

Decriminalization of Abortion in Sri Lanka: An Appraisal

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Introduction

The origin of Sri Lankan abortion laws lies in colonial jurisprudence. In general, criminalization of abortion in the colonizing European countries sought to protect sanctity of foetal life and reflect abortion as a religious sin (Cook R.J. and Dickens B.M, 2003). Consequently, Sri Lankan Penal Code of 1883 mirrored this notion prescribing abortion as a crime except when procured to save the life of a pregnant woman. However, in spite of attributing criminal legislative penalty, it is depicted that women who are faced with unwanted pregnancies increasingly use abortion to prevent birth. Various studies revealed that the figure is 150,000-175,000 per year (Rajapakse and De Silva; De Silva et.al, 2006).

Research Problem

On one hand, Sri Lankan law does not reflect the needs of the society contravening the notion of the sociological school of law; it disregards the developments of human rights on the other. Further, the issue of induced abortion has resulted in far reaching repercussions such as health complications. It is difficult to understand why Sri Lanka is still continuing with a colonial enactment in a context that almost all colonial countries including India, Bangladesh and Nepal have liberalized the law irrespective of cultural and conventional nature of the society. Even though, there were attempts to amend the law in Sri Lanka, it is doubtful as to why those attempts failed and whether the attitudes of legal personnel were being taken into consideration during the amendment process.

Objectives of the Study

Against this backdrop, this research intends to academically analyze the prevailing law in a practical context. It also attempts to ascertain the attitudes of the legal fraternity on the issue and the practice relating to abortion. Further, it is intended to comprehend suggestions needed to improve

the situation having comparatively analyzed the issue, especially relating to the emerging global human rights trends.

Methodology

Qualitative research methodology has been adopted in this research where a semi-structured questionnaire was administered among 40 members of the legal profession including judges, attorneys-at-law and academics in gathering information.

Key Findings

Generally, the colonial province of section 303 of the Sri Lankan Penal code is section 58 of the English Offences against the Person Act 1861. As per the provision, abortion is lawful only if it has been done for ‘preservation of the mother’s life’. However, the panorama of case law in Sri Lanka depicts that, there are very few cases reported on abortion comparing to other offences. *Sheela Sinharage v. AG*¹, which deals with a septic abortion done by an Ayurvedic physician which resulted in the death of the mother is one of the reported cases in this regard. However, that case failed to analyze the issue of abortion as it went on to analyze some issues related to evidence and procedure. On the contrary, creating clouds of uncertainty, the Penal Code provisions have failed to provide a clear guidance to women as well as healthcare providers about when abortion is lawful. For instance, whether a mental health issue such as suicidal risk of a conceived woman as a result of a rape or incest can be identified as a risk to the mother’s life is an unsolved or unaddressed issue.

The major problem of criminalization of abortion is the risk that it creates on the mother’s life when an induced abortion is performed. For instance, unsafe abortion constitutes 10 percent of maternal mortality in Sri Lanka (De Silva et.al, 2010). Although, the women with adequate financial means and knowledge on the availability of safe, even if illegal, services in the private sector avail themselves of safe options, the majority of women have resort to unsafe abortions. Though in the last five decades or so many commonwealth jurisdictions, including Asian countries such as India, Nepal and Bangladesh following the global trends, liberalized the restrictive abortion

¹ (1985) 1 Sri L R 1

laws, Sri Lanka has failed to do so due to various reasons (De Silva et.al, 2010).

Interestingly, however, some of the interviewees responded that the practical application of the abortion related laws in the country are different as most of the judges are sympathetic towards the accused as she is also a victim mother. Some stated that even though the punishment for committing an abortion is an imprisonment up to seven years, judges tend to give suspended sentence for them at the first instance. For example, one of the respondents has stated that "... judges look at it (issue of abortion) more as a humanitarian issue. Thus women who were found guilty are excused to a certain extent." Moreover, another respondent has mentioned that "... the only thing they [judges] can do is to mitigate the punishment in considering the social and economic factors that compelled the woman to do the abortion"

Furthermore, this research reveals that, the legal profession signs a green light towards the liberalization of abortion laws. According to their proposition, as a preliminary measure, the exceptions on which abortion can be performed are to be increased. For instance, fetus abnormalities and women subjected to rape or incest can be introduced as new grounds for abortions. The following statement of a respondent depicts this point of view: "The law needs to be amended because it does not recognize social needs. See the alarming increase of abortions: it shows the necessity of amending the law. More specifically, when a rape victim conceives or when there is a deformity in the foetus it is better to allow such abortions." Nevertheless, some interviewees mentioned that "it would be an opening of floodgates and consequently amount to a misuse of the law." (reviewer suggested to cite numbers)

With the emergence of the UN mechanisms on human rights and health issues, abortion began to be considered as a global women's rights issue. Whereas right to abortion is not directly identified by any HR instrument, it has been given an intrinsic recognition through rights such as right to life, equality and health rights. Recently, in *LC v. Peru*² the Committee on the Elimination of all forms of Discrimination against Women (CEDAW) held that Peru was in breach of its obligations under the CEDAW, when it denied the right of abortion to a sexually abused 13 year old girl. As

² Communication No. 22/2009, CEDAW/C/50/D/22/2009, October 17, 2011

per the Peruvian Penal Laws, only therapeutic abortion is permitted, but in this case the medical board appointed for this particular incident denied the request on the ground that LC's life was not in danger.

Nevertheless, in Sri Lanka, there is a bar to adopt such developments into domestic law as Sri Lanka is a dualist country³. In *Singarasa v. AG*⁴, Justice N. Silva's dictum reflects that there is no room to implement a recommendation of international human rights redress mechanisms at the domestic level, unless there is an enabling legislation.

As reflected by many scholarly writings, it is clear that abortion is morally dichotomous (Tribe L, 1990). However, it is undeniable that it is women who are at the crux of the physical and mental burdens of reproduction and more specifically carrying a foetus. As per Fraser, the issue of criminalization of abortion is intertwined with the 'misrecognition' of women in a society and consequently an issue of social justice (Fraser N, 1997). It is a misrecognition that is ultimately tethered to structural inequality in a gendered world in which the political and economic interests of women are marginalized (Ngwena C.G., 2013). This point of view is mirrored through the result of an unsuccessful attempt to liberalize the abortion laws through the Penal Code Amendment Act, No.22 of 1995. Hansard report⁵ related to the attempt reflects the attitude of the MPs towards the issue and women (Abysekara S, 1997). Even though, the Minister of Justice mentioned that there is at least a need of a health legislation to address the issue of abortion when withdrawing the particular provision on abortion in 1995⁶, that is yet to be materialized, and as of 2013, after twenty years, it is difficult to expect that this initiative will be taken up.

Furthermore, Martha Nussbaum has used 'capabilities approach' originally developed by Amartya Sen as a category of gender analysis for the achievement of de jure rather than de facto equality of women in a universe where in many spheres, women are second-class citizens lacking in capabilities precisely because unequal socio-economic circumstances, not least structural inequality, give women who have rarely been kings, or nobles

³ As per 'dualism', International Law is not directly applicable in a country unless otherwise translated into the domestic law.

⁴ S.C. Spl(LA) No. 182/99

⁵ Hansard, Sri Lanka, 19th and 20th September 1995

⁶ *ibid*

or rich but frequently poor, sick and dead, unequal human capabilities (Nussbaum, 2000). Even though, Nussbaum has put forward this argument to justify the right to abortion, with the emergence of gender specific abortion in which the female foetuses are being terminated in countries such as India, arguably, same ideology would be a boomerang for the right to be born as a woman.

Conclusions

As elsewhere, abortion rights have been a controversial issue in Sri Lanka with opposing standpoints of pro-life and pro-choice tending to dominate the academic discussion of the issue. When the rights of the unborn are placed in juxtaposition with the rights of the mother, it is difficult, if not impossible, to find a balance. Nevertheless, with the emergence of international recognition of abortion rights and the identification of potential health complications in an induced abortion, a more balanced approach needs to be adopted in Sri Lanka by de-criminalization or at least by introducing more exceptions to the prevailing provision in the Penal Code. Even though, there is a positive sign from the legal profession on the matter as evident through the research, there is a difficulty in bringing forward the issue in the policy making level for several reasons including political popularization and fear of religious pressure groups.

Keywords: Abortion;Criminalization; Human Rights; Induced Abortion;
Social Justice

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