

Abortion in Sri Lanka in the Context of Women's Human Rights

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This paper analyses, from the perspective of women's human rights, an unsuccessful attempt to amend the abortion law in the Penal Code of Sri Lanka in 1995. The Parliamentary debate brought to the surface a number of contentious issues relating to women's right to control their sexuality and reproductive capacities, in which women were variously assumed to be promiscuous and conniving, or vulnerable and needing protection. Some members of Parliament resorted to arguments based on cultural, religious or traditional differences regarding the origin and sanctity of life, to justify their opposition to abortion and support other discriminatory practices in relation to women. Others spoke in favour of gender equality and the need to address abortion as a public health and social issue, but few addressed the human rights aspects of this issue. The coming together of conservative religious and political opinions against women's right to control their sexuality and reproduction in this debate is of grave concern. This paper argues that a human rights framework, with its emphasis on equality and universality, is appropriate for conceptualizing and working for women's right to abortion.

UNDER the Penal Code of 1883, abortion in Sri Lanka is a criminal offence except when performed to save the life of the woman. Women's groups in Sri Lanka have been campaigning for a number of reforms in existing laws on abortion, rape and divorce for more than a decade. In 1991 the government began the process of drafting a Women's Charter, largely based on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This process involved consultations with a wide range of women's organizations, who succeeded in having included in the section on health a reference to women's right to control their reproductive function. The Charter was presented to Parliament in March 1993, and was approved with little debate. However, as late as March 1997, the Charter remained a commitment on paper only.

Both this Charter and Sri Lanka's ratification of CEDAW make it incumbent on the government to bring national law in line with the principles set out in these instruments. As part of this commitment, and in consultation with the Ministry for Women's Affairs, the Ministry of Justice drafted a bill to amend relevant sections of the Penal Code. A number of representatives of women's NGOs were

also involved in the initial discussions, but the bill as presented in Parliament apparently did not reflect the views expressed in these discussions.

In September 1995, the Sri Lankan Minister of Justice, Professor G L Peiris, moved the second reading of a bill to amend the Penal Code in Parliament. This bill proposed the introduction of marital rape and sexual harassment (including verbal harassment) as criminal offences; expanded the penalties for rape; and brought incest, which had previously been treated as an offence under the marriage laws, under the Penal Code.

Although the original draft of this bill had contained a section relating to the relaxation of restrictions on the medical termination of pregnancy, in introducing the Bill the Minister stated that he had decided to delete this section in its entirety. This move, he said, had been prompted by the realization that this was a very controversial matter. However, in spite of this attempt to pre-empt any discussion on the issue of abortion, many MPs did address it during the course of the parliamentary debate, although the amendment itself had been withdrawn.

The potential changes they were reacting to would have allowed abortion in cases when conception takes place as a result of an act of rape or incest or in cases of fetal abnormality. Despite how limited these changes would have been in terms of who was eligible for a legal abortion, stringent, safeguards to 'prevent misuse' of the law were also included. For example, it was proposed that a certificate authorising an abortion be issued only by a medical practitioner with postgraduate qualifications in gynaecology and obstetrics, and that the abortion itself be carried out by a different, medical practitioner. The proposal would also have required the abortion to be carried out in a government hospital or registered nursing home.

The Parliamentary Debate on Abortion

The debate that took place in Parliament around the proposed amendments to the Penal Code was a critical one. In Sri Lanka, legislative enactment is the only available method of modifying the Penal Code. The debate took place over two days, and lasted six hours. [1] There were no specific party positions on the issues being debated. Instead, throughout the debate, MPs presented their own personal opinions, coloured, of course, by their general attitudes towards women. These attitudes ranged from seeing women as promiscuous, to conniving or vulnerable.

The debate reflected some of the most common perceptions and misperceptions with regard to abortion and women's right to control their bodies and their lives.

One view was that women have a natural tendency to be promiscuous and would 'run wild' given the opportunity, a view that has been repeated time and again in abortion debates around the world. John Amaratunga of the United National Party (UNP) said, for example, that allowing any form of abortion would 'open the floodgates' and that a mere certification from a medical officer which entitles a person to resort to such an action would be made use of to continue (it) in a bigger scale'.

Ms. Pulendran (UNP), said that the Hindu religion forbade the taking of life, but her intervention focused mainly on male bias in society. For example, she spoke of son preference and the problems created by tests which revealed the sex of a fetus, and of male decision-making power within the family. Liberalisation of abortion, in her view, would also cause conflicts between men and women and weaken the institution of the family, and was hence not desirable. She also said that relaxing the controls on abortion would lead to promiscuity, especially among the young.

Some of the Members conjured up images of women as conniving, sly and deceitful. An example of this was Tyronne Fernando (UNP), who also opposed the amendments. When questioned by Minister Peiris why abortion should be denied to a woman, who has been raped, his reply was that any woman can get into the witness box in court and say she has been raped. 'We know very well that half these stories are made up'. Mr. Fernando also asked for the Evidence Ordinance to be amended, so as to require allegations of sexual harassment to be supported by corroborative testimony. Otherwise, he feared that women could use the law to embarrass men and bring false charges against them. Another UNP member, Mahinda Samarasinghe, argued for making some form of medical evidence necessary as corroboration in cases of rape, to prevent false accusations from being made (by women) in order to victimise someone, or take revenge.

Even those who spoke in favour of the amendments tended to take a paternalistic tone, portraying the amendments as meant to help women who were weak and vulnerable, especially poor women. In introducing the Bill, for instance, the Minister of Justice clearly stated that the amendments being moved were proposed in order to protect "vulnerable" interests - namely women and children'. He also spoke of the need to respect 'the wishes, personality and self esteem of women, in the conditions of modern society'. The words 'protection', 'vulnerable' and 'weak' recurred throughout the debate in references to women.

In his intervention, MP de Mel (UNP) also focused on women as a weaker section of society and therefore in need of protection. He spoke in favour of abortion, citing the large number of illegal and unsafe abortions performed in Sri

Lanka each year, and said that in his opinion the legislation did not go far enough.

Chamal Rajapakse, of the People's Alliance, commented on the problems faced by poor women with unwanted pregnancies and said that the laws regulating abortion should be reviewed. MP Weerakoon, Lanka Sama Samaja Party (LSSP), was also in favour of liberalising the abortion law. He pointed out that poor women could not afford to wait - and risk death while the amendments were postponed.

Little Support for Abortion as a Woman's Right

There were a few voices in favour of abortion as important for women's equality, but none claiming it as an unequivocal right. MP Tiruchelvam (Tamil United Liberation Front) in his intervention referred to new and profound changes in contemporary mores and values relating to gender equality, which must be reflected in the law. He spoke of four developments with regard to women's equality: a growing global consciousness of the phenomenon of violence against women, the growing sensitivity to reproductive rights, concern with the health risks to which women are subjected due to unsafe abortions, and discrimination on the basis of sexual preference. Speaking on the issue of abortion, he mentioned the class biases of the present situation, in which it is poor women who suffer the consequences of unsafe abortion, and he urged a more humane and realistic regulatory framework.

Former Minister of Health and Women's Affairs, Renuka Herath (UNP), was the only other woman MP who spoke on abortion. In her comments she referred extensively to the Women's Charter, which was brought before Parliament during her time. Overall, she supported the amendments to liberalise abortion, quoting a UN publication on the global abortion situation. However, she noted that care should be taken to ensure that such measures would not promote rape in society. In addition, she defined the time limit during which abortion should be permitted as 'before the fetus was transformed from a collection of cells into a child'. Ms Herath also supported stronger punitive measures against those who commit violence against women, advocated sex education in schools and measures to increase awareness that contraception was essential if the problem of unwanted pregnancy was to be addressed.

Explicit mention of abortion as a human right of women was made by only one Member, Mr. Perera (Sri Lanka Muslim Congress), who spoke in favour of the proposed reforms and quoted Hillary Clinton that: 'The rights that women are fighting for are none other than the rights that are enjoyed by other human beings'. In his closing remarks, Mr. Perera said that women's rights were taken

for granted in rural areas and that people in those areas would be receptive to the changes that had been proposed.

Anti-Abortion Views and Respect for Cultural Difference

Many Parliamentarians also resorted to arguments based on cultural, religious, or traditional differences regarding the origin and sanctity of life, to justify their opposition to abortion and support for other discriminatory practices in relation to women. The Minister of Justice himself, in his introduction of the amendments, spoke of the different systems of personal law prevailing in the country and in particular, he referred to the susceptibilities of the Muslim community. He observed that:

'It is difficult to conceive of absolute norms or principles, which cut across cultural distinctions. It sometimes becomes necessary to recognize different standards and values applicable to different sections of the community. That is a part and parcel of life in Sri Lanka... It is not possible to emulate uncritically legal development in other countries. We have to take into account the cultural realities in our own countries....'

MP Azwer (UNP) invoked the Quran and the Bible in his opening statement, and went on to affirm that: 'Life begins, at conception. That is God's work. We have no business to interfere'. In arguing against abortion, Mr. Azwer pointed out that many young men had died due to violence and that there was a male-female imbalance in present day Sri Lankan society. Any means used to restrict population growth, in his view, would be negative. In passing, he also justified polygamy as an Islamic response to any imbalance in the male-female population ratios at particular points in history. He appealed to the House, and to members of all religions, to remember that:

'We have a culture. We have something called a decent upbringing. When something like this happens in our villages we call them indecent women, indecent girls. You must not give protection to that indecency. That is against our traditions and our culture. All our religions are opposed to this'.

Among other comments made by Mr. Azwer were. 'What is rape in some societies is not so in others.' With reference to rape in marriage, he said: 'The primary objective of marriage is procreation'.

John Amaraturunga (UNP), said he was speaking as a representative of the Catholic community, which constituted seven percent of the country's population. His contention was that any attempt to legalise abortion 'will be strongly opposed by all sections of society and would affect the fundamentals of

social life and cultural life of the people of this country. His argument was based on 'a belief in the sacredness of life'. He said that 'not only Christians but also Buddhists, Muslims, Hindus and all who believed in the supremacy of life' would oppose such a proposal.

Seconding Mr. Amaratunga's views, Tyrone Fernando (UNP) spoke of 'unborn children alive and kicking inside the mother's womb'. Calling those who supported liberalising abortion legislation as 'Frankenstein monsters' he said that 'liberalising abortion legislation in Sri Lanka would pave the way for euthanasia'. He argued that if abortion is permitted, then suicide would have to be permitted too. According to Ms. Pulendran (UNP), abortion was forbidden by the Hindu religion as well.

Minister CV Gooneratne (Sri Lanka Freedom Party), who pleaded for viewing abortion as a social issue, nevertheless spoke of the need to make changes in, the law 'within the ambit of our culture...'. He reassured the House that '...I am not for a moment suggesting to hurt the susceptibilities of any particular religion or community.... We should look at it as a social issue.'

Backing Down in the Face of Pressure

The Sri Lankan government maintains a tenuous hold on power, with the support of coalition partners from the minority religious and ethnic communities. Consequently, there were clear political imperatives which led the Minister of Justice to withdraw his proposal to amend the law on abortion even before it came up on the floor. Even so, the debate continued on abortion for a second day, along with proposals to amend the law on marriage and divorce.

In the course of the debate, Minister Peiris commented that abortion reflected some 'intractable' moral problems, and noted that the area of contention was 'between those traditions that regard all life as being sacrosanct and those voices that believed in the independence and autonomy of women and of women's right to determine their own future.' The controversy had made it clear to him that the matter required more attention. In spite of a personal commitment to liberal principles of equality and justice, in withdrawing the amendment, he said: 'We have tried to accommodate different points of view, different religious convictions and different cultural and moral traditions.' In the end, no one was willing to challenge legal norms and values based on religious belief.

The coming together of conservative religious and political opinions against women's right to control their sexuality and reproduction, as reflected in this debate, is of grave concern for women in Sri Lanka. The Muslim lobby, for example, were able to obtain many concessions from the Minister in the course of

the debate. It was agreed for example, to maintain the existing age of marriage and consent for Muslim women at 12 years of age. In addition, marital rape was not accepted as a criminal offense except when a couple are judicially separated.

Abortion Remains a Criminal Offence

In withdrawing the amendment to liberalise abortion, the Minister of Justice expressed his personal commitment to decriminalising abortion. In his view:

'Decriminalisation of abortion is a feature of evolving legal systems in many parts of the world and I do not see any reason why Sri Lanka should be out of step with that general development.'

Hence, he promised to introduce health legislation to address the issue of abortion. This has not yet materialised. Since this sole parliamentary debate in 1995, abortion has continued to be a criminal offence in Sri Lanka. In 1996, there were several cases in which women, who had obtained an abortion for themselves, as well as women who had helped others to obtain an abortion, were prosecuted by the police. For example, several people have been arrested for conducting abortions, including two doctors in Kandy in February 1996 and one person in Gampaha in December 1996. In September of 1996, UG Malkanthi of Kandy District was sentenced to three months in prison (but given a suspended sentence), and fined Rs. 1000 for an attempted abortion. On the other hand, in January 1997, the President of Sri Lanka set up a Special Task Force on Health; women's groups are now investigating the possibility of lobbying for abortion reform through this Task Force.

Biology and Identity: Abortion as a Key area of Women's Rights

The discussion around the amendments to the Penal Code in Sri Lanka brought to the surface a number of contentious matters relating to women and their autonomy. Women's right to decide when and if they have sexual relations with their spouse (in terms of the concept of marital rape) and their right to control their reproductive capacities (in terms of abortion) as well as their right to be recognised as individuals and as members of a particular community, were all at issue in the debates both inside and outside Parliament. These issues are relevant not only to Sri Lankan women, but are manifest worldwide.

Abortion has always been an area of controversy in terms of the rights discourse, especially when it has been posed as a conflict between women's right to choose and the right to life of the fetus. Within most legal frameworks, abortion is not conceived in terms of woman's right to self-determination. Instead, in many countries, including Sri Lanka, it is viewed as a crime against the state. In the

USA, where the women's movement has fought many battles over issues around access to abortion, arguments have often been based on the right to privacy. Thus, in the USA women have been granted access to abortion as a privilege accorded to each one of them as individuals, as the right to exercise decision-making in private rather than the public and acknowledged right of women to control their lives.

Looking at abortion in this way, as Catherine Mackinnon has pointed out: '...has shielded the place of battery, marital rape and women's exploited, domestic labour. It has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition. [2]

The anomaly of applying different legal standards to public and private life has been a part of South Asian existence since the colonial period, when uniformity was ensured in terms of civil and criminal law, land tenure, evidence and revenue. However, the colonial state refused to intervene in matters relating to the family and to domestic disputes, reinforcing the division between the public and private spheres. Today, governments are technically bound by international human rights laws and standards, which define equality as non-discrimination on the basis of gender, among other factors, but in fact national laws, like those of Sri Lanka, do not reflect the equality principle as regards family relations.

Thus, in the public sphere, in the areas of political participation education and employment, minimum standards of equality are prescribed and when these are not realized, can be challenged in the courts. At the same time, with regard to other areas of life, which require litigation, including in the criminal law, no distinction is made on the basis of religion or which ethnic community a person belongs to. Murder is murder, regardless of creed.

The situation is still quite different from this, however, in the so-called private sphere, with regard to matters pertaining to marriage, divorce, maintenance, guardianship, custody, adoption and inheritance. The legal norms that prevail from community to community, as Sara Hossain points out, 'relegate the private sphere of home and the family to an arena beyond Justice, regulated by a variable set of norms. [3] Thus, as evidenced in the debate in Sri Lanka, religious and customary laws may be invoked to impinge on women's rights and responsibilities during marriage and its dissolution, and the right to abortion is rejected out of hand.

In this context, finding the means in law to take women into account in a way that acknowledges women's role as social and biological reproducers of society, and respects women's bodily integrity and sexual autonomy - and yet does not confine women because of their bodies - remains a fundamental challenge to

activism in this arena. The issue is further complicated by the framework of religious and traditional (or customary) norms and practices which endow patriarchal institutions and social formations, in particular the family, with the ideological and moral rationale for controlling and regulating women's sexuality and for subordinating women at home, at work and in society at large.

Conceptualising Abortion as a Human Right of Women

The focus on women's sexual and reproductive rights is a development in contemporary women's activism that has brought two major areas of debate on women's human rights together. On the one hand, there is a call to examine women's right to control their sexual and reproductive functions, which challenges existing assumptions about the division of the world into public and private spheres, with the private sphere continuing to be viewed as the arena into which the state and law-making cannot enter.

On the other hand, there are issues of identity, culture and minority rights from a perspective of universality and the need to evolve acceptable common standards for human behaviour. Here, the focus is on the dynamic between universality and cultural specificity; on the one hand, human rights activists argue against the use of 'culture', 'tradition' and 'custom' to justify blatant discrimination against women. On the other hand, they also stand firmly for the rights of all minority ethnic, religious and other communities to express their identities with dignity and respect.

The linking of women's health issues to a human rights framework has challenged many existing assumptions on issues such as abortion and provided invaluable tools for challenging two forms of discrimination at once. Within the framework of this debate, as the discussions in Sri Lanka have illustrated, abortion continues to be a highly controversial and contentious issue. It demands that a subject which has for centuries been considered entirely private, immoral and shameful is brought into public view and that public funds are spent to ensure that women can have access to safe, inexpensive abortion procedures. It also demands that respect for women as human beings overrides respect for women as members of particular religious and cultural groups or ethnic communities. The central dilemma is to encompass women's unique ability to become pregnant within a framework in which women are entitled to be treated as full and equal human beings. Centuries of unequal treatment on the basis of our capacity to reproduce need to be overcome as women stake this claim.

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