



## **The need for rethinking the law relating to abortion in Sri Lanka: A critical examination**

**T.R. Galappaththige**

Attorney at- law, Lecturer (Temporary)  
Department of Public and International Law, Faculty of Law  
University of Colombo, Sri Lanka  
Email: thilinigalappaththige@gmail.com

### **Abstract**

There are many arguments for and against the law of abortion around the globe. Though Sri Lankan law has remained static on the subject, many of the ideologies and the laws of other countries have changed with the ground realities. Under the Sri Lankan law, abortion has been criminalized under sections 303 to 306 of the Penal Code. Since the enactment of the Penal Code of Ceylon in 1883, there has been no amendment brought about for the provision relating to abortion. However, in recent decades, increased interest has been focused on laws of abortion and attempts have been made to reform the laws of Sri Lanka. This situation has reached its climax with the effort of the recent cabinet paper on amending the current law on abortion. This research paper examines whether the existing law relating to abortion in Sri Lanka adequately addresses the social realities and if not, how the existing law be reformed especially, with reference to neighboring India. At the same time, the historical foundation and background of the law pertaining to abortion was also discussed briefly. This research was conducted primarily as a qualitative research, mostly using secondary sources. This paper, while examining the global trends relating to abortion, identifies that the jurisdictions around the world permit abortion on seven grounds while Sri Lanka accepts only one of them. However, the research concludes that it would not be advisable for Sri Lanka to adopt criteria which underpin strange ideologies. The principles, culture and the moral values that underlie the Sri Lankan society must be seriously considered in deciding appropriate amendments. Similarly, it is vital to maintain a balance between providing access for termination in genuine cases and to ensure that the law is not abused.

**Keywords:** abortion, Penal code, reforms, ideologies, amendments

### **Introduction**

‘Abortion is legally defined as the expulsion of the fetus from the uterus (womb) at any time before its term of gestation is complete.’ (Russell, 1951-1952) For medico-legal purposes, abortions may be grouped into three categories, namely spontaneous, therapeutic, and criminal abortions. A spontaneous abortion is as opposed to an induced abortion. Also, a therapeutic abortion is an interruption of pregnancy performed to safeguard the health or save the life of the mother. Criminal abortions are unlawful abortions and the interruption of pregnancy by the mother herself or another person is considered as a criminal abortion. However, in lay language, the term abortion is generally considered synonymous with criminal abortion. (Russell, 1951-1952)

There are many arguments for and against on the law of abortion around the globe. Some firmly believe that abortion should be criminalized and others are in view of decriminalizing abortion. As David Boonin (Boonin, 2002) explains, ‘opponents of abortion typically believe that, the matter is fairly clear-cut: The fetus is a human being, killing human beings is morally wrong, abortion causes the death of the fetus, therefore abortion is morally wrong’. Further, he states that supporters of abortion often seem to treat the matter as equally simple: ‘It’s the woman’s body, so it’s her choice’.

In between the said two viewpoints, there is another view that abortion should only be permitted in specified conditions such as to protect the mother's physical and mental health or if the fetus is impaired, or if the mother had been a victim of rape or incest etc.

The law relating to abortion in Sri Lanka is governed under the Penal Code. (Penal code of Ceylon No.02 of 1883) Abortion has been criminalized under sections 303 to 306 of the Penal Code. Since the codification of Penal Code in 1883 there had been no single amendment to the provisions relating to abortion. Under the current law, abortion is legally permitted only if it is performed to save the mother's life. (Section 303 of the Penal code of Ceylon) The informal evidence and studies have revealed that despite the restrictions in law, clandestine abortion services are in operation in Sri Lanka. One such study indicates that approximately 125,000 to 175,000 induced abortions are performed annually. (Silva, 1997) In contrast, a subsequent study estimated a much higher figure of 658 induced abortions per day, giving an abortion ratio of 741 per 1000 live births. (Abeykoon, 2009) However, it can be logically argued that, these figures do not reflect the actual total number of Sri Lankan women subjected to abortions.

With the above noted concerns, several attempts have been made to reform these laws in 1970s, 1995 and 2011-2013. (Kumar, 2012) This situation has reached its climax with the effort of recent cabinet paper on amendments to the abortion laws. Followed by years of frustration, the Cabinet had recently approved papers that would legalize the 'medical termination of pregnancy' in two specific instances. The first is if a mother was raped and the second is if the fetus had a lethal congenital birth defect. However, the proposal regarding legalization of abortion under specified conditions is still oscillating on its ethics and the role of the state in its regulation. In this context, this paper examines whether the existing law relating to abortion in Sri Lanka adequately addresses the social realities and if not, how the existing law be reformed. Further, the historical foundation and background of the law pertaining to abortion was also discussed briefly to get an idea about this area.

### Methodology

This research was conducted primarily as a qualitative research, mostly using secondary sources such as legal statutes, international instruments, academic expressions and judicial decisions. However, interviews were also carried out in reaching a conclusion.

### Findings

Going back in history even under the old Hippocratic Oath the abortion was condemned. It was worded as follows: "*I will not give to a woman a pessary to produce abortion.*" (Candappa, 1993) In ancient Greek and Roman societies an induced abortion was considered a crime against the husband. (Simon, 1998) The earliest Christian views on abortion can be found in the second-century and Saint Basil the Great of the Eastern Church wrote, 'a woman who deliberately destroys a fetus is answerable for murder.' Twelfth-century Canon Law considered abortion as homicide if it was performed after quickening. (Simon, 1998)

Considering secular law, it can be found that the early English Common Law made a distinction between early and late abortion demarcating the same at quickening. Prior to 1803, abortion before quickening was not considered a crime, and even abortion later in pregnancy was not severely punished. According to Rita J. Simon, the first secular law concerning abortion was passed in England, the Irish Chalky Act. (Simon, 1998) The Act has punished a woman who committed an abortion by life imprisonment. The Irish Chalky Act was followed by the Offences against the Person Act passed in 1861. It stated: 'It is a felony punishable by life imprisonment for any woman with child unlawfully to procure or attempt to procure her own miscarriage and for any other person to do any similar act with similar intent, whether she be with child or not.' (Section 58 of the Offences against the Person Act passed in 1861) The Offences Against the Person Act formed the basis for abortion law throughout the Commonwealth.

This situation was reflected in many other countries during the said period. However, a major change in English Common Law occurred in 1938 in the case of *Rex v. Bourne*. [3 All E. R. 615 (1938)] In this case, a physician was accused of performing an abortion on a 14 year old girl who had been raped and the court indicated specified instances where an abortion would be lawful. The accused was acquitted because continuation of the pregnancy would have caused the girl to become a

'mental wreck.' The judge declared that the words 'unlawfully' in the 1861 Act implied that abortion performed with the intent of preserving the woman's life or health was not a criminal act and that health included both physical and mental health. (Simon, 1998) However, the ideologies that prevailed during the past are still retained and valued by some societies even in the contemporary world without necessary amendments.

Turning to the law governing abortions in Sri Lanka, voluntarily causing miscarriage is a crime punishable with up to three years of imprisonment or with fine or with both and if the woman quick with child, the punishment is up to 7 years. (Section 303 of the Penal Code) According to the explanation to section 303, a woman who causes to miscarry herself is within the meaning of this section. According to section 304, if such miscarriage is caused without the consent of women, whether the woman is quick with child or not, the punishment is up to 20 years of imprisonment and also be liable to fine. Further, if the woman dies due to an act carried out with the intention to cause a miscarriage with child the punishment is up to 20 years. [Section 305 of the Penal Code of Ceylon; *Regina vs. Waidyasekere* (57 NLR 202)] The only exception to these offences is where the miscarriage is caused in good faith for saving the life of the woman. (Section 303 of the Penal Code of Ceylon)

According to the Law Commission report, jurisdictions around the world permit abortion on seven grounds; to save the life of the woman; to preserve a woman's physical health; to preserve a woman's mental health; where the pregnancy is the result of rape or incest; because of fetal impairment; for economic and social reasons and on request. (Law Commission Report, 2013)) The grounds range from the most restrictive to the most liberal and Sri Lanka falls into the most restrictive category.

According to the Asia Safe Abortion Partnership website, the only other country in the South Asian region that has restrictive abortion law is Afghanistan. In contrast, other neighboring countries have relatively liberalized abortion laws. Despite restrictive legislation in Bangladesh, a policy that allows for menstrual regulation up to the 10<sup>th</sup> week of pregnancy provides significant leeway to women there. Both in Pakistan and the Maldives abortion is permitted to preserve physical health and those laws are less restrictive than in Sri Lanka. In Bhutan, abortion is permitted to save a woman's life as well as in instances of rape and incest. In addition, this law considers grounds relating to factors such as a woman's age and capacity to care for a child. In India, the law permits abortion for socioeconomic reasons, to preserve health, when there are fetal abnormalities, and after rape. The most progressive abortion law comes from Nepal, where abortion is permitted in the first trimester without restriction except for a prohibition on sex-selective abortion.

Since, the provisions relating to abortion in Indian penal code (The Indian Penal Code, 1860) identical to the Sri Lankan Penal code at the beginning, author in the view of identifying and comparing the development of Indian law is essential. Under section 312 of the Indian Penal Code, 'abortion under any circumstances, except danger to a pregnant woman's life was identified illegal at the beginning. According to the section 312, the penalty for abortion practitioners was either three years in prison, or a fine, or both; for the woman availing of an abortion, the penalty was either seven years in prison, or a fine, or both.' However, the prevalence of illegal abortions in India caused the government to reconsider the law relating to abortions. As a result, the Indian abortion laws fall under the Medical Termination of Pregnancy (MTP) Act No. 34 of 1971. Under the MTP Act, pregnancies not exceeding 12 weeks may be terminated based on a single opinion by a registered medical practitioner formed in good faith. (Section 3(2) a of MTP Act No. 34 of 1971) Moreover, in case of pregnancies exceeding 12 weeks but less than 20 weeks, termination needs opinion of two registered medical practitioners.

Medical termination of pregnancy has been legal in India under certain conditions. The MTP Act clearly states the said conditions as follows: The continuance of the pregnancy would involve a risk to the life of the pregnant women, a risk of grave injury to her physical or mental health, if the pregnancy is caused by rape, there exist a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped, failure of any device or method used by the married couple for the purpose of limiting the number of children, risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.

Though the MTP Act does not mention anything about a woman's right to terminate a pregnancy beyond 20 weeks, in *Ms. X v. Union of India* (Ms.X Vs. Union of India , 2016; Veena Johari Veena Johari and Uma Jadhav, 2017) the Supreme Court of India permitted a rape survivor to terminate her pregnancy at 24<sup>th</sup> week, which is beyond the permissible 20 weeks under MTP Act. (Bedi, 2016) Their grounds were that continuing the pregnancy could greatly endanger her physical and mental health. In this instance, the Supreme Court directed the members of the appointed medical board to examine the petitioner and the viability of the pregnancy. The board found that the fetus had multiple congenital anomalies and the severity of these anomalies posed a grave risk to the physical and mental health of the petitioner. Therefore, the medical board recommended that the petitioner be allowed to not continue the pregnancy. Based on these recommendations, the Supreme Court granted the petitioner the necessary permission to terminate her pregnancy. Moreover, the Supreme Court of India has allowed a 13-year-old alleged rape survivor to terminate her 32 week old pregnancy after taking note of a medical report. While considering all orders in the recent times, point that it was due to sexual abuse/rape and that the victim did not want to carry on with it.

Further, while granting a prisoner the right to abort her fetus, the Bombay High Court judgment of *Halo Bi v. State of Madhya Pradesh and Others* (Halo Bi v. State of Madhya Pradesh & Ors, 2013) recognized a woman's absolute right to abortion. (Veena Johari Veena Johari and Uma Jadhav, 2017) The order concludes, "We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist." The Court has ordered the government to provide the victim with immediate abortion service.

With this spectrum of developments, there would be a reasonable doubt on the suitability of the current Sri Lankan law relating to abortion with the social reality and needs of the country. However, it would not be advisable for Sri Lanka to adopt criteria which are brought with strange ideologies which are not practical within the Sri Lankan context. Especially, ground realities, principles, culture and the moral values that underlie the Sri Lankan society must be seriously considered in deciding appropriate amendments with respect to women's rights.

### Conclusion

Though, there are justifications to move away from the strict prohibition on abortion, there is a wide range of concerns that should be considered as mentioned above. According to the previous research conducted in Sri Lanka suggests that most abortion seekers are married and that the primary cause for unwanted pregnancies is the failure to use effective contraception. (P C Gunasekera and P S Wijesinghe, 2001) It may be logical to argue that there is a mismatch between actual current needs and the proposals. Therefore, it is essential to pay attention to liberalizing abortion laws in similar with strengthening the status of reproductive health services and developing comprehensive sexuality education in Sri Lanka.

Similarly, when it comes to the termination of a pregnancy in the case of rape and serious fetal impairment, it is vital to maintain a balance between providing access for termination and ensuring that the law is not abused. There is a reasonable doubt whether the current proposal for legal reform will be used for abusing the process rather than using it as a last resort. Therefore, it is recommended the necessity of details of the procedure which is based on the recommendation of a panel comprising of respective professionals who will be required to assess whether there are reasonable grounds for the termination. This would obviate and reduce the abuse of the process. Hence, the enactment of an independent and comprehensive statute like MTP Act in India is recommended, as opposed to merely amend the Penal Code.

### References

- Abeykoon, A. (2012). Estimates of Abortion Rate in Sri Lanka using Bongaarts Model of Proximate determination of Fertility. UNFPA. Retrieved from <http://www.ihp.lk/publications/docs/EOASL.pdf>
- Boonin, D. (2003). A Defense of Abortion. New York: Cambridge University Press. Retrieved from <https://ethicslab.georgetown.edu/phil553/wordpress/wp-content/uploads/2015/01/David-Boonin-A-Defense-of-Abortion.pdf>

- Candappa, G. (1993). Abortion, Euthanasia and the Doctor's Dilemma: The Need for a more Rational Approach. *Law Asia* 93 Sri Lanka.
- Halo Bi v. State of Madhya Pradesh & Ors, WP (C) 7032/2012 (High Court of Madhya Pradesh (Indore Bench) January 16, 2013).
- Johari, V., & Jadhav, U. (2017). Abortion rights judgment: a ray of hope!. *Indian Journal Of Medical Ethics*, 02(03). <http://dx.doi.org/https://doi.org/10.20529/IJME.2017.044>
- Kumar, R. (2012). Misoprostol and the politics of abortion in Sri Lanka, *Reproductive Health Matters. Sexual and reproductive morbidity: not a priority* , Vol. 20 (Kumar R, Misoprostol and the politics of abortion in Sri Lanka, *Reproductive He No. 40*), 166-167.
- Kumar, R. (2018). Abortion in Sri Lanka: The Double Standard. *American Journal Of Public Health*, 03(103), 400-404. <http://dx.doi.org/10.2105/AJPH.2012.301154>
- Medical Termination of Pregnancy - Proposals of The Law Commission of Sri Lanka. (2013) Retrieved from [http://lawcom.gov.lk/web/images/stories/reports/medical\\_termination\\_of\\_pregnancy\\_proposals\\_of\\_the\\_law\\_commission\\_of\\_sri\\_lanka.pdf](http://lawcom.gov.lk/web/images/stories/reports/medical_termination_of_pregnancy_proposals_of_the_law_commission_of_sri_lanka.pdf).
- Medical Termination of Pregnancy Act No. 34 of 1971 (India)
- Ms.X Vs. Union of India , No. 593 (Writ Petition (C) 07 25, 2016).
- Offences against the Person Act in 1861 (UK)
- P C Gunasekera and P S Wijesinghe. (2001). Reducing abortions is a public health issue. *Ceylon Medical Journal* , 46 (2).
- Penal code of Ceylon No. 02 of 1883
- Rex v. Bourne [1939] 1 K. B. 687, 3 All E. R. 615 (1938)
- Russell, S. F. (1951-1952). Criminal Abortion. *Journal of Criminal Law and Criminology* (2).
- Silva, W. D. (1997). The practice of induced abortions in Sri Lanka. *Takemi Programme in International Health, Harvard School of Public Health*.
- Simon, R. (1998). *Abortion: Statutes, policies and public attitudes the world over*. Praeger Publishers