘*It is argued that trafficking in women, particularly for the purpose of sexual exploitation, is a manifestation of the discrimination and disadvantageous encountered by women in most contemporary societies*’.

<sup>82</sup> Article 9 of the CEDAW states that women should not be discriminated on grounds of marriage or maternity.

See in general in this regard, Jenifer M. Bushaw, *Suicide or Sacrifice : An Examination of the Sati Ritual in India*, The University of Chicago Centre for Middle Eastern Studies, USA, 2007.

<sup>83</sup> Human Rights Watch, *Will I Get My Dues Before I Die?: Harm to Women from Bangladesh’s Discriminatory Laws on Marriage, Separation and Divorce*, published by the Human Rights Watch, USA, 2012.

<sup>84</sup> *Supra* (n. 66) *Trafficking in Humans* at p. 43 ‘*traditional values based on cultural identity may influence a person’s perception of what constitutes appropriate work, behaviours, rights and entitlements, and consequently influence the kind of employment they aim for and conditions they experience*’.

<sup>85</sup> See World Organization Against Torture for the Committee on the Elimination of all forms of Discrimination Against Women, *Violence Against Women in Sri Lanka*, < <http://www.omct.org/files/2002/01/2178/srilankaeng2002.pdf> >, 2002, (accessed 20<sup>th</sup> February 2014).

<sup>86</sup> For a similar perspective in relation to India, see Amitabh Kundu and P.C. Mohanan, *Employment and Inequality Outcomes in India*, accessed at <https://www1.oecd.org/els/emp/42546020.pdf> on 9<sup>th</sup> October 2014, International Migration and Gender Report UNICEF, 2012 accessed at [http://www.unicef.org/india/5\\_INTERNAL\\_MIGRATION\\_AND\\_GENDER\\_%2803-12-2012%29.pdf](http://www.unicef.org/india/5_INTERNAL_MIGRATION_AND_GENDER_%2803-12-2012%29.pdf) on 9<sup>th</sup> October 2014 and S. Anukrithi and Todd J. Kumler, *Tariffs, Social Status and Gender in India*, Discussion paper Series, Columbia University, February 2014.

considerable difference between the gender wage gap.<sup>87</sup> According to a publication by the Central Statistics Office of India<sup>88</sup> the workforce participation rate of females in the rural sector was a mere 26.1% in 2009/10 whereas the workforce participation rate of males was at a comparatively staggering rate of 54.7%.<sup>89</sup> It can be stated that the worst forms of discrimination against women exist in India as evidenced by the practice of *sati pooja* in which a widowed woman is expected to burn herself in the same pyre of the burning body of her deceased husband.<sup>90</sup> It is no surprise that women wish to flee their countries under such tragic circumstances which in turn contribute to them falling prey to yet another heinous crime such as human trafficking.

The caste is another factor which contributes to various forms of discrimination.<sup>91</sup> This problem prevails in Nepal up to date despite it being legally abolished in 1963<sup>92</sup> as the caste system is woven into the lifestyle of Nepali citizens in such an entangled manner.<sup>93</sup> Although not very prominent in Sri Lanka, caste continues to be a problem in India. Despite the Asian nations becoming state parties to the ICCPR, state parties have not adopted effective mechanisms to eradicate such discriminations.<sup>94</sup> While this analysis is by no means exhaustive, it establishes clearly that discrimination is prevalent against women in the Asian culture which is also backed by legal provisions irrespective of the state becoming parties to various international covenants. This analysis is hence aimed at suggesting policy formulations to address the issue of human trafficking in the Asian context.

#### IV. MIGRATION TO HUMAN TRAFFICKING

##### A. Human Trafficking as a Broader Concept

It has been suggested that the first real opportunity of reopening the debate pertaining to human trafficking arose with the introduction of the aforementioned Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>95</sup> Gallagher states that the history of the term can be traced back to 'white slavery' - a term that was used to refer to trafficking for purposes of prostitution.<sup>96</sup> The definition given in the Protocol has been divided in to three categories as

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<sup>87</sup> See the Central Bank of Sri Lanka, *Annual Report of 2012*, Central Bank of Sri Lanka Publications, Sri Lanka, at p. 105. For instance in the agricultural sector the male has earned an average daily wage of Rs. 691 while the female counterpart has only been paid an average daily wage of Rs. 512.

<sup>88</sup> Published under the Ministry of Statistics and Programme Implementation, Government of India.

<sup>89</sup> *Ibid* Statistics pertaining to participation in economy.

<sup>90</sup> *Supra* (n. 67), Jenifer M. Bushaw, *Suicide or Sacrifice*.

<sup>91</sup> *Supra* (n. 64) *Trafficking in Humans* at p. 42 'Race, ethnicity, cultural identity, caste and the like contribute to people's vulnerability to trafficking in a range of ways'.

<sup>92</sup> See Kailash Pyakuryal and Murari Suvedi, *Understanding Nepal's Development : Context, Interventions and People's Aspirations*, Study Guide of the Department of Agriculture and Natural Resources, Michigan State University, 2000, at p.5.

<sup>93</sup> See Sankalpa – Women's Alliance for Peace, 'Nepal Women Suffer from Four Levels of Discrimination', <<http://www.awid.org/Library/Nepal-Women-Suffer-from-Four-Levels-of-Discrimination>>, 2013, (accessed 24<sup>th</sup> January 2014).

<sup>94</sup> The Convention by virtue of Articles 3, 14 and 26 urge the state parties to promote equality among men and women and equality before the law.

<sup>95</sup> Anne T. Gallagher, *The International Legal Definition in The International Law of Human Trafficking*, Cambridge University Press, New York 2010 at p. 12.

<sup>96</sup> *Id.*

comprising of an overt action, the use of threat or force and the goal or purpose for which such trafficking is committed.<sup>97</sup>

Although it is stated that there is universal acceptance of the definition provided by the Protocol, it has been highlighted in the work of Aronowitz that the aspect of coercion and deception<sup>98</sup> remains to be interpreted according to given contexts.<sup>99</sup> It is stated that coercion or deception is not exactly ‘*false pretense*’ but that it might also be a lack of relevant information.<sup>100</sup> Although this is a proposition that can be accepted, it is respectfully submitted that Aronowitz argument is lacking in that he has not referred to the deliberate withholding of relevant information from the migrant which could also be another aspect of coercion. In other words, in a context where the migrant is not privy to all relevant information, an informed decision cannot be made thus, leading the migrant to be a victim of trafficking.<sup>101</sup> The author’s proposition stated elsewhere in this paper that the migration of women who have faced inequalities should be referred to as *unsafe* as opposed to *illegal*, can be connected with the proposition of Aronowitz as such women can fall victim to coercions, deceptions, false pretenses and willful non-disclosure of relevant information to make an informed decision regarding migration. This would hence negate any *mens rea* that is attributed or attributable to the victim-offender<sup>102</sup>. Such negation would result in the removal of the double jeopardy of victimizing a victim through the application of insensitive, archaic laws.

If a party responsible for facilitating migrants has deliberately withheld relevant information from such migrant, the said party will be liable for acting without the consent of the migrant. By analogy, an English case from 1882 can be referred to in this context. In the case of *R v Coney*,<sup>103</sup> it was stated by Stephen J. that ‘*when one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured*’. Accordingly, it can be stated that even if the migrant was aware that there were *some* risks involved in the migration process that would not be a defence to the perpetrator who has withheld information if such withholding results in any injury, especially in the form of exploitation. In the interests of justice, it is not to be assumed that the victim appreciated in full the risks of unsafe migration as she may have lacked the relevant knowledge, experience and guidance to engage in a risk – assessment. Undertaking of such an uncalculated risk then is purely due to the vitiation of consent that occurs through the withholding of information.

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<sup>97</sup> See Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, Praeger Publishers, USA, 2009 at p. 1.

<sup>98</sup> See Sentence No 55/11, UNODC No: ARG015 against Argentina which assessed the element of deception used in human trafficking. See also *L, H.V.N, T.H.N and T v R* [2013] EWCA Crim 991 which also discusses deception used for purposes of human trafficking.

<sup>99</sup> *Ibid* at p. 2.

<sup>100</sup> *Id.*

<sup>101</sup> See *supra* (n. 64), Leslie Holmes (eds), *Trafficking and Human Rights*, at p. 2 which states that the people who contact smugglers for the purpose of reaching a destination country illegally are aware of most of the risks associated with the situation yet fall prey to human trafficking.

<sup>102</sup> The author is grateful to Mr. V.T.Thamilmaran for drawing the author’s attention to the victim-offender concept in this regard.

<sup>103</sup> [1882] 8 QBD 534.

## **B. Addressing the Issue of Human Trafficking**

A reality that needs to be acknowledged in the context of human trafficking is that the *feminization*<sup>104</sup> of immigration has contributed to increased rates of human trafficking and unless this trend is altered there will be no possibility of controlling and finally eradicating the menace of human trafficking.

In formulating policies for the prevention of human trafficking, the Asian countries could also draw from the Brussels Declaration which recommends practices that can be followed for preventing, combating and finally eradicating human trafficking.<sup>105</sup> Subsequent to the adoption of the recommendations by the European Union Council in 2003,<sup>106</sup> an Expert Group on Trafficking in Human Beings has been appointed. This practice ought to be followed in the Asian context too in order to gain more systematic and accurate data regarding illegal migration and human trafficking<sup>107</sup> which could subsequently be used in raising awareness among women. The recommendations of such a Committee can further be used both for policy formulation and formulation of local laws.

The Trafficking in Persons 2012 Report of Sri Lanka<sup>108</sup> urges the country to prosecute offenders of trafficking. However, the country has made limited improvement in this regard as indicated by the approach adopted through the Vagrants Ordinance to trafficking that occurs within the territorial jurisdiction. However, it is submitted that the law enforcement responses of Sri Lanka remain at a bare minimum and that some local laws ought to be altered, if at all, effective implementation of laws are to be expected. For instance, some of the archaic provisions of the Penal Code could be amended and replaced with more appropriate laws to cater to the needs of the modern society. Some of the more discriminatory laws, which have been analysed in this paper, which criminalises the actions of the victim of trafficking indubitably need to be repealed as necessitated by Article 6 of CEDAW.

The discriminatory laws of the Asian region which were analysed cursorily in the previous section need to be changed in order to formulate new policies for the prevention of human trafficking in the Asian region. It is doubtful whether human trafficking can be prevented without amending discriminatory laws. Moreover, it is submitted that awareness programmes should be conducted in Asian countries to make more people aware of the realities of human trafficking. In addition, such awareness programmes should also contain in their mandate the attempt to effect an attitudinal change towards gender, caste, race and similar factors that may give rise to discrimination.

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<sup>104</sup> *Supra* (n.65), *Combating Human Trafficking* at p.92.

<sup>105</sup> For a detailed analysis in this regard see International Organization for Migration, *Data and Research on Human Trafficking: A Global Survey*, Special Issue of International Migration volume 43 (1/2) 2005, published by the International Organization for Migration, Geneva, Switzerland at p. 6.

<sup>106</sup> *Id.*

<sup>107</sup> *Supra* (n.64) *Trafficking and Human Rights* at p.5 states that there are methodological difficulties in measuring the scale of human trafficking due to the non availability of accurate statistics.

<sup>108</sup> Sri Lanka, 'The Trafficking in Persons 2012 Report of Sri Lanka', <[http://photos.state.gov/libraries/sri-lanka/5/pdfs/Trafficking\\_in\\_Persons\\_Report\\_2012.pdf](http://photos.state.gov/libraries/sri-lanka/5/pdfs/Trafficking_in_Persons_Report_2012.pdf)> 2012, (accessed January 24<sup>th</sup> 2014).

## V. CONCLUSION AND RECOMMENDATIONS

The recommendation that is suggested by many researchers and scholars for any issue pertaining to human rights and criminal law for example is that an Act for the prevention of such violation or crime ought to be implemented. However, the author is of the view that such an enactment will not be well placed when conflicting local laws are in place. Hence, the first step should be towards the repealing and amendment of local laws which cater to discrimination which in more circumstances than not result in migration for work which leads to human trafficking. In this regard, it is impossible to hope for a society with no discrimination unless Art 16 of the Constitution is amended. The law of Sri Lanka needs to be brought in line with the provisions of, in the main, CEDAW and ICCPR while laying a basic framework for drafting and implementing more inclusive laws for accommodation of meaningful equality for women.

The amendments of the law should be targeted at improving living standards for women that would remove the necessity of migrating for employment opportunities. The author proposes, in light of the foregoing analysis, that such an inclusive framework can reduce the likelihood of women falling prey to traffickers. Some of the strategies that can be adopted by states for prevention of trafficking include the adoption of National Action Plans, implementing the recommendations that are received with conjunction to reports provided by National Anti-Trafficking Rapporteurs, development of Regional Action Plans and Policies and the development of an Inter-Agency Coordination Mechanism.<sup>109</sup>

In examining a complicated issue of this nature, very little can be done in terms of analysis in a paper of limited length. What we already know and what we have yet to discover in relation to human trafficking need to be analysed in greater detail in proposing recommendations. However, it can safely be asserted based on the facts analysed in this paper that a larger percentage of female workers attempt to migrate unsafely or illegally due to the discriminatory conditions that prevail either in their countries or within their communities. Hence, it is justifiable to state that answers to the question of human trafficking cannot be sought without addressing the factors which trigger illegal / unsafe migration and discrimination. The final aim should be to achieve *functional equality* which is different from the *façade of equality* that the local laws and communities guard with jealousy.

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<sup>109</sup> See United Nations Office on Drugs and Crime *Toolkit to Combat Trafficking in Persons*, Global Programme Against Trafficking in Human Beings, Published by the United Nations, New York, 2008.