

Shattered Consent: A Comparative Study on Reproductive Autonomy for Rape Survivors in Sri Lanka

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Review Article

Abstract

Introduction: As recognized under Section 303 of the Penal Code of Sri Lanka, induced abortion is a criminal offence which results in imprisonment for a period of three years or a significant fine. Penal Code provides only one exception for abortion within Sri Lankan domestic legal framework, Particularly in circumstances where the mother's life is at risk. The present study attempts to examine the impact on right to reproductive choice from criminalizing abortion for rape victims under the Penal Code of Sri Lanka.

Objective: The objective of this research is to propose reform-based recommendations to ensure right to reproductive choice of the pregnant rape survivors in Sri Lanka through effective legal and procedural reforms.

Methodology: The qualitative research methodology through normative judicial research method and comparative research method was adopted in this research.

Results: Under section 303 of Penal code, induced abortion is considered as a criminal offence even for a rape victim. In 1995, amendment to decriminalize abortion in specific circumstances including rape, incest or fetal abnormalities was forwarded to the Parliament of Sri Lanka which was unsuccessful. In 2012 and 2022 respectively, there were attempts to reform existing legislative provisions on abortions which turned out to be a failure. Being a state party to CEDAW and other international human instruments, Sri Lanka is bound to remediate Reproductive Rights of women.

Conclusion: Forced pregnancy and motherhood of rape victims can be defined as a form of cruel and degrading treatment. After critical analysis of domestic law, it can be observed that despite of various attempts to reform the existing law, Law of abortion in Sri Lanka has remained as an untouched area. Therefore, it can be concluded that denial of abortion to rape survivors needs to be reformed to ensure right to reproductive choice of women in Sri Lanka.

Key Words: Abortion, International Obligations, Penal Law, Reproductive Autonomy, Victims of Rape



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Introduction

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

— *Supreme Court of United States, Majority Opinion* [1]

Within human rights law, abortion is considered a complex issue as it is much like two sides of the same coin—a crime and a right at the same time, which is clearly reflected in different legal frameworks. In the Sri Lankan context, section 303 of the Penal Code [2], adopted during the British colonial period in the year of 1883, employs a restrictive approach towards abortion.

In March 2025, the Government of Sri Lanka reaffirmed its commitment to amend the abortion law, section 303 of the Penal Code of Sri Lanka, to permit termination of pregnancies in cases of rape, incest and severe fetal deformities [3]. These failed efforts to amend the abortion law reflect the shortcomings of the legal system in enforcing human rights, particularly women's reproductive autonomy and related rights. This failure is not an isolated event, it highlights a broader pattern of the legislators' inability to recognize women's rights within criminal law, as evidenced by failed attempts to criminalize marital rape, redefine the scope of the legal definition of rape and reform abortion laws.

Considering the broader issue of gender discrimination within Sri Lanka's criminal law, this paper presents restricted access to abortion as an issue of reproductive autonomy. It examines the current legal framework on abortion and their impact on the reproductive autonomy and rights of rape survivors. Using radical feminist theory, this paper explores how continuous legislative failures impact women's reproductive autonomy and argues

that legal reform is essential to strengthen women's rights. Through a comparative analysis of Sri Lanka and Nepal, this paper aims to demonstrate the urgency of addressing the lacunas in existing laws and advocate for reforms that uphold reproductive autonomy, equality and justice for rape survivors.

Part I of the paper presents an analysis raised by feminist scholars on reproductive autonomy, attempting to establish the failure of the government in securing the rights of rape survivors due to outdated abortion laws. This analysis lays the foundation for the next section, which provides a comparative examination of existing abortion laws in both Sri Lanka and Nepal. Finally, this paper offers recommendations framed for the Sri Lankan context, supported by Nepalese jurisdiction and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) to support the protection of reproductive autonomy of women and promote gender sensitivity within the domestic criminal law framework.

Methods

This article employed a normative judicial approach and a comparative legal approach as the main methods of the study. Employment of these methods limited the scope of sources to existing primary and secondary sources, including legislative provisions, case law, international treaties and existing research contributions of scholars. The normative judicial approach involved a critical analysis of primary sources such as statutory provisions, constitutional guarantees and judicial decisions governing abortion in Sri Lanka supported by secondary sources including academic journals and policy reports. The comparative analysis was limited to jurisdiction of Nepal, where it was selected for its unique position from being a historically restrictive abortion regime to

liberal legal framework in South Asia with similar sociocultural context. This comparison was framed within international human rights standards, including Sri Lanka's obligations under CEDAW and other international human rights obligations. This study was limited to desk-based analysis and no empirical research was undertaken.

Discussion

Feminist Critique on Reproductive Autonomy and Abortion

Motherhood is a beautiful phase in a woman's life, which comes with the right to choose whether or not to reproduce, including the right to decide whether to carry or terminate an unwanted pregnancy. In this regard, the decision on having children is an expression of individual autonomy, which is recognized by human rights law with minimum state interference [4]. The ability of a woman to control their reproductive destiny is a key measurement of substantive equality and freedom of women in a society. Reproductive rights throughout women's life cycle include: sex education and contraception, the ability to decide whether to have or not have children, antenatal care, the right to give birth safely and reproductive needs beyond pregnancy and childbirth [5]. Within reproductive autonomy, abortion remains a key struggle, where recognition of women's right to have abortion is unencumbered by legal conditions. Abortion rights are inherently connected with law, and their interpretation is based on different justifications; reproductive choice and reproductive justice [6]. While the former can extend legal protection to some women, the latter focuses on a more transformative approach of reproductive justice supported by substantive equality, autonomy and social rights, which hinders traditional patriarchal norms. Thus, this article builds its argument based on reproductive justice. As Loretta Ross argues, reproductive autonomy is not only

about access to contraception and maternal care, but also understanding economic, social barriers in bearing and raising a child [7]. The reproductive justice approach is built on five principles: first, a substantive understanding of women's reproductive autonomy within their specific contexts, second, substantive equality on reproductive autonomy. Third, reproductive autonomy should be interpreted with connection to socio-economic rights. Fourth, a substantive and intersectional analysis of all these rights will protect disadvantaged women. Fifth, the legal and policy framework must recognize and facilitate abortion rights while considering social, economic and other conditions that enable reproductive justice [8]. Thus, the right to abortion, particularly in rape must be contextually understood, where the reproductive choice of rape victims should be located within broader interpretation of social, economic, cultural constraints on bearing a secondary victim of rape. As existing studies suggests, criminalizing abortion to rape victims result in victims experiencing double marginalization as they have go through illegal abortions that are not following the law. Folky Fuad commented as follows:

"The existence of a law that criminalizes all forms of abortion plus the fear of social sanctions if it is known to the public, makes women who experience unwanted pregnancies (for example, rape victims) perform abortions secretly to untrained people" [9].

Grounded on the theory of reproductive justice, this paper evaluates Sri Lanka's legal framework on abortion to assess its alignment with the principles of that theory.

Sri Lanka's Legal Framework on Abortion; A Critical Analysis

A unified and structured criminal law system was only introduced in Sri Lanka by the British, where British authorities drafted a Penal Code

for India, which was applied to Sri Lanka with some essential alterations [10], which still remains in operation even after 75 years of independence. The offence of Rape is defined under section 363 of the Penal Code as amended as follows;

"Section 363: A man is said to commit " rape " who enactment has sexual intercourse with, a woman under circumstances falling under any of the following descriptions: (a) without her consent even where such woman is his wife and she is judicially separated from the man (b) with her consent when her consent has been obtained, by use of force or threats or while she was in unlawful detention. (c) with her consent when her consent at a time when she was of unsound mind or was in a state of intoxication (d) with her consent when the man knows that he is not her husband, and that her consent is given because he believes that he is another man to whom she is, or believed herself to be, lawfully married; (e) with or without her consent when she is under sixteen years of age [11]."

The criteria for defining the offence of rape are based on the requirement of 'consent', which is not clearly defined within the Penal Code. On the other hand, Section 303 of the Penal Code criminalizes abortion as follows;

Section 303; however voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine [12].

Examining sections 363 and 303 of the Penal Code together, under Sri Lankan criminal law, rape victims who terminate unwanted pregnancies are classified as perpetrators of illegal abortion. It can be argued that, when taken together, these sections are crafted in a manner that discriminates against the rights of rape victims, both women and adolescent girls. The provisions of section 363 and 303 raises two critical issues; 1 (It imposes the burden of unwanted motherhood on rape victims, including adolescent girls and 2) children born as a result of such circumstances are often burdened with social, economic, psychological challenges, which pose a serious threat to protecting their best interests, as mandated by Article 3 of the Convention on the Rights of the Child (CRC), to which Sri Lanka is a party.

Further, subsection 364 [3] addresses instances of rape involving a minor, where the victim is a child herself. However, when read in conjunction with Section 303, the provisions impose an undue burden on a child by compelling her to assume the role of a mother while still being a child.

This contemporary legal stance on abortion provision in Sri Lanka, particularly in rape cases, can be critically examined through the lens of feminist scholarship and historical perspectives on women's subordination. Different feminist scholars and anthropologists have examined the status of women during the Victorian era where their roles were shaped by their objectification. As these scholars emphasize, women were often restricted to their domestic, sexual and societal value reinforcing their subordinate position.

This Victorian ideology of women is visibly encapsulated in the English proverb of 'A spaniel, a woman, and a walnut tree, the more they're beaten, the better they be [13]'. As explored by John Stuart Mill in his work

of "The subjection of Women, In Essays on Sex Equality", the position of married in the Victorian era was described as worse than that of slaves, as women were legally bound to their husbands, rendering them completely subordinate. [14]. As Daniel Siegel observes in 'Charity Through Dissociation: The Task of the Bible-Woman', there was a disparity between men and women in both public and private life in the Victorian era, where women were burdened with high moral expectations, particularly around ideals of moral purity, expectations and legal obligations within marriage. [15]. The colonial-imposed law, which reflects Victorian ideology, visibly remains instilled in Sri Lankan Law today, which is evident in the persistent failure to amend its restrictive abortion laws. This not limited to Sri Lanka, but also to many other colonized nations. As argued by Erdman [16].

"The law labels the destruction of an embryo and/or fetus an ethically or morally significant act, which gives reason to regulate abortion as something more than a personal decision or a medical procedure, but as a social act"

Victorian ideology, coupled with social-cultural stigma, has resulted in failures of many attempts to amend the domestic abortion law. A recent initiative was attempted in 2013, where a special report was compiled with a proposal to the government to reform the existing abortion provisions by permitting a victim of rape to terminate the pregnancy. Despite the effort, the proposal was rejected. In 1995, the Ministry of Justice presented an (Amendment) Bill to the Penal Code in which section 03 sought to decriminalize abortions in cases of rape, incest and congenital abnormalities. Nevertheless, in presenting the bill, Section 03 was withdrawn and was not voted for [17]. Regrettably, however, the Sri Lankan parliament never succeeded in decriminalizing abortion for victims of rape.

Being a state which recognize substantive equality under article 12[4] and a state party to different international human rights conventions, Sri Lanka is obliged to protect women against discrimination, which has been a failure thus far. The next part of the article will delve into Sri Lanka's international obligation towards protecting women against discrimination.

Sri Lanka's International Human Rights Obligations

The criminal law of a country is the core pillar of its sovereignty and is restricted from any interference; doing so is considered a substantial violation of the principle of 'non-intervention' as enshrined by United Nations Charter;

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [18]".

Nevertheless, this does not authorize State parties to exclude their commitments under UN conventions. Reproductive rights have been recognized through the interpretation and enforcement of international human rights treaties, particularly under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Sri Lanka being a state party to many international human rights conventions, CEDAW is the most relevant convention which particularly addresses the rights of women. With the obligation to domestically implement the rights of CEDAW, Sri Lanka has drafted a women's charter which is a non-binding soft law. Yet, Sri Lanka's obligation towards

upholding CEDAW has been acknowledged in the case of *Manohari Pelaketiya v Secretary of the Minister of Education* [19] which states as follows;

"Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court cannot simply ignore...Sri Lanka has undertaken international obligations to eliminate all forms of discrimination against women by acceding to CEDAW on 17.07.1998"

Article 12 of the Convention, complemented by article 16 [1] (e), guarantees women the right to health, including sexual and reproductive health. These articles read in conjunction stipulate the need to eliminate discrimination against women in reproductive rights. Article 2 (c), (d), (f) and (g) stipulate the obligation towards state parties to establish legal recognition of the rights of women and to restrict the activities or practices that are discriminatory to women, particularly to take appropriate measures. Article 2, further requires State parties to repeal national penal provisions which are discriminatory to women. Article 5, read in conjunction with Article 12, 16, requires the elimination of gender stereotypes that impede equality in health and have a negative impact on women's capacity to make free choices about their sexuality and reproduction.

In 2014, the CEDAW Committee's Statement on sexual and reproductive health and rights recognized that women's right to autonomy is an integral part of sexual and reproductive rights. It suggests, with the harm associated with unsafe abortion, 'states should legalize abortion at least in cases of threat to life, health, rape or incest, or severe fetal impairment.'

The general recommendation No.24 of the CEDAW Committee outlines the State's

responsibility to protect women's right to safe motherhood and relevant obstetric services (para 27) [20]. Moving further from right to health, the general recommendation No.35 is on gender-based violence against women. The Committee states that forced continuation of pregnancy, criminalization of abortion, denial of safe abortion or post-abortion care are forms of gender-based violence and depending on the circumstances can be interpreted as torture or cruel, inhuman or degrading treatment [21].

In respect of international obligations, ongoing criminalization of abortion continues to be a legal obstacle in realizing gender equality and empowering women in having full control over their lives in Sri Lanka. This can be interpreted as a state-induced torture or inhuman treatment against rape victims, thereby the State is violating Article 11 of the 1978 Constitution of Sri Lanka; 'No person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.' Therefore, while the above discussed UN Conventions that are binding on Sri Lanka as a signatory, Nepalese laws may offer a persuasive approach to Sri Lanka's reformation of abortion laws. In the following section, this article will examine Nepal's legislative progress on decriminalizing abortion, thereby proposing amendments to Sri Lankan criminal law.

Comparative Insights: Nepal's Progressive Model

As a neighbouring country with a similar socio-economic context, legislative progress has been made in Nepal for abortion rights. Until 2002, Nepal was implementing a repressive legal regime where abortion was entirely criminalized without any exceptions [22]. As studies reveal, by 2000, an estimated 20% of Nepalese women were incarcerated due to abortion, with a 70% conviction rate (23). The 11th amendment to National Penal

Code (Muluki Ain) introduced section 28 (b) which provided for several exceptions to criminalization of abortion, including abortion within twelve weeks of gestation with consent of the mother and where life or physical or mental health of the mother is at risk [24].

In the year of 2006, with the adoption of the Gender Equality Act 2006, it was further amended to include the exception to criminalize abortion up to eighteen weeks in cases of rape and incest. Expanding its scope, the Interim Constitution in 2007 explicitly recognized women's right to reproductive health and reproduction-related rights under Article 20[2]. Similarly, the current constitution promulgated in 2015 enshrines the right to safe motherhood and reproductive health under Article 38[2]. This explicit entrenchment of women's reproductive rights is a significant development which provides an explicit mandate to enforce these rights and protect from executive and legislative interference.

In 2018, following the Supreme Court's recommendation in *Lakshmi Dhikta v. Nepal* (2009) the Safe Motherhood and Reproductive Health Rights Act 2018 was introduced with extensive obligations on the State to ensure reproductive health of every girl and woman under section 3[1]; thereby emphasizing the necessity to provide information, counselling, education and services related to sexual and reproductive health. Followed by the state being obliged to provide obstetric care, newborn care and safe abortion services under section 15 of the respective act. As section 15 (c) states ;

"Section 15(c); Seeking safe abortion: A pregnant woman shall have the right to seek safe abortion under the following conditions: Up to twenty-eight weeks of pregnancy with the consent of the pregnant woman in case the conception is a result of rape or incest."

A significant aspect of the Nepalese law is the incorporation of privacy and confidentiality. These services are centered around the principle of confidentiality, whereby details relating to reproductive health related services received by each individual are required to remain confidential in accordance with section 4 of the Act. Accordingly, it can be argued that despite being a South Asian country, influenced by religious, cultural and societal factors for a prolonged period, the Nepalese government has been successful in ensuring the welfare of rape victims, thereby contributing to the protection of women's rights in the broader context.

Conclusion and Proposals to Revise

Legislative choices are always shaped by context, and transformative outcomes are often hindered by surrounding socio-political factors. The idea of reproductive autonomy in Sri Lankan jurisprudence is narrowly interpreted as a negative right offering protection only when the mother's health is at risk, limiting individual choices and being under state incursion.

In addition, the failure to amend the law not only limits Article 12, the right to equality, but also undermines the protection of women against discrimination. Further, Article 12 right to equality would emphasize not only that a failure to decriminalize abortion in cases of rape is a form of discrimination against women in general, but also that it continues to stigmatize them for seeking abortions and disadvantages them in facing the social and economic consequences of unwanted pregnancies. The structural inequalities and intersectional barriers faced by women in Sri Lanka have imposed more stringent and positive obligations on the state to remove those barriers. As discussed, this marks a shift toward a more progressive judicial

approach to justice by the courts of Sri Lanka. This shift places an obligation on the judiciary to reconsider the interpretation of Section 303 in light of reproductive justice theory.

The fundamental issue of Section 303 lies in its restrictive approach, which decriminalizes abortion only when the mother's health is at risk. Although Sri Lanka is a state party to CEDAW, it has yet to fully adhere to Article 03, which requires state parties to take appropriate measures, including legislation, to guarantee the exercise and enjoyment of human rights by women. As emphasized earlier, forcing a woman to carry a pregnancy that is the source of serious psychological distress can be interpreted as a form of torture. This article acknowledges that full decriminalization of abortion may be perceived as opening the floodgates, potentially leading to negative social and cultural impacts. However, in cases of rape in Sri Lanka, abortion should be decriminalized to ensure both the welfare of the mother and the child. A significant change that can be employed is the adoption of a 'special and differentiated approach for women by the judiciary. In cases of sexual crimes against women, countries such as the United States adopt the practice of 'reasonable woman tests' which allows courts to understand the victim's position subjectively. Adopting this approach in abortion cases involving rape cases will help ensure a gender sensitive justice system.

While laws protecting women have often been enacted by a male-dominated legislature, this article explores how such laws have impacted the rights of rape victims. By

comparing Nepalese abortion law with Sri Lanka's international obligations, the article highlights the need to adopt gender sensitive approaches within abortion legislation. It emphasizes how Sri Lanka's current legal framework failures have violated international obligations both under CEDAW and ICESCR. The article proposes targeted reforms to enhance the protection of rape victims within the domestic legal system.

Data Availability Statement

As this study is based entirely on previously published literature, publicly available legal documents, and other secondary sources, no new datasets were generated or analysed. All sources referenced in this review are cited in the manuscript and can be accessed through the relevant publishers, repositories, or official websites.

External Funding

The author declares that they received no external funding.

Conflicts of Interest

The author declares that there is no conflict of interest in the conduct of the study. No financial, personal or professional affiliations have influenced the research, analysis of presentations of the findings.

Ethical Approval

This study was conducted utilising secondary data and existing literature, with no involvement of human or animal subjects. As such, ethical approval is not deemed necessary.

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