



## Sri Lanka, its Laws and its Women: Feminist Jurisprudence Views Law as a Subversive Site for Women

\*<sup>1</sup>Kamini Rathnayake

<sup>1</sup>Independent Researcher (Sri Lanka), LLB (Hons) Law (Liverpool John Moores University, UK)

Email address of the corresponding author: \*rathnayakekamini@gmail.com

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### ABSTRACT

Patriarchal laws of a country subject women to various degrees of oppression owing to socially constructed institutions. Sri Lankan women continue to struggle with socio-economic, political, and cultural issues that marginalise them, as different social structures, classes, castes, customs, religions and societal behaviours influence, control and suppress them. In this background, the Sri Lankan judicial thinking is dominated by the sameness approach to equality that ensures 'gender neutral' laws. And feminists argue that this 'neutrality', is simply a male-standard. In this explanatory investigation, this paper questions this 'male-standard' and 'asks the woman question' to provide insight to the question; Does Sri Lankan Law serve as a Subversive Site for Women? Through this inquiry, it deduces that, taking a *difference approach* to achieve substantive equality by understanding positionalities and intersectionalities of women in patriarchal societies shall inhibit the contribution of a country's laws to create a subversive site for its women.

## 1. INTRODUCTION

Women's movements in Sri Lanka, for over a century and a half have strived to achieve equality of rights in both public and private spheres of women's lives, as law-making bodies and authorities are inherently patriarchal with only a handful of women lawmakers, not to mention the colonial period and the laws prevalent since. These patriarchal laws subject women to various degrees of oppression owing to socially constructed institutions like marriage, religion, and gender. Women continue to struggle with socio-economic, political and cultural issues that marginalise them, as different social structures, classes, castes, customs, religions and societal behaviours influence how women are controlled and suppressed. This oppression of women varies from the global south to the global north. Cultural and patriarchal institutions of Sri Lanka are the basic reasons for the lack of proper implementation of internationally recognised women's human rights in the country. These subversive laws are laid out in Sri Lankan jurisprudence as Sri Lankan law is derived from a conglomeration of systems including archaic English Law, Roman-Dutch Law and Indian law as well through a multitude of cultural influences of personal laws such as Kandyan law, Muslim law and Thesawalamai law.

## 2. MATERIALS AND METHODS

This study was conducted as an explanatory qualitative research based on empirical evidence. Primary sources such as local legislation, and local and international secondary sources such as books and journal articles were used in this study. Based on an essay submitted for the partial completion of the writer's Postgraduate Diploma in Gender and Women's Studies, this inquiry seeks to provide insight to the research question; Does Sri Lankan Law serve as a Subversive Site for Women?

Not adequate or substantive research has been done on this aspect of women and law and this pa-

per wishes to provide an entry point for the initiation of the same. To this end, this paper conducts a Feminist Legal Analysis of the laws of Sri Lanka and how they contribute to subverting the status of women in the country. And for the purposes of this paper, the writer draws examples from certain aspects of Sri Lankan law, which includes the discussion of 'consent' in law on rape, burden of proof for cases of sexual and gender-based violence and implicit legality of marital rape. This paper employs the Feminist Legal Method of 'Asking the Woman Question' for its Feminist Legal Analysis. As per Bartlett; "...asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups."<sup>1</sup>

### 2.1. The Sri Lankan judicial thinking is dominated by the Sameness Approach to equality that ensures "gender neutral" laws

The Sri Lankan judicial thinking is dominated by the sameness approach to equality that ensures "gender neutral" laws, in which men and women are considered to be the same, hence to be treated equally. The Constitution of Sri Lanka<sup>2</sup> in Article 12 (1) of its Fundamental Rights Chapter ensures the equality of all citizens before the law and the entitlement of all citizens to equal protection of the law. Furthermore—however problematic it is—the Constitution in Article 12 (2) provides protection for all citizens against discrimination on various grounds, including the sex of a person. However, as MacKinnon presents in her arguments, the sameness approach to equality fails to notice that the attention brought to the difference between men and women is measured on a masculine yardstick and women are compared to men to determine how closely the former resembles

1 Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829 <<https://www.jstor.org/stable/1341478>>.

2 The Constitution of Democratic Socialist Republic of Sri Lanka.

the latter.<sup>3</sup> This comparison is used to determine how equal they are, and in this writer's opinion, it is inherently flawed. When the law is 'neutral', 'impartial' and 'objective', it takes away the sensitivity towards the differences in the position of being a 'woman'. Interestingly, the State of Sri Lanka does not fail to ensure the "advancement" of women—lumped with children and disabled persons—through Article 12 (4) of its Constitution<sup>4</sup>, which reads, "Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons."

This—and many other—protectionist laws further prove MacKinnon's claim of the norm or the standard of law being a masculine one, through which the feminine/woman needs to be 'protected'.<sup>5</sup> In other words, 'advancement' or 'protection' of women and their rights are in the hands of these male dominated institutions. For example, Local Authorities Elections (Amendment) Act, No. 22 of 2012<sup>6</sup> introduced a quota for female representation in local government authorities, which "... [resulted] in a dramatic gain in women's representation (17,000 women candidates stood for local office and women elected rose from 89 to 2,300 in the course of a single election)"<sup>7</sup>. In its Section 22 (4) (2B) the Amendment provided, "Notwithstanding any provision to the contrary in this Ordinance, twenty-five per centum of the total number of candidates ... may [emphasis added] consist of women and youth."<sup>8</sup> It must be noted that this

was discretionary, not to mention the lumping of women and youth together in the same quota. Further, the Local Authorities Elections (Amendment) Act, No. 16 of 2017<sup>9</sup>, which followed, in its Section 25 repeals the principal enactment of 'Apportionment of women members' and provided that "25 per cent of the total number of members in each local authority shall [emphasis added] be women members."<sup>10</sup> This amendment mandated the quota, and set it at an exact limit. However, in reality, it is apparent that parties still have not given full effect to the mandatory provision of the amendment. If we look at numbers, women's representation is at the bare minimum and this mandate prevents female representation exceeding 25 per cent, even if there are women who rightfully deserve to be included in nomination lists of parties. This situation then warrants the question, "Who then decides which ones of the eligible women should be included in the nominations list?", and it would be indisputable to answer that it is the male dominated authorities and administration of parties, and also the government and State, that carries the say on these matters. To this writer, it is noteworthy to discover that the official website of the Election Commission of Sri Lanka holds testimony to this. It reads;

*"The law in Sri Lanka states that women enjoy equal opportunities and equal rights like men, yet it is argued that in practice the woman is only a second class citizen in the county. Opinions are being expressed that in a patriarchal society, the due position of the woman is denied under male dominated thinking and decision making."<sup>11</sup>*

3 Catharine A MacKinnon, 'Difference and Dominance: On Sex Discrimination' in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Routledge 1984) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9780429500480-6/difference-dominance-sex-discrimination-1984-catharine-mackinnon>>.

4 The Constitution of Democratic Socialist Republic of Sri Lanka.

5 MacKinnon (n 3).

6 Local Authorities Elections (Amendment) Act, No. 22 of 2012.

7 Inter-Parliamentary Union (IPU), 'Women in Parliament in 2020: The Year in Review' (2021) <<https://www.ipu.org/women-in-parliament-2020>>.

8 Local Authorities Elections (Amendment) Act, No. 22 of 2012.

9 Local Authorities Elections (Amendment) Act, No. 16 of 2017.

10 Chulani Kodikara and Kumuduni Samuel, 'The Significance of the 25% Quota for Women in Local Government' (*Groundviews*, 2018) <<https://groundviews.org/2018/02/07/the-significance-of-the-25-quota-for-women-in-local-government/>>.

11 Election Commission of Sri Lanka, 'WOMEN'S REPRESENTATION' <[https://elections.gov.lk/en/all\\_inclusive\\_election/all\\_inclusive\\_women\\_representation\\_E.html](https://elections.gov.lk/en/all_inclusive_election/all_inclusive_women_representation_E.html)>.

And as a result of these protectionist and tokenistic laws, "... no quota exists at the national level and women's representation has never exceeded 6 per cent.", in a country where "[w]omen make up 56 per cent of registered voters."<sup>12</sup>

Some of the criticism made by women's human rights campaigners on this aspect of hegemony can be summed up in Charlesworth's remarks;

*"Because the law-making institutions of the international legal order have always been, and continue to be, dominated by men, international human rights law has developed to reflect the experiences of men, and largely to exclude those of women, rendering suspect the claim of objectivity and universality of international human rights law. Until the gendered nature of the human rights system itself is recognized and transformed, no real progress for women can be achieved."*<sup>13</sup>

### **2.2.A Feminist Legal Analysis of Law – "Asking the Woman Question"**

Kapur & Cossman in their work titled 'Subversive Sites: Feminist Engagements with Law in India', dive into feminist views of law as they recognise law to have substantial power to impact both the status and discrimination of women. They establish 'law' to be more than a mere instrument of oppression or liberation, as this paper discussed previously;

*"Legal discourse has constructed women as gendered subjects—it has constructed women as wives and mothers, as passive and weak, as subordinate and in need of protection. It is a discourse which has contributed to the subordinate position of women through its very construction of women's roles and identities."*<sup>14</sup>

This is where—and why—we need to undertake a Feminist Legal Analysis<sup>15</sup> posed by the feminists who "do law": An exploration of the reasonings and assumptions beneath the surface of the law to identify its role in constructing, imposing and maintaining gendered norms and roles is imperative. The understanding that not men and women are situated equally in society is needed to be taken to the forefront. In other words, the positionality<sup>16</sup>—and also intersectionalities—of individuals/groups/ communities must be taken into account in the process of making—and most importantly—interpreting and implementing the law. This means, taking a *difference approach* to achieve substantive equality. In simpler terms, different opportunities must be created in order to achieve equal results and this essentially may mean having to positively discriminate against or have an enabling bias towards women (and other marginalised and discriminated groups), by taking their position in society and its systems into consideration.

Sri Lankan law built on said archaic systems, now influenced by feminist activists and social reformers, has attempted to recognise the need for a

<sup>12</sup> Inter-Parliamentary Union (IPU) (n 7).

<sup>13</sup> Hilary Charlesworth, 'Human Rights as Men's Rights' in JS Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781315656571-14/human-rights-men-rights-hilary-charlesworth?context=ubx&refId=6dc0d3fa-97c7-4da3-9350-11d252e98a0e>>.

<sup>14</sup> Ratna Kapur and Brenda Cossman, 'Introduction' in Ratna Kapur and Brenda Cossman (eds), *Subversive Sites: Feminist Engagements with Law in India* (SAGE Publications 1996) <[https://books.google.lk/books/about/Subversive\\_Sites.html?id=tcuRAAAAMAAJ&source=kp\\_book\\_description&redir\\_esc=y](https://books.google.lk/books/about/Subversive_Sites.html?id=tcuRAAAAMAAJ&source=kp_book_description&redir_esc=y)>.

<sup>15</sup> Bartlett (n 1).

<sup>16</sup> Mitsunori Misawa, 'Queer Race Pedagogy for Educators in Higher Education: Dealing with Power Dynamics and Positionality of LGBTQ Students of Color' (2010) 3 *The International Journal of Critical Pedagogy* 26 <<http://www.partnershipsjournal.org/index.php/ijcp/article/download/68/53>>.

substantive approach to judicial reform. However, many of these attempts are yet to see the light of practice. For the purposes of this paper, let us dive into some aspects of laws related to rape in Sri Lanka.

It is evident that the State has not developed a complete understanding of 'consent' (in relation to rape, including marital rape) in accordance with international normative frameworks. If one conducts a Feminist Legal Analysis of 'asking the woman question' to uncover the unfair bias about laws on sexual offences in Sri Lanka on women, it would be evidence of how the law is subversive for them.

Section 363 of the Penal Code (Amendment) Act (No. 22 of 1995) provides for the offence of 'Rape' and it reads; "A man is said to commit "rape" who has sexual intercourse with a woman...".<sup>17</sup> In its Explanation (i), sexual intercourse is said to be constituted if 'penetration' can be proven. "Sri Lankan law is confined to an extremely narrow definition of rape, focusing on the absence of consent to penal-vaginal penetration by a man of a woman."<sup>18</sup> This means penetration of a person's bodily orifices by the use of any other instrument, device or body part, by or someone other than a man shall be regarded under Section 365(B)<sup>19</sup> as 'Grave Sexual Abuse'. While the Penal Code (Amendment) Act (No. 22 of 1995)<sup>20</sup> imposed the same punishment for both rape and grave sexual abuse, Penal Code (Amendment) Act (No. 16 of 2006)<sup>21</sup> amended the act to impose lower punishment for the latter. If one "asks the woman question" - if the victim, for example, is—without their consent—penetrated using a device in their anus, by a woman, are they then not allowed to feel violated of an offence as heinous as rape?

17 Penal Code (Amendment) Act (No. 22 of 1995) 1995.

18 Centre for Equality and Justice Sri Lanka, 'Rape and Sexual Violence in Conflict: DEFINITIONS UNDER DOMESTIC AND INTERNATIONAL LAW' (2018) <<https://cejsrilanka.org/wp-content/uploads/Rape-and-Sexual-Violence.pdf>>.

19 Penal Code (Amendment) Act (No. 22 of 1995).

20 *ibid*.

21 Penal Code (Amendment) Act (No. 16 of 2006) 2006.

Furthermore, since laws pertaining to cases of sexual and gender-based violence are provided in the Penal Code of Sri Lanka, they are treated as regular criminal cases. This means the burden of proof of the offence—beyond reasonable doubt—falls on the prosecution. This was affirmed in the Supreme Court of Sri Lanka in the case of *Inoka Gallage v. Kamal Addararachchi and Another* (2002)<sup>22</sup>. The Court held that, "In the case of rape the onus is on the prosecutrix to prove affirmatively, beyond reasonable doubt each ingredient of the offence beyond reasonable doubt and such onus never shifts.". Penal Code (Amendment) Act (No. 22 of 1995)<sup>23</sup> explicitly provides; "Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.". The same, and that corroboration is not an indispensable requirement to the case was held by the Supreme Court in the aforementioned case as well<sup>24</sup>. However, on the other hand, the same judgement held that "the prosecutrix was an unreliable witness, and it was unsafe to act on her sole testimony."<sup>25</sup> A feminist legal analysis of aspects such as these brings up numerous questions. For example, it is from experience and practice, we know that on one hand, oftentimes abusers and victims of sexual and gender-based violence are parties with close relationships to each other, and on the other hand, these incidents take place in private and intimate settings. Given how power dynamics work in these situations, there rarely exists physical signs of abuse or injury. We then need to "ask the woman question" - Is it correct (or fair) for the system to expect the prosecution/victim to produce evidence—beyond reasonable doubt—to establish that the victim did not consent to sexual intercourse? Or the more overarching question of why the element of 'consent' focuses on the perspective of the victim?

22 *Inoka Gallage v Kamal Addararachchi and Another*.

23 Penal Code (Amendment) Act (No. 22 of 1995).

24 *Inoka Gallage v. Kamal Addararachchi and Another* (n 22).

25 *ibid*.

On another aspect of sexual and gender-based violence, despite the Prevention of Domestic Violence Act (No. 34 of 2005)<sup>26</sup> and Penal Code (Amendment) Act (No. 22 of 1995)<sup>27</sup>;

The law implicitly permits marital rape unless the parties are judicially separated [Section 363 (a)<sup>28</sup>]. The law implicitly permits marital rape of children over the age of 12. This is in conflict with Sri Lanka's family law which sets the minimum age of marriage at 18, though personal laws such as the Muslim Marriage and Divorce Act have no minimum legal age of marriage [Section 363 (e)<sup>29</sup>]<sup>30</sup>

All these actively—though not explicitly—contribute to creating a subversive site for women in the judicial space of Sri Lanka.

### 3. CONCLUSION: SRI LANKA - CULTURE, WOMEN AND LAW

In societies that are inherently patriarchal, it is nature for persons who make laws, implement and interpret laws to have their own judgements, biases and understanding of gender, and especially of women. How this is peril is when this background influences the outcomes of laws and their implementation in a country. As a country with a history of monarchic and colonial rule, Sri Lanka rejoices in her “traditions and cultural values”, and characters such as Anagarika Dharmapala fuelled these ideologies which further subordinated women post-independence.

*“Women have been, and still are, dependent of their rights to such opportunities as work and education sometimes based upon the pretext of tradition and cultural*

26 Prevention of Domestic Violence Act (No. 34 of 2005) 2005.

27 Penal Code (Amendment) Act (No. 22 of 1995).

28 *ibid.*

29 *ibid.*

30 Equality Now and Dignity Alliance International, ‘Sexual Violence in South Asia: Legal and Other Barriers to Justice For Survivors’ (2021).

*classifications that would be the bases of rights, not the grounds to deny rights. Thus, the right to culture has often been applied as the right of men to continue their traditional practice or custom of subordinating women.”<sup>31</sup>*

Pre-texts of tradition and culture reiterated not only in terms of societal norms and practices, but also tools such as literature and pedagogy continue to confine and reduce the woman's role to a wife, mother and home-maker. “Familial ideology constructs the family as the basic and sacred unit in society, and women's roles as wives and mothers as natural and immutable. This vision of the family, and women's roles therein, appears throughout the law as self-evident, and beyond question.”<sup>32</sup> Discrimination and biases which then come with this confinement greatly impact women's search for justice. Therefore, the Law, as a system which operates very much within societies—where women play a predominant role—cannot and should not allow the perpetuation of the subversive site it creates for women and operate oblivious to the nuances of ‘being a woman’.

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32 Kapur and Cossman (n 14).

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