Law and Social Problems in Modern Sri Lanka

D.C. Jayasuriya

This book is a case-study of the inter-action of law and society in a Third World setting. From the perspective of five major socio-economic problems which are common to many Third World countries in Asia, Africa and Latin America the author has identified the parameters of the existing legal framework in Sri Lanka and has offered many suggestions for optimizing the role of law as an instrument of change. Many of these suggestions are valid even for other Third World countries and this publication is an indispensable guide to law reformers and social planners.

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PREFACE

During the past few years I have paid a great deal of attention to the role of law as an instrument of social change in the context of the realities existing in Third World countries. Sri Lanka's position as a Third World country is unique in several respects. The country is the heir to a rich legal tradition bred and nurtured over several centuries. The statute book of the country bears ample testimony to the extent to which resort has been had to legal measures for a variety of purposes. Economic growth rates have lagged behind but the quality of life and the country's physical infrastructure are impressive by any standard. Though one would expect Sri Lanka to have achieved some success in using law as an instrument of social change, no microscopic examination is required to appreciate that the country is yet to cope with even some of the basic social problems which yield themselves to solution, albeit partially in the case of some problems, through legislative measures. The essays in this series are an attempt to identify Sri Lanka's legal framework in relation to various social problems which are common to Third World countries and to understand why we have failed to reap the benefits envisaged by law reformers and the legislators. Law is not a panacea for all social problems but it has an important role to play in relation to many social problems. How could the role of law as an instrument of social change be optimized ? What other inputs are required to enable any law to bring about the desired results ? This book does not provide comprehensive answers to all these problems, nor has an attempt been made to identify all the options and strategies available. Nevertheless, with all modesty, I feel that the little that has been said in each chapter is sufficient to generate some thinking which will ultimately lead to the formulation and implementation of better laws and better programmes not only by Sri Lanka but even by other Third World countries which are now seriously

considering using law as an instrument of change. The other volumes will deal with the role of law in relation to other social problems such as alcoholism, environmental pollution, development administration, infringement of fundamental rights, sex-related behaviour, access to judicial remedies, bribery, etc.

Due to pressure of my professional responsibilities the manuscript of this book was completed in circumstances hardly conducive to pursuits of this nature. Its completion is due entirely to the inspiration and encouragement I received from my wife Shanthi, to whom this book is dedicated.

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SHANTHI

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LAW AND ITS IMPACT ON FAMILY FORMATION AND FAMILY SIZE

Section 1

Background:

The recognition that law could be used as an instrument of population change is not new. History is replete with examples of such laws, the genesis of some of which goes as far back as the Roman period. The laws of Augustus (B.C. 27—A.D. 14), for instance, are said to be:

> "The most striking example of the foresight of a great ruler in population matters. Sensing the double threat of corrupted *mores* and the resulting depopulations he promulgated in Rome, then at the height of its splendour, laws facilitating marriage, suppressing adultery and making divorce more difficult. He penalised bechelors and childless couples through changes in the laws of succession; through the *jus trium liberorum*, he granted special privileges in the matter of inheritance and taxation to couples at least with three children."[1]

Many countries have, from time to time, enacted laws to regulate the reproductive behaviour of men and women. However, until relatively recent times, demographers as well as social development planners did not pay much attention to law as a possible input in population policy-making. It is really from

the mid-1960s that the study of law and population began to gain currency.[2] Family planning came to be articulated as a basic human right in the Declaration signed by the twelve Heads of State in 1966 and also in the Teheran Proclamation two years later. In 1974 the World Population Plan adopted at the Bucharest Conference re-iterated the importance of legal factors identifying the dynamics of population change. Several countries in Asia, among them being China, Thailand and the Philippines have already incorporated references to population policy-making in their Constitutions. In the Latin American region Ecuador and Mexico have accorded planned parenthood the status of a constitutional right. Many other countries have made similar reference in other key documents, including national development plans.[3]

Sri Lanka has a total population[4] of approximately 15 million with nearly 50 per cent being under the age of 24 years. High infant and maternal mortality rates prevailed in the pre-1950 era when malaria was endemic in certain parts of the country. During this period the network of medical institutions in rural and semi-urban areas also left much to be desired. With the increasing use of D.D.T. to eradicate malaria[5] and the rapid improvements in the health infrastructure[6] mortality rates recorded a decline which is remarkable by any standard. For instance, the maternal mortality rate which was 16.5 per 1000 live births in 1945 came down to 1.5 per 1000 live births by 1970. However, the downward trend in birth rates has been painfully slow. The birth rate of 36.6 per 1000 population in 1945 came down to 28.7 only by 1979, some three and a half decades later. Adverse balance of payment conditions, low per capita income levels, galloping cost of living with a large conglomeration of persons entering the unemployment market annually are phenomena which have accompanied Sri Lanka's high fertility rate. It was in 1965 that the Government officially supported family planning activities. However, since 1952, the Family Planning Association, a non-governmental organization affiliated to the International Planned Parenthood Federation, has been providing family planning services. No comprehensive national population policy has been formulated as yet though there has been considerable discussion about the necessity for

an official statement by the Government articulating its policy on population issues.

This back-drop of Sri Lanka's demographic profile makes it evident that any national population policy should pay attention to all change mechanisms. As will be demonstrated later in this Chapter law is, or rather could be, an important catalyst of population change and to that extent there is much to be said for a legal input to be built-into population policies which will be formulated in course of time.

Section 2

Conceptualization and Scope of Population Law:

Population Law, as the study of the inter-relationship between law and population has now come to be known, has been defined as:

> "The body of laws and regulations which has a bearing on population dynamics:
>
> (a) by regulating the growth, composition and movement of the population; and
>
> (b) by inducing behavioural and attitudinal changes in individuals;
>
> with a view to enhancing the quality of life both at the micro-level of the family unit and at the macro-level of the community or the nation."[7]

The domain of 'Population Law' embraces within its scope a wide variety of laws—laws of different categories; laws which have short as well as long periods of gestation. Empirical research studies on the inter-relationship between law and population change are still in their embryonic stages or in their infancy and consequently the categorization of population laws has proceeded more on assumptions structured on unqualified generalizations rather than on any coherent or rational basis. Subject to this limitation, population laws may be delineated as

falling within the following broad categories,[8] though neither such categorisation nor the aspects referred to within each category is to be treated as exhaustive or all-embracing:

—Direct fertility control measures (e.g., abortion; menstrual regulation; sterilization and contraceptives);

—Formation of families (minimum age of marriage; prohibited degrees of marriage; requirement of consent; registration of marriage; incidents of marriage; termination of marriage; custody of children; succession and inheritance; taxation etc.);

—Quality of life issues (education; health; social welfare; employment and security of tenure; status of women etc.);

—Sexual behaviour (homosexuality; heterosexuality; prostitution; polygamy; polyandry etc.);

—Developmental issues (housing and colonisation schemes; land tenure systems; etc.); and

—Registration of vital events (births; deaths; marriages; census).

As regards the functional nature of population law, there are some laws which are designed to augment or encourage population growth, while there are others which will inhibit or restrict the growth of the population. Sometimes from the very nature of a law one could prognosticate the type of impact it would have. There are also some laws which have, if at all, only a symbolic effect. A good example of a law which has such an effect is tax exemptions upto two children. Such a law would reflect the anti-natalistic or restrictive policy of the government. However, in many countries only a microscopically insignificant minority is liable to pay tax, but the very existence of such a law on the statute book serves as a guide or as an indicator to the non-income tax payers of the thrust of the population policy of the State. With a view to optimizing the functional utility of population laws, not infrequently it is not a single law but a mix of laws which is deployed—"there will be a number of legal voices speaking—singing if you like, the whole constituting a

chorus. It is the chorus that is heard, not the individual voices. It will be very difficult to determine, for instance, what precise effect maternity leave alone, as distinguished from other legal benefits and inducements, has on population."[9]

Section 3

The Concept of Family Size:

From a demographic perspective, 'family size' means "the total number of children born to a married couple over the whole of the wife's reproductive span."[10] A woman's reproductive span extends from puberty to menopause though with the development of new technology for the management of fertility it is now possible, with the least health hazards, to end the procreative life span prematurely or to control and regulate procreation so that a couple could aspire to have the desired number of children at desired intervals of time.

The basic human right to family planning as articulated so far extends not only to the choice of determining the number and spacing of children but also to the mechanics of having access to the information, education and the means to do so. The exact scope and content of this basic right varies not only from region to region but also from country to country. This is inevitable not only due to differentials in national and regional population profiles but also due to the reason that different people have a different perception of human rights and their scope and content. The Bucharest World Plan of Action on Population underscored the need for couples to exercise this right by taking cognizance of "the needs of their living and future children and their future responsibilities towards the community."[11] Many social, economic, political, ethical and philosophical issues pervade any discussion on the parameters of this right. Many of the issues which have emerged so far have eluded any satisfactory or logical explanation or response with the debate on some of the issues being more likely to be never ending. However, for the present purposes it is sufficient to note that it has been highlighted that inasmuch as

the population problem is a national problem and not an individual predicament—

> "the number of children couples want is not automatically the number they should have from a national point of view. To make individual decisions add upto a desirable population trend, a nation must find ways to influence the decisions in accord with an overall plan. Otherwise individual planning would simply result in collective non-planning. To declare that couples have 'a basic human right to have as many children as they want' is like trying to control firearms by telling people they have a right to own all the guns they want."[12]

The deprivation of motherhood by discouraging any family from having even a single child is not advocated by any civilized nation. Such a restriction, if imposed, will constitute a serious infraction of every known ethic or code of moral conduct. On the other hand the concept of the small-family norm has gained considerable currency during the past few years and has come to be regarded as a more acceptable compromise. While the exact number of children of the 'ideal' family would vary from society to society in relation to different time frames, two or three children appear to be the optimum level which has so far gained universal acceptance. Many family planning posters and booklets in Third World countries contain pictures of a boy and a girl as constituting the 'ideal' family size. Studies done in India and Korea have shown that due to the preference for a son some families keep on proliferating the number of children until a son is born. The high incidence of mortality among infant females has been attributed to the greater degree of attention that is accorded to infant boys as against infant girls.

Section 4

Bias towards the Formation of Families and Procreation:

Before considering the more specific laws and regulations which have a bearing on the size of families, attention should

be focussed on the general policy of the law towards the formation of families and procreation. What is the attitude of the law towards family formation and child-bearing ? Do the laws of Sri Lanka encourage or discourage the formation of families and child-bearing ?

One of the Directive Principles of State Policy enshrined in the Constitution is that :

> "The State shall recognize and protect the family as the basic unit of society."[13]

The principles of State policy do not confer or impose legal rights or obligations. Nor are they enforceable in any court or tribunal.[14] Nevertheless they are indicators of the type of over-riding considerations which should guide the law-making process and the governance of Sri Lanka. There is now a mandate to regard the family unit as the foundation on which laws impinging on interpersonal relationships should be enacted.

The law regards any agreement which is in the nature of a general restraint on marriage as void on the ground of being contrary to public policy.[15] Gifts made to a concubine in contemplation of the continuance of the relationship of illicit cohabitation are treated as bad. A concubine is also debarred from suing for the recovery of anything promised to her.[16] No court of law would grant relief to a woman who seeks to recover property gifted to her by her paramour.[17]

The rule which requires birth and not conception to be after marriage if the child is to be presumed legitimate[18] and the rule that even where a child is born out of wedlock the subsequent marriage of the parents would render the child legitimate[19] reflect the bias towards marriage. Subsequent marriage legitimizes even adulterine bastards,[20] a concession which was not available until 1970 under the Roman Dutch Law principles which applied in this country. A further instance which reflects the bias towards marriage is that the law presumes, in the absence of documentary evidence of registration and until the contrary is proved, that customary marriages, or "marriages by habit and repute"[21] as these are sometimes known, are valid.

The law views with favour not only the institution of marriage but also the right to procreate. In a Kandyan marriage where one or both parties are below the minimum age of marriage the marriage will not be invalid if both parties thereto cohabit as husband and wife for a period of one year after the party or parties thereto have attained the lawful age of marriage or if a child is born of the marriage before either of them has attained the lawful age of marriage.[22]

Some of the grounds on which a marriage could be dissolved or declared a nullity are related to procreation and the right to motherhood or fatherhood, as the case may be. An action for nullity of marriage is available for a variety of reasons such as fraudulent misrepresentation that the wife was never married previously;[23] pregnancy of the wife by another man at the time of marriage (*antenuptial stuprum*) unknown to the husband;[24] and impotency at the time of marriage.[25] An action for nullity is available even if the wife, due to malformation in her genital organs or due to a condition such as vaginismus, is incapable of consummating the marriage.[26] There is an *obiter dictum* in a decision of the Supreme Court which suggests that a marriage could be dissolved if a party was "incapable of procreation at the time of the marriage."[27] The decisions of the South African Courts, where too Roman Dutch principles are applied, are conflicting on the question whether sterility not accompanied by incapacity for intercourse is sufficient for annulment. The view has been expressed by Hahlo, an authority on modern Roman Dutch Law that "on grounds of social policy it would be most unfortunate if sterility not accompanied by impotence were accepted as a ground for annulment of marriage."[28] If the primary objective of the law is the protection of the institution of marriage there is much to be said for this view.

Section 5

Laws regulating Family Size

In accordance with the right recognised at the Teheran Human Rights Conference and endorsed at the Bucharest World Population Conference "all couples and individuals have the

basic right to decide freely and responsibly the number and spacing of their children and to have the *information, education* and the *means* to do so."

There are no specific legal restrictions on the distribution of literature on contraceptive techniques or on the advertisement of various biological and mechanical contraceptive devices over the mass-media. Penal laws relating to obscenity are unlikely to be violated by any advertisement which is carefully worded about the functional purpose of the contraceptive device or technique. For several years the Sri Lanka Broadcasting Corporation has refused to accept commercial advertisements of contraceptives. The United Nations Interagency Family Planning Mission to Sri Lanka, after referring to the country's impressive infrastructure of information, emphasised as far back as 1971, the need to intensify communication activities in the field of family planning.[29] At the National Seminar on Law and Population held in 1974 one of the recommendations called for a change of this policy on the part of the Broadcasting Corporation. Commercial advertisements of contraceptives are still not accepted by the Corporation. However, newspapers do carry advertisements about oral contraceptives and about facilities for sterilization. For many years English, Sinhalese and Tamil newspapers published advertisments about drugs to cure menstrual disorders. Under the Cosmetics, Devices and Drugs Act[30] which came into operation in July 1980 no person could advertise any cosmetic, device or drug to the public as a treatment, prevention or cure for various diseases or disorders set out in a Schedule to the Act. No person could also import, sell, offer for sale or distribute any cosmetic, device or drug that is represented by a label or that is advertised to the public as a treatment, prevention or cure for any such disease or disorder. Among the diseases and disorders set out in the Schedule are the following: disorders of menstruation, nausea and vomiting in pregnancy, nocturnal emissions, sexual impotency, sexual underdevelopment, spermatorrhoea, vaginitis, venereal disease and white discharge. While newspaper advertisements do not appear now, several medical practitioners received, as recently as February 1981, a circular, marked 'confidential' about the availability of menstrual regulation facilities in a

certain clinic. The Family Planning Association of Sri Lanka has enlisted the assistance of a large number of volunteers to spread the family planning message in rural areas. The Ministry of Information and Broadcasting has conducted several family planning communication research activities. However, communication programmes are still conservative and orthodox and much remains to be done to tap new communication and information strategies. Many countries, including several in Asia, provide family planning advise over the telephone and this has proved to be a very popular channel of communication. Sex education or family planning education is not a subject included in the school curriculum. However, from about 1971, with financial and technical assistance from UNFPA and UNESCO, material on population education has been integrated into subject areas which permit the inclusion of such material. The Curriculum Development Centre of the Ministry of Education was in charge of the population education programme. Several attempts were made for material on law and population to be included in training programmes and in publications on population dynamics but these attempts did not meet with any success. As far as the *means* of regulating the number and spacing of children are concerned the legal provisions relating to oral contraceptives, contraceptive devices, sterilization and abortion will be considered below.

For several years the purchase and sale of oral contraceptives were subject to certain restrictions contained in the Control of Prices (Drugs) Order made under the Control of Prices Act.[31] In terms of the Order no drug listed in Schedule II could be sold by any importer, trader or pharmacist except on the authority of a prescription of a medical practitioner. All oral contraceptives as well as hormonal preparations were listed in this schedule. The expression 'medical practitioner' was defined to cover only those registered under the Medical Ordinance[32]—the category of practitioners commonly referred to as "western medical practitioners" as against "ayurvedic" or "native" or "homeopathic" practitioners. This restriction did give rise to certain anomalous results in that the government public health midwives, the grass-roots level workers in maternal and child health work, were allowed by the government to distribute

contraceptives without the requirement of a prescription. Those who did not have access to government midwives or to hospital sales outlets had to obtain prescriptions from private practitioners for a fee. The Price Control Order relating to Drugs was rescinded in 1979 by the Government with a view to re-adjusting the price structure of drugs. No new order has been enacted since then and the resulting position is that oral contraceptives could be obtained without a prescription. However, certain pharmaceutical sales outlets including those of the State Pharmaceutical Corporation still insist on a prescription though there is no legal sanction for such a requirement. In view of the possibility of side-effects it would be useful to provide purchasers of oral contraceptives with a check-list of possible contra-indications. Many countries have found this system to be a satisfactory alternative to the requirement of a prescription.

Contraceptive devices are covered by the provisions of the Cosmetics, Devices and Drugs Act. Without a licence no device could be manufactured, imported, sold or distributed. No device could be sold if it would cause any injury to the health of the user. The Act does not permit any advertisement which is likely to create an erroneous impression regarding its merit or safety. Besides the restrictions contained in this Act there is no law relating to the use of contraceptive devices. Trained para-medical personnel are permitted to insert IUDs under the supervision of qualified medical personnel. IUDs never became popular in Sri Lanka though in some countries it is by far the most popular method. For instance, in China some 40 million women used IUDs in 1979 as against 8 million who used oral contraceptives.

Sterilisation as a method of fertility control has been popular in Sri Lanka for several years. Its popularity increased with the payment of an incentive of rupees five hundred to every person who offered himself or herself for sterilization. After some time this payment was reduced to rupees two hundred, the main reason for the reduction being the lack of sufficient funds to meet the demand. According to the reports that are forthcoming there is a drop in demand after the reduction in payment. Incentives to encourage sterilization are

not uncommon. Sarees, radio sets, promotions, salary increments, shirts, trousers etc., are some of the payments in kind which have been offered by various Asian countries to those who undergo sterilization operations. Any system of incentives and disincentives has its supporters as well as critics and the system tried out in Sri Lanka is no exception to this. In Parliament a Member of Parliament referred[33] to this payment as being similar to a 'sweep ticket lottery'. It is not without significance that this Member favoured the withdrawal of privileges like free medical facilities and free educational facilities from families with more than two children. Some countries such as Singapore, for instance, have specific legislation dealing with sterilization. Sri Lanka, like several other countries without legislation on this subject, has proceeded on the assumption that 'what is not expressly prohibited by law is permissible'. However, before a sterilization operation is done the consent of the patient has to be obtained[34] otherwise the doctor runs the risk of being charged for causing hurt, an offence under the Penal Code in respect of which one of the recognized defences is consent. To be valid consent must have been given not only voluntarily but also in full awareness of the implications of the operation, and especially about its likelihood of being permanent and irreversible. The practice of obtaining consent of women who are in labour and on the threshold of delivery is to be condoned for the reason that such persons may not be in the best frame of mind to grant their consent. The consent of the spouse is not a legal requirement though if such consent has been obtained it would enure to the advantage of the doctor in the event of a civil suit against the doctor for damages. If sterilization operations are being encouraged as part of the national family planning programme it would be desirable to have specific legislation dealing with matters such as who could undergo sterilization operations, who could perform such operations and the institutions where such operations could be undertaken. Specific provision could also be made to confer immunity to doctors from civil and criminal liability in respect of bona-fide acts or omissions. Many Third World countries which receive technical and financial assistance from foreign sources have been informed

that such assistance will not be available in respect of sterilization programmes which are not voluntary. For instance, funds provided by the US Agency for International Development cannot be utilized for involuntary or coercive sterilization programmes. The Ministry of Health and Family Welfare in India has repeatedly drawn the attention of all State governments to the need to conform to the guidelines contained in the Sterilization Manual as some of the donor agencies, like the Swedish International Development Agency, had indicated that they were not satisfied that operations were always done voluntarily.

Abortion has remained as a controversial and sensitive issue for a considerable period of time with very few people being prepared to discuss this subject in public. It could no longer be gainsaid that illegal abortions are taking place in this country. What is not certain, however, is the exact incidence of illegal abortions. The most distressing feature about the abortion situation in Sri Lanka is that the very restrictive nature of the law contained in the Penal Code is often circumvented by persons belonging to certain socio-economic groups. Rajanayagam, a past President of the Sri Lanka Medical Council, was the first to highlight this state of affairs. According to him:

> "A woman from the upper socio-economic group who is expecting an unwanted child will consult her psychiatrist for severe mental depression combined with suicidal tendencies. The pyschiatrist advises termination of pregnancy to save the life of the woman and she gets this done in a private or government hospital by a qualified medical practitioner."[35]

The views expressed by Rajanayagam have been confirmed by several others including a former Judicial Medical Officer of Colombo. According to him quacks or the so-called 'back door abortionists' perform abortions on women from middle or low socio-economic groups "under the most primitive and unhygienic conditions resulting in high mortality and chronic ill-health."[36] The question of reforming the country's abortion laws has

generated some discussion at various seminars and conferences held since 1974 but nothing has been done as yet to translate the recommendations made at these seminars and conferences into action. Several countries in Asia have approached the question of abortion law reform from a pragmatic and humanitarian perspective. Japan permitted, as far back as 1948, abortions as an eugenic protection measure. According to certain reports the incidence of illegal abortions then had been as high as 2.3 million per year. India liberalized the law relating to abortion in 1971, at a time when the annual incidence of illegal abortions was estimated at 6.5 million. Prior to 1971 the Indian law on abortion was identical with the law in Sri Lanka—a pregnancy could be terminated only to save the 'life' of the mother, the concept of 'life' being regarded as danger to the physical life. In every society a few individuals try to represent themselves as the 'guardians of public morals'—some self-appointed guardians trying to prescribe to the rest of humanity what they think is good or bad, desirable or undesirable. Every attempt to reform the country's abortion law has been stalled so far on the ground that such reforms would constitute an outrageous violation of the feelings and sentiments of a conservative religious-minded population. Religion or no religion, there is very little justification for a law which enables certain socio-economic groups to infringe it with impunity while driving away others from a qualified doctor in a good hospital in search of a quack in a butchery. Is a fourteen year old girl who is raped and who conceives thereafter to be expected to be saddled with a fatherless child for ever ? If her pregnancy is not to be terminated, will the 'guardians of public morals' undertake to look after her and her child for ever ? No society has evolved as yet a system in which unwanted pregnancies do not occur. Until such a system could be evolved (if such a system could be at all), it is the responsibility of the law to protect certain categories of persons who should not be compelled to go through a pregnancy. A girl who contracts German measles while being pregnant, a mother who has become pregnant immediately after giving birth to a deformed child, a girl who has been raped and has conceived thereafter and a mother of ten children who despite the use of a contraceptive has become

pregnant again—at least for deserving cases like these should not the law prescribe some procedure whereby the pregnancy could be terminated on the recommendation of medical specialists ?

Section 6

Laws having a Direct Bearing on the Postponement of the Formation of Families.

Compulsory minimum age of marriage laws and compulsory education laws have a direct bearing on the postponement of the formation of families.

The minimum age of marriage for males who are governed by the general law is 16 years while it is 12 years for females (for daughters of European or Burgher parents it is 14 years). Under the Kandyan Law the age limits are 16 years for males and 12 years for females. The Muslim Marriage and Divorce Act does not specify any minimum age limits. However, the registration of Muslim marriages of females under the age of 12 years is an offence unless the consent of the Quazi has been obtained. Under the Penal Code a husband commits the offence of rape if he has sexual intercourse with his wife who is yet under the age of 12 years. It is also an offence to have or attempt to have sexual intercourse with a girl above the age of 12 years and under the age of 14 years but "sexual intercourse by a man with his own wife or between a man and girl who are living together as husband and wife with the consent of the parents or guardians of the girl"[37] is not an offence if the girl is of or above the age of 12 years.

As far back as 1958 the Royal Commission on Marriage and Divorce strongly recommended that the existing age limits should be increased. The Commission observed that an increase in the minimum age will not only act as a check on maternal mortality but would also have a salutary effect on the rising birth rate. In relation to Muslim marriages the Commission observed that "the infant and maternal mortality rates are particularly high among the Muslim community in Sri Lanka largely due to early marriages and to the number of

pregnancies. A State should prescribe minimum age limits in conformity with its considered population policy. We do not think intelligent Muslim opinion would oppose a rise in age limits which must ultimately be to the benefit not only of the Muslims but to the rest of the community."[38]

During the last few decades the average age at marriage has risen considerably due to the over-all economic and social changes that have taken place in the country. In 1971, the average age was 28.0 years in respect of males and 23.5 years in respect of females. However the average age of marriage of Muslim females was 18.6 years. The high incidence of early marriages among Muslims accounts for the very high crude birth rate among that community. The majority of marriages are contracted under the general law but marriage registration has not yet been made compulsory. As a result it is difficult to get a correct picture of the exact incidence of marriages, especially in rural areas, where one or both parties are very young.

An increase in the minimum age of marriage, if it is substantially high, can have significant demographic implications. In recent times many countries have raised the minimum age of marriage. In 1978 India enacted the Child Marriage Restraint (Amendment) Act by which the minimum age was increased from 15 to 18 years in respect of females and from 18 to 21 years in respect of males. In September 1980 the National People's Congress adopted a new marriage law in terms of which the minimum ages for Chinese males and females have been fixed at 22 years and 20 years respectively. The prevalence of the dowry system has been one factor which has been responsible for late marriages. With large numbers going to the countries in the Middle East for lucrative employment, there are already signs of a higher incidence of relatively early marriages.

Though education is often treated as a panacea for all the ills and evils which confront countries in the Third World and as a means of social mobility, yet one finds that in Sri Lanka there is a very high incidence of school leaving at all levels of education. Education is still not compulsory in Sri Lanka. As the Royal Commission on Education pointed out, as far

back as 1961, regulations have yet to be enacted under the Education Ordinance of 1939 to define the "compulsory school age range". In an agrarian society like that of Sri Lanka where the "extended family" system is prevalent and where hired labour is an expensive commodity, the very absence of any regulation imposing an obligation on parents to send their children to school is likely to result in children being deliberately kept out of school so that they could assist in agriculture and other domestic work. Given the high incidence of unemployment in the country many parents and children would perceive greater benefits accruing from being self-employed at a younger age than remaining unemployed with high aspirations, after several years of schooling and university education. Illiteracy and ignorance are the main barriers to the spread of family planning services and to the acceptance of the "small family" norm. If female children are compelled to remain at school for a longer period this would result in an increase in the age at marriage. All these considerations are sufficiently strong enough to warrant the immediate implementation of measures designed to enact a compulsory school age limit and to ensure that it is strictly observed.

Section 7

Laws which may not Encourage the Formation of Families:

It is difficult to identify the laws that may not encourage the formation of families. Certain laws, such as tax laws, are likely to have, if at all, only a marginal impact because it is very unlikely that a person would consider the tax concessions before deciding whether to marry or not. Laws relating to homosexuality and prostitution may be classified under this heading. However, it must be noted that in any given society the number of persons to whom a liberalization of the homosexuality and prostitution laws is likely to have any significance is bound to be relatively insignificant.

The exact incidence of homosexuality in this country is not yet known. According to the Penal Code "any male person

who, in public or private, commits or is a party to the commission of, procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person"[39] is guilty of an offence. With the influx of tourists many children and young persons have been deployed by organized groups and it is likely that in time to come there would be prosecutions for contraventions of the law. In so far as the population implications of homosexual laws are concerned it has been observed that "the repeal of anti-homosexual laws would no doubt affect social attitudes towards homosexuality thereby reducing the number of heterosexual marriages and births."[40] The function of criminal law in relation to social morality, a topic which generated much controversy in other countries especially after the Wolfenden Committee issued its Report, is an area which needs examination in depth in the context of the social, economic, religious, cultural and demographic factors peculiar to this country.

The exact relationship between fertility and prostitution is not very clear. The imbalance in the male-female ratio in so far as the availability of males and females at the marriageable age is concerned, the postponement of marriages due to unemployment or underemployment, marital or sex problems and poverty are some of the main factors which may have a bearing on the incidence of prostitution. These factors regulate to a great extent the demand for and supply of prostitutes as well.

The statutory provisions in Sri Lanka relating to prostitution are found in four different statutes. These provisions could be broadly classified as falling within the following three areas: (a) provisions which do not make prostitution an offence *per se* but only if done in particular circumstances; (b) provisions relating to the management of brothels and making a livelihood on the earnings of prostitutes; and (c) provisions relating to procurement, encouragement or solicitation.

In order to determine whether prostitution should be legalised and if so, subject to what medical or health control systems, one must necessarily take cognizance of social, economic and demographic factors. It is relevant to consider statistics to ascertain whether there is any imbalance in the availability

of males and females at the marriageable ages. The rationale underlying the prevalence of polygamy or a system of "minor wives" as in Thailand is that in those societies females outnumber males.

In societies where pre-marital sex takes place on a large scale the availability of liberal abortion laws may have a bearing on the formation of families, for the termination of the pregnancy would be considered as a satisfactory and perhaps a convenient alternative to marriage. In a society where virginity does not find a place among the social values and norms the easy availability of contraceptives may become a factor that would not encourage the early formation of families at least among teenagers.

Section 8

The Legal Basis of Factors that may Encourage Large Families:

Some of the factors that could be considered as being conducive to promoting large families are the laws providing attractive social welfare schemes on the one hand and the absence of adequate social security schemes on the other.

In their study on *Population Growth and Economic Development* Jones and Selvaratnam have described this country as a forerunner for the countries of Southern Asia in the provision of social welfare scheme. "Its system of free education and health services and consumer subsidies is unmatched anywhere in the region. Successive governments have shown, over the years, a commendable concern for the welfare of the country's poorer citizens. And yet the provision of so many free services has become a severe strain on the economy as the population has grown so fast and government budgets held down by the slow pace of economic growth."[41]

Apart from the free medical and free education schemes that are available, a rice subsidy scheme was in operation for nearly two and a half decades. A scheme was also implemented to give sugar at a subsidised rate. Due to the shortage of rice and sugar and the exorbitant prices which certain people are prepared to pay for these commodities, families from lower

socio-economic groups with a large number of children found it a very profitable venture to sell the rice and sugar purchased at subsidised rates. To this extent these subsidy schemes had a pro-natalistic effect.

It was as far back as 1944 that the Royal Commission on Social Services recommended that the State should commence an unemployment assistance scheme. However, no steps were taken until 1977 to translate this recommendation into action. In his Budget Speech the Minister of Finance and Planning announced that until such time an effective and intensive employment programme is implemented the Government would pay Rs 50/- per head per month to those without gainful occupation. This scheme has certain pro-natalistic implications in that the number of persons to whom payment could be made is co-related to the size of the family.

In spite of convincing demographic evidence that generous maternity benefit laws tend to produce prolific mothers unless there is sufficient motivation to adopt family planning methods, yet no attempt has been made in Sri Lanka to amend the statutes which confer generous maternity benefits. The Maternity Benefits Ordinance, the Medical Benefits Ordinance and the Shop and Office Employees (Regulation of Employment and Remuneration) Act contain a number of statutory provisions designed to enable working women to get maternity benefits which are unlimited in so far as the number of pregnancies are concerned. One of the maternity and other benefits that is available before and after confinement is 6 weeks' full pay leave. It is interesting to note that in 1949 an unsuccessful attempt was made in the House of Representatives to pass a resolution requesting the Government to grant all expectant mothers in employment 6 weeks' leave with full pay before child birth and 6 weeks' leave with full pay after child birth. In seconding this resolution a Member of Parliament pointed out that "the efficiency of a Government can be measured by the importance that is attached by it to the care of the young children."[42]

It is of interest to note that according to a research study done in Sri Lanka [43] an overwhelming majority of the women workers who were interviewed were in favour of the introduction of a 'no-baby bonus scheme' in lieu of maternity benefits

after the second or third child. They also felt that it would be in the interests of the newly born baby that the mother should get more leave than what is granted now.

One of the reasons attributed to the existence of the system of the "extended family" in countries such as Sri Lanka and India, where it is not uncommon to find persons belonging to several generations living under the same roof for a considerable period of time is the absence of adequate and effective social security schemes. If social security schemes are available and if employees and self-employed persons could be assured of a reasonably comfortable income after retirement the need to have several children as a form of "insurance in old age" would disappear. Less reliance would then be placed on children as a potential source of maintenance and support in old age. In this context it is of significance that certain commercial banks have recently introduced various pension and annuity schemes.

Section 9

The Legal Basis of Factors that do not Encourage Large Families:

There are various statutory restrictions on the employment of children in certain types of employment. These laws have the salutary effect of reducing the economic value of children to their parents. Some of those laws are not strictly enforced and as a result there is a large conglomeration of young boys and girls who are engaged in various types of employment.

While generous maternity benefits may encourage large families, on the other hand it could be said that because of this possibility certain employers are likely to discriminate against females in offering employment.[44]

The tax benefits that are available in respect of children cannot be considered to be a factor that would have any significant demographic implications because the number of tax payers concerned is small. However, a reduction in the number of children/dependents in respect of whom tax exemption is available is likely to have some kind of symbolic significance—

a form of psychological reassurance to the others that the policy of the country is anti-natalistic.

In early 1930's with the establishment of colonisation schemes in various parts of the country an attempt was made to redistribute the population on a limited scale. In the selection of colonists preference was given to those who had large families and to this extent these schemes had a pro-natalistic impact. In the early years of the colonisation schemes family labour was an asset. Hired labour was too expensive a commodity. But with the passage of time the existence of large sized families triggered off many problems relating to succession to land and inheritance. In certain instances land had to be divided among several children resulting in fragmentation of land into uneconomic holdings. A number of countries, most prominent among them being Singapore, have successfully made use of legislation as an instrument to deprive large families from being eligible to receive land or housing facilities. In the formulation of a comprehensive national policy for Sri Lanka it is worth focussing attention on the role that law could play in this connection.

Legislation which removes all forms of discrimination against females and provides for equality of opportunity helps to enlist the support of females in tasks of a developmental nature. In view of the new role which women are called upon to play and in consequence of their new responsibilities the population implications are likely to be in the direction of a lowered fertility.

Section 10

Conclusions:

In the above discussion attention was focussed on a few areas where law was likely to have some bearing on the formation of families and family size. The areas that were discussed are by no means exhaustive of the areas of law which have an impact on population dynamics.

Sri Lanka has lagged behind other countries in resorting to law reform to achieve demographic goals. It is not that every

legal measure adopted elsewhere should be replicated here. There are many legal measures which may not be suitable for Sri Lanka. Any contemplated legal measure could be usefully analysed in terms of certain criteria such as political viability, scientific readiness, administrative feasibility, economic capability, ethical acceptability and presumed effectiveness.

The population problems of Sri Lanka are growing in intensity and magnitude. It is no longer possible to be oblivious to this reality. What needs to be accorded priority now is the identification of those measures which would enable Sri Lanka to exploit fully the potential of law as a catalyst of population change and to translate such measures into action.

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2

STATUS OF WOMEN AND EQUALITY BEFORE THE LAW: MORE CHILDREN OR LESS CHILDREN ?

Section 1

Background:

With the declaration of 1975 as the International Women's Year attention was focussed, in both developed and developing countries, to a greater extent than over before, on issues relating to the status of women. Attempts were made in many countries to identify the parameters of the rights which women are entitled to exercise under the existing laws of the country, and to evaluate the extent to which such legislative provisions promoted or inhibited female participation in social, political and economic activities. The setting up of a National Committee during International Women's Year and its continued functioning, the holding of numerous seminars on different aspects relating to the status of women and the preparation of a study, by a sub-committee of the UNESCO National Commission for Sri Lanka on "Educational Opportunities and Employment Opportunities Open to Women in Sri Lanka" are among the highlights of the activities that have taken place in Sri Lanka in connection with the International Women's Year. Sri Lanka was also represented at the Mexico and Copenhagen Conferences on Status of Women.

Demographic studies done in recent years have highlighted

the inverse relationship between the status of women and the decline of fertility. These studies demonstrate that women, with increased educational and vocational opportunities outside the home, plan the number and spacing of children more judiciously than women with little or no educational or vocational opportunities. Social stratification of women has thus come to be viewed as an important phenomenon in population dynamics. Inasmuch as there could be legal provisions which preclude the effective participation of women in the decision-making process, both at the micro-level of the family unit and at the macro-level of the community or nation, demographers have quite correctly focussed their attention on the role of law in changing the status of women.

One of the fundamental assumptions underlying demographic studies on the co-relation between the status of women and fertility behaviour should be that law is only one of the strategies that could be used to change the status of women and thereby improve the quality of life. But its effectiveness depends on numerous other factors as well. To consider law as the exclusive instrument for changing the status of women, and thus achieving a decline in fertility rates, would b to take a very narrow perspective of the mechanics of population dynamics and a gross exaggeration of the potential of law as catalyst of demographic change. It is probably due to this misconception that the recommendations of most of the studies that have been undertaken in many countries, including Sri Lanka, on the question of the status of women have failed to identify or articulate specific demographic objectives that could be achieved by bringing about legal reforms. The objective of this chapter therefore is to throw some light on the possible co-relation between legal reforms and demographic change in so far as the status of women in Sri Lanka is concerned. This chapter also attempts to identify what more is needed to supplement legal provisions which have a bearing on the status of women in order to achieve a decline in fertility rates. For purposes of convenience the approach that has been adopted here is to examine the various aspects relating to the status of women in relation to the rights set out in the Declaration on the Elimination of Discrimination against Women proclaimed by the

General Assembly of the United Nations on the 7th of November, 1967.

Section 2

Conceptual Limitations:

"Status" is a relative term. The phrase "status of women" has been often used *vis-a-vis* rights and liabilities enjoyed by men. From a demographic perspective a survey of the rights and duties of the different sexes under the law would only be of academic interest. For the demographer what is more important is not so much the equality between the sexes as the factors that preclude the formation of large families and which promote inter-personal contact between husband and wife thus making it more conducive for couples to accept the small family norm. Therefore the factors that have a bearing on the status of women must be considered from a broader perspective than what has hitherto been attempted in other studies. The primary focus here is on those factors which affect the legal status of women in so far as they have demographic implications.

The right to ownership of property by females, for instance, has, if at all, only a marginal demographic impact. Even this right affects fertility behaviour indirectly by probably improving the status of women within the family and the society, for there could well be several other factors which operate to perpetuate the subservient role which women, even with substantial means, have to play in many societies with the husband being the sole authority in the decision-making process. To take another example, the right to work is considered as a significant causative factor in low fertility behaviour and thus as a measure which would enhance the status of women. In certain societies where female employment outside the home is not socially approved of, but legally possible, a female who is compelled to work in order to supplement the family income will be considered by others in society, and probably even by those within the immediate family circles, as being of a lower status than other non-working women. It would thus appear that "status" is regulated not only by legal provisions but also

by societal norms, conventions and traditions and that not all the measures designed to improve the status of women would have demographic implications and this would apply *vice versa* as well. The term 'status' is employed here not in the limited sense of the status of women *vis-a-vis* men but to embrace a wider spectrum of issues which affect the attitudinal and be havioural responses of women in so far as opportunities are concerned for improving their quality of life, both within the immediate family circle as well as in the community in which they live.

Section 3

A Demographic Profile of Women in Sri Lanka:

According to the statistics collected at the censuses dating from 1871 the percentage of females in the population has been increasing very marginally over the years. The following table sets out the number and percentage of females in the population at the various censuses:

TABLE I

Number and Percentage of Females and the Ratio of Males per 1000 Females in the Population 1871—1971

Census Year	Total Population	Number of Females	Percentage of Females	Ratio of Males per 1000 Females
1871	2,400,380	1,120,251	46.7	1143
1881	2,759,738	1,290,185	46.9	1139
1891	3,007,789	1,414,413	47	1127
1901	3,565,954	1,669,742	46.8	1135
1911	4,106,350	1,931,320	47	1126
1921	4,498,605	2,116,793	47	1125
1946	6,657,339	3,125,121	46.9	1130
1953	8,097,895	3,829,165	47.3	1115
1963	10,582,064	5,083,390	48	1082
1971	12,711,143	6,185,195	48.7	1055

Source: *Census Reports.*

Birth rates have gradually declined over the years. In 1946 the crude birth rate was 37.4 while by 1973 it had come down to 27.8. Apart from the fact that more married couples have been exposed to fertility limitation measures due to the expansion of the national family planning programme another contributory factor has been the decline in the proportion of married females. The following table indicates the percentage of women married at the time of the last three censuses.

TABLE II

Percentage of currently married Women at the Censuses of 1953, 1963 and 1971

Age of Women	Percentage of Women currently married		
	1953	1963	1971
15—19	23.7	14.8	10.3
20—24	65.7	57.6	45.9
25—29	84.4	81.0	73.5
30—34	87.8	88.6	85.9
35—39	86.5	89.8	89.3
40—44	80.7	86.1	87.8
45—49	73.8	81.6	84.9

Source: *Women of Sri Lanka*, 1975, p. 19.

During the last few decades maternal mortality rates have recorded a significant decline. For instance, in 1946, the maternal mortality rate was 15.5 maternal deaths per 1000 live births. The rates for subsequent years, are given in Table III on the following page.

For several decades females had a lower expectation of life at birth than males, but during the 1960s there has been a reversal of this trend as Table IV indicates:

TABLE III

Maternal Mortality Rates 1947—1971

Year	Maternal Mortality Rate	Year	Maternal Mortality Rate
1947	10.6	1959	3.4
1948	8.3	1960	3.0
1949	6.5	1961	2.5
1950	5.6	1962	3.0
1951	5.8	1963	2.4
1952	5.8	1964	2.8
1953	4.0	1965	2.4
1954	4.6	1966	2.2
1955	4.1	1967	1.7
1956	3.8	1968	1.8
1957	3.7	1969	1.5
1958	3.9	1970	1.2
		1971	1.2

Source: *The Population of Sri Lanka*, 1974, p. 27.

TABLE IV

Expectation of Life at Birth in Years

Period	Male	Female	Excess of Female expectation over the male expectation
1920—22	32.7	30.7	—2.0
1945—47	46.8	44.7	—2.1
1952	57.6	55.5	—2.1
1962—64	63.3	63.7	0.4
1964	63.0	65.0	0.6
1965	63.7	65.0	1.3
1966	63.6	65.0	1.4
1967	64.8	66.9	2.1

Source: *The Population of Sri Lanka*, 1974, p. 28.

Statistics regarding female enrolment rates at the primary, secondary and tertiary levels of education and about labour force participation are given in subsequent sections of this chapter.

Section 4

Equality of Rights with Men:

Article 1 of the Declaration on the Elimination of Discrimination against Women states that—

> "Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity."

This is, to some extent, a restatement of article 1 of the Universal Declaration of Human Rights. According to this article "all human beings are born free and equal in dignity and rights". Furthermore article 2 specifically states that everyone is entitled to all the rights and freedoms set forth in the Declaration without any distinction based on the ground of sex.

Article 2 of the Declaration on the Elimination of Discrimination against Women elaborates on article 1 and imposes certain positive duties on government to take action. According to Article 2—

> "All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women, in particular:
>
> (a) The principle of equality of rights shall be embodied in the Constitution or otherwise guaranteed by law;
>
> (b) The international instruments of the United Nations and the specialized agencies relating to the elimination of discrimination against women shall be ratified or

acceded to and fully implemented as soon as practicable."

Chapter VI of the Constitution of Sri Lanka is entitled "Directive Principles of State Policy". These principles are to "guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka."[1] According to this Chapter the Republic is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which included "full realization of the fundamental rights and freedoms of all persons."[2] One of the principles of State Policy is to "ensure equality of opportunity to citizens."[3]

Chapter VII of the Constitution is entitled "Fundamental Rights". One of the rights and freedoms guaranteed by the Constitution is that—

"all persons are equal before the law and are entitled to equal protection of the law".[4]

Another right that is guaranteed by the Constitution is that whether it be in the matter of employment or otherwise there will be no discrimination based on sex.[5]

Article 3 of the United Nations Declaration also deals with the equality of the sexes. In terms of this article states are under a duty to take all appropriate measures to:

"educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women".

Some of the specific areas where the law has provided for differential treatment are considered below under the appropriate headings.

Section 5

Political Rights:

Article 4 of the Declaration on the Elimination of Discrimination against Women states that:

"All appropriate measures shall be taken to ensure to women on equal terms with men, without any discrimination:

(a) The right to vote in all elections and be eligible for election to all publicly elected bodies;

(b) The right to vote in all public referenda;

(c) The right to hold public office and to exercise all public functions.

Such rights shall be guaranteed by legislation".

Women in Sri Lanka enjoy all these rights and the exercise of these rights is implicitly guaranteed by legislation. Women were granted the privilege of exercising their franchise as far back as 1931. The Royal Commission on Constitutional Reforms, headed by the Earl of Donoughmore, which came to Sri Lanka in 1927, adopting an approach which was very liberal, if the political and social milieu at that time is considered, strongly recommended that the right of franchise be extended to women, too. The Commissioners said:

"Apart from the familiar arguments in its favour, and the general principle of sex equality we have been impressed by the high infant mortality in the Island, the need for better housing, and for the development of child welfare, midwifery, and antenatal services, all providing problems in the solution of which women's interest and help would be of special value".[6]

The Commissioners thought that the right to franchise should be gradually extended to all the eligible women by imposing at first a higher age qualification than that applicable in respect of males. The Commissioners said:

"There is much to be said in favour of a procedure which will throw on to the women themselves the responsibility for making efforts to influence public opinion in Ceylon in favour of a fuller franchise".[7]

A survey of the main political parties in Sri Lanka has shown that, on the average, about 35 per cent of the total party membership and about 15 per cent of the party office bearers are women.[8] Many women have successfully contested at the general elections held since 1931. Participation of females in elections reached a climax in 1961 when Sri Lanka produced the first woman Prime Minister. The following table shows the number of females who have been elected at various general elections:

TABLE V

Elected Women Members

(including those elected at by-elections)

First State Council		(1931) —	2
Second State Council		(1936) —	1
First House of Representatives		(1947) —	3
Second	— do —	(1952) —	2
Third	— do —	(1956) —	4
Fourth	— do —	(1960) —	3
Fifth	— do —	(1960) —	3
Sixth	— do —	(1965) —	6
Seventh	— do —	(1970) —	6
First National State Assembly		(1972) —	6
Second	— do —	(1977) —	3

Source : *Women in Sri Lanka*, 1974, p. 47-8.

From 1947 till 1969 seven women served as members of the Senate.

At local authority elections during the period 1960 to 1975 out of 149 women candidates 54 have been elected (36.29%).[9]

The existing legal framework in Sri Lanka provides for the full participation of women in political activities.

Section 6

Nationality and Citizenship:

Article 5 of the Declaration on the Elimination of Discrimination against Women states that—

> "Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband".

The Citizenship Act[10] does not discriminate between males and females in so far as the right to acquire, change or retain the nationality is concerned. An alien spouse is entitled to citizenship by registration if the Minister is satisfied that—

> "(a) the applicant is of full age and of sound mind;
>
> (b) that the applicant is, and intends to continue to be, ordinarily resident in Sri Lanka; and
>
> (c) that the applicant has been resident in Sri Lanka throughout a period of one year immediately preceding the date of the application of such applicant".[11]

The Minister could refuse an application made to him if he is satisfied that it is not in the public interest to grant the application.[12] The Minister's decision is final and cannot be contested in any Court.[13]

An alien spouse is entitled only to citizenship by registration as against citizenship by descent. The distinction between the two categories of citizenship lies in the fact that only those who could satisfy the strict requirement that the father's and/or paternal grandfather's and/or paternal great grandfather's place of birth was Sri Lanka are entitled to the former type of registration. An alien spouse (citizen by registration) who resides outside Sri Lanka for five consecutive years or more will cease to be a citizen by registration unless such person has resided abroad with his or her spouse who is a citizen of Sri

Lanka by descent.[14] Chapter V of the Constitution, however, precludes any distinction being drawn between citizens of Sri Lanka for any purpose by reference to the mode of acquisition of such status.

Under the law of Sri Lanka marriage to an alien does not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband.

It is significant to note that, under the Citizenship Act, any reference to father, paternal grandfather or paternal great grandfather relating to citizenship by descent is, in regard to a person born out of wedlock and not legitimated, deemed to be a reference to mother, maternal grandfather or maternal great grandfather respectively.[15] This provision ensures that an illegitimate child will not suffer any disability in the matter of citizenship due to his illegitimacy.

Section 7

Legal Capacity and Property Rights:

According to the Age of Majority Ordinance[16] a person is deemed to have attained majority if he has attained the full age of twenty-one years. But this provision does not preclude a person from attaining majority at an earlier period by operation of law. There has been some doubt as to whether this Ordinance applied in respect of Muslim persons and as to what effect marriage would have on attaining majority.[17]

One of the most conspicuous features in the law of property[18] in Sri Lanka is that there is no uniform law which applies to all the women in the country—women are governed by four different systems of law which provide differential rights and privileges to women *vis-a-vis* men.

The Matrimonial Rights and Inheritance Ordinance[19] of 1876 did go a long way to remove some of the disabilities which women were subjected to under the common law which was applicable till then. This Ordinance did not apply to those who were governed by the Kandyan Law, Muslim Law and Thesawalamai. One of the significant innovations introduced

by this Ordinance was the abolition of 'communio bonorum' or community of goods or property. With the abolition of 'communio bonorum' women became entitled to hold and dispose of, as their own, all immovable property they owned not only at the time of marriage but even what was obtained subsequently. Movable property, by and large, remained vested in husbands who had the power of disposing such property even without the consent of the wives. Money realized from the sale of lands belonging to women also vested in their husbands.

In 1924 the Matrimonial Rights and Inheritance Ordinance was replaced by the Married Women's Property Ordinance.[20] The latter Ordinance removed some of the limitations placed on female emancipation. Any woman who married after this Ordinance became entitled to hold both movable and immovable property as if she was an unmarried person (*feme sole*). The Ordinance also dealt with contractual and other rights of women.

The present legal position of women who are not subject to the personal laws can be summarised thus :

(i) in respect of movable and immovable property the rights they could exercise are not subject to any restrictions in favour of the husbands;

(ii) they could sue and be sued in their personal names without making their husbands also a party to the action;

(iii) they could enter into contracts without the consent of the husbands; and

(iv) they could lend money to their husbands subject to the restriction that in the event of insolvency the loans given by them would not get priority over claims of other creditors.

Under the Kandyan Law from the outset the position of women was much more favourable than under the general law. A married woman was always treated as a *feme sole*. This was so whether the marriage was one in *binna* or *deega*. In 1938 the Kandyan Law Declaration and Amendment Ordinance[21] was

enacted. This Ordinance governs questions relating to succession to property rights. Under the Kandyan Law a distinction was drawn between acquired property and *paraveni* or hereditary property. The former includes all types of property other than property devolving upon a person by succession or inherited by virtue of gifts *inter vivos* or by virtue of a devise under Last Will from a person to whose intestate estate he would be heir. The distinction between acquired property and *paraveni* property is of significance for purposes of determining succession to property.

Under the Muslim Law women are treated as *feme soles*. The concept of community of property is also unknown to the Muslim Law. But in the field of inheritance there is a great deal of discrimination against widows and female children. The law favours widowers and sons in that on intestacy a widower gets 1/4th share against 1/8th which a widow is entitled to. A son gets double the share to which his sister is entitled. In the absence of any children, too, a widower gets preferential treatment—a widower is entitled to 1/2 the estate while a widow is entitled only to 1/4 share.

The Jaffna Matrimonial Rights and Inheritance Ordinance[22] governs the rights of spouses. A married woman who is subject to the Thesawalamai is not treated as a *feme sole*. Though she has the right to hold both movable and immovable property as her separate property she cannot dispose of such property during her lifetime except with the consent of the husband. A concept similar to but not identical with community of property operates even under the Thesawalamai law in respect of '*thediatheddam*' property. The following property is deemed to be the *thediatheddam* of a spouse—

(a) property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse; and

(b) profits arising during the subsistence of the marriage from the separate estate of that spouse.

On the death of either spouse, one half of the '*thediatheddam*'

which belonged to the deceased spouse, and has not been disposed of by Last Will or otherwise, would devolve on the surviving spouse and the other half would devolve on the heirs of the deceased spouse. A woman subject to the Thesawalamai cannot appear alone in Court. She has to be represented by her husband.

There has been hardly any agitation for the removal of the discriminatory provisions found in the sphere of property law.

Section 8

Family Law:

Article 6 also deals with two other aspects, namely the right to marry and the duties in relation to children. According to this article:

> "All appropriate measures shall be taken to ensure the principle of equality of status of the husband and wife, and in particular:
>
> (a) Women shall have the same right as men to free choice of a spouse and to enter into marriage only with their free and full consent;
>
> (b) Women shall have equal rights with men during marriage and at its dissolution. In all cases the interest of the children shall be paramount;
>
> (c) Parents shall have equal rights and duties in matters relating to their children. In all cases the interest of the child shall be paramount;
>
> (d) Child marriage and the betrothal of young girls before puberty shall be prohibited and effective action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".

Under the Marriage Registration Ordinance[23] the minimum age of marriage for a female is 12 years. In the case of a daughter of European or Burgher parents the minimum age is

14 years. It is significant to note that these age limits were fixed as far back as 1908 and no revision has taken place since then. Despite the minimum age limits the trend in recent years has been to postpone marriages. The reasons for this trend are probably the high incidence of unemployment and economic difficulties arising from the high cost of living (it is still too early to predict whether the heavy exodus to the Middle-east in search of lucrative employment might result in early marriage of close relatives of those who have gone abroad). It is of interest to note that in 1958 the Royal Commission on Marriage and Divorce observed that—

> "a rise of the minimum age will not only act as a check on maternal mortality but also tend to have a salutary effect on a rising birth rate".[24]

After "taking into consideration the present stage of the development of the country and its economic conditions" the Commission recommended that the present limit of 12 years should be increased to 16 years. The Commission also recommended an increase from 16 years to 18 years in respect of males. The same age limits operate even in respect of marriages governed by the Kandyan Law.[25] But a significant difference is that even where one or both parties to the marriage are below the minimum age the marriage would not be invalid if both parties thereto cohabit as husband and wife for a period of one year after the party or parties have attained the lawful age of marriage or if a child is born of the marriage before either of them has attained the lawful age of marriage.[26] This provision of the law has a definite pro-natalistic bias. One of the recommendations of the Royal Commission was that the age limits under the Kandyan Law should be increased to 18 years in respect of males and 16 years in respect of females. The Commission also suggested that a considerable amount of education and propaganda be undertaken in those areas to explain the ills of early marriage. However, it is several years later that through population education programmes those enrolled in secondary schools were exposed to the co-relation between early marriage and high fertility rates. In respect of Muslim women

there is no statutory provision relating to the minimum age of marriage. However, the Muslim Marriage and Divorce Act of 1950[27] does not permit the registration of Muslim marriages of females who are under 12 years of age unless the consent of the Quazi has been obtained. The Royal Commission on Marriage and Divorce went into this question very carefully and observed that—

> "the infant and maternal mortality rates are particularly high among the Muslim community in Ceylon largely due to early marriage and to the number of pregnancies. . .A State should prescribe minimum age limits in conformity with its considered population policy. We do not think intelligent Muslim opinion would oppose a rise in age limits which must ultimately be to the benefit not only of the Muslims but to the rest of the community".[28]

The economic and social changes that have taken place in the country have resulted in a significant increase in the average age of marriage—at the beginning of the century the average age of marriage for males was 24.6 years and 18.3 years for females. Seven decades later, at the time of the 1971 Census, the average age of marriage for males was 28 years and 23.5 years for females. However, as in the case of several other multi-communal and multi-religious countries in Asia and Africa, the rise in the age of marriage in Sri Lanka has been confined to some of the ethnic and/or religious groups. Table VI indicates the differences in the age of marriage.

It is probably due to the early marriages of Muslim women that they have a very high birth rate. In 1968, for instance, the crude birth rate among Muslims was 40.9 compared with 32.2 for Sinhalese and 33.7 for Tamils.

Under the Marriage Registration Ordinance if any party to the marriage is yet minor, i.e., under 21 years of age,[29] then the consent of the parent or guardian has to be obtained. No such consent is required in the case of a re-marriage of widows, widowers and persons whose marriages have been legally dissolved.[30] If the parent or guardian has unreasonably withheld or refused consent an application could be made to Court to get

TABLE VI

Average Age at Marriage for General, Kandyan and Muslim Marriages during the period 1960-1970

YEAR	GENERAL		KANDYAN		MUSLIM	
	Male	Female	Male	Female	Male	Famale
1960	28.3	23.1	27.6	21.5	27.1	18.5
1961	28.8	23.1	27.8	21.7	26.5	18.4
1962	28.0	23.1	27.7	21.8	26.8	18.5
1963	28.8	23.2	29.2	20.0	28.6	19.5
1964	29.4	23.8	31.2	24.5	26.5	18.5
1965	29.6	24.7	33.7	26.7	27.5	19.5
1966	27.2	22.4	28.5	21.8	26.1	18.3
1967	27.9	23.2	31.3	24.7	26.0	18.1
1968	29.1	23.6	31.2	25.1	26.5	18.7
1969*	28.5	23.3	29.6	22.9	26.9	18.6
1970*	28.6	23.4	29.8	23.1	26.8	18.6

*Provisional

Source : *Statistical Bulletin on Vital Statistics, 1972*

the necessary consent.[31] Under the Kandyan Marriage and Divorce Act the consent of the parent or guardian is necessary if the male child is below 18 years or the female child is below 16 years.[32] The Court has the power to grant consent if such consent has been unreasonably withheld or refused by the parent or guardian[33]. The Royal Commission on Marriage and Divorce recommended that the age of consent should be raised to 21 years in respect of both males as well as females.[34] The Muslim Marriage and Divorce Act prohibits the registration of Muslim marriages of females under 12 years of age unless the consent of the Quazi has been obtained. Different rules apply in respect of females of different sects. For instance, a female of the Hanafi sect is a *feme sole* at and after puberty and could contract a marriage by appointing her own *wali* i.e., guardian for marriage. In 1973 the Muslim Law Research Committee recommended that in the case of marriages of Muslim girls

between the ages of 12 and 14 years the Quazi should have the power to authorize the solemnization and registration of such marriages.[35]

The marriage laws applicable to the different communities contain prohibitions on marrying certain persons. As far as the general law and the Kandyan Law are concerned the prohibited degrees of relationship are the same as regards males and females. But under the Muslim Law there are certain differences such as the following—(a) the restrictions apply only to females who are over 12 years of age[36]; (b) in the case of a male it is an offence to marry his wife's sister if the wife is then alive[37]; (c) in the case of a male it is immaterial that carnal intercourse was had or that the attempt was made with the consent of the woman[38] but in the case of a female it is a valid defence that she was at the time of the offence under the coercion of the person having carnal intercourse with her[39]; and (d) in the case of a male the "attempt" to have carnal intercourse is sufficient to entail penal liability.[40]

The Marriage Registration Ordinance does not require the registration of marriages. Registration is regarded as the best evidence of marriage. The validity of a marriage is therefore not dependent on registration or solemnization. This has led to the recognition of certain marriages where there is a presumption that there has been a marriage by habit and repute. Evidence of cohabitation for a long period and the recognition by relations and neighbours of the man and woman as husband and wife give rise to a presumption, albeit a rebuttable one, of a valid marriage. Under the Kandyan Marriage and Divorce Act, however, every marriage has to be registered if it is to be treated as valid. Customary marriages or the so-called "marriages by habit and repute" do not find a place under the Kandyan Law—the rationale underlying this is the looseness of the marriage tie in the Kandyan Kingdom at the time of its conquest and the desire to avoid having to sort out difficult questions relating to inheritance.[41]

The Muslim Marriage and Divorce Act enacts that "nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim Marriage or Divorce which is otherwise invalid or valid,

as the case may be, according to the Muslim Law governing the sect to which the parties to such marriage or divorce belong."[42] The Act makes it mandatory to register a marriage immediately after the conclusion of the *Nikah* ceremony.[43] The bridegroom, the *wali* and the person who conducted the *Nikah* ceremony are under a duty to cause the registration of such marriage.

Under this Act it is an offence for a woman to contract a marriage or participate as a bride during her period of *iddat*[44] and no such marriage could be registered.[45] The registration of the following classes of marriage is prohibited : the marriage of a woman of the Shafi sect without the intervention of her rightful *wali*, unless the Quazi in the exercise of his powers has authorised the marriage and dispensed with the necessity for the *wali's* presence and approval;[46] a marriage at which the person acting as the *wali* is not entitled, according to the Muslim Law governing the sect to which the bride belongs, to act as *wali* to that bride;[47] the marriage of a Muslim girl under the age of twelve years unless the Quazi has authorised the registration of such marriage;[48] a second or subsequent marriage without giving the Quazi one month's prior notice.[49] Section 25 which requires the *wali's* presence and approval (unless the Quazi has authorised the marriage and dispensed with the necessity for the *wali's* presence and approval) and bride's own consent to the marriage as conditions precedent to the validity of all marriages "embodies as a positive requirement of the recommendation of the Shafi jurists that it is always desirable to consult a virgin daughter in regard to her future husband."[50] Section 71 of the Muslim Marriage and Divorce Act treats the registration of marriages as "the best evidence of the marriage".

The Royal Commission on Marriage and Divorce thought that the present law under which a Muslim bride, but not brides under the general law or Kandyan Law, is not required to sign either the declaration in which notice is given of the intended marriage or the Muslim Marriage Register is not satisfactory. Since "it is conceivable that situations may arise where a marriage is registered against the consent of a bride"[51] the Commission recommended that legal safeguards should be introduced to ensure that no Muslim marriage takes place without the written consent of the bride.

Marriage is a voluntary union between one man and one woman. The voluntary nature is given effect to by the Marriage Registration Ordinance which declares that "no suit or action shall lie in any court to compel the solemnization of any marriage by reason of any promise or contract of marriage, or by reason of the seduction of any female, or by reason of any cause whatsoever."[52] No marriage duly solemnised and registered under this Ordinance could become vitiated by any such promise or contract or seduction.[53] The Ordinance does not take away the right to bring an action to recover damages for breach of promise[54] or for seduction or for any other reason.[55] The view that a promise of marriage should not be the subject of a commercial bargaining has led English[56] and South African[57] courts to treat as void marriage brokerage contracts. Local courts have taken two different views on the validity of marriage brokerage contracts.[58] It has been pointed out that "having regard to the customs of the country which limit the broker's function to the making of a proposal, leaving the parties free to make their own independent inquiries before taking a decision"[59] the view that such agreements are in accordance with local customs and therefore enforceable should be preferred.[60]

The requirement that parties intending to contract a marriage must give their consent in writing (except in the case of Muslim females) ensures to some extent that the parties are not going through the marriage ceremony due to duress or compulsion.

Certain customs and formalities associated with the institution of marriage could have a bearing not only on the age of marriage and the need to find employment but also on the very stability of the institution of marriage. In this context the dowry system and the dual system of Kandyan marriages are of some significance.

The functional aspect of the dowry system was described in the Thesavalamai Code in the following manner: "It is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most men marry".[61] The proposition that dowry is usually the inducement agreed upon in the course of negotiations for a marriage was however, considered by the Supreme Court in a decision given in the

early part of this century, as one which is not of universal application.[62] Most of the marriages are still arranged by parents and not infrequently the quantum of the dowry plays an important role in the bargaining process. Difficulties in collecting a dowry due to economic problems is likely to make the selection of a suitable bridegroom a process which would take time. If the bride is educated and is in employment her prospective earning capacity would no doubt compensate for the inability to offer a substantial dowry. Measures taken in recent times to reduce the gap between the rich and the poor by imposing higher taxes, a ceiling on income and on land and house property etc., together with the highly competitive nature of the examinations that have to be completed to obtain higher qualifications and the difficulties in finding employment would have the cumulative result of destroying the dowry system by a gradual and slow process and to the extent that marriages have to be postponed till such time that a substantial dowry is collected or employment is secured the population implications are in the direction of a lowered fertility. A few years ago it was reported that the National Committee for International Women's Year has suggested the abolition of the dowry system by law as one of the measures to improve the status of women.[63] While improvements in the status of women are no doubt related to lower fertility rates, the very existence of the dowry system, at least in so far as arranged marriages are concerned, appears to be a factor that would delay marriages resulting in a direct impact on fertility.

The Kandyan Law recognises the *diga* system of marriage and the *binna* system of marriage. In the absence of any entry in the marriage register the law presumes, till the contrary is proved, that the marriage had been contracted in *diga*.[64] What constitutes a *diga* marriage is "the conducting of the wife to and the living in the husband's house or in any family residence of his/or if he does not own a house and lands, the taking her as his wife and the conducting her away from her family to a place of lodging."[65] In *diga* marriages the bride gets a dowry and renounces all claims to her father's inheritance thus avoiding the sub-division of property.[66] In *binna* marriage the bridegroom is received into the house of the bride and lives there so long as the

wife permits him to stay. "In *binna* marriage, the bride is generally an heiress of the daughter of a wealthy family in which there are few sons. The bridegroom does not acquire any right over the wife's property. The right of expelling him from the home of his wife is possessed not only by the wife but also by the wife's parents and brothers."[67] Since the grounds on which a Kandyan marriage could be dissolved are very liberal (e.g., mutual consent; desertion by husband or wife for two years; inability to live happily together of which actual separation from bed and board for a period of one year is the test[68]) the stability of the *binna* system of marriage is an aspect which is worth investigating further.

Only Muslims are entitled to contract marriages of a polygamous character. Polyandry is absolutely prohibited. However, there is evidence that polygamy and polyandry had been prevalent in this country, especially in the Kandyan provinces, for several centuries. A writer on the social conditions of the country observed, in 1681, that "both Women and Men do commonly wed four or five times before they can settle themselves to their contentation."[69]

In 1859 by an Ordinance which amended the law relating to marriages in the Kandyan provinces both polygamy and polyandry were prohibited. This prohibition applied to civil as well as religious marriages.[70] A penalty of imprisonment for a period of three years was prescribed for any violation of this prohibition.[71] The Preamble to this Ordinance stated in the following terms the reason for imposing this restriction:

> "... And whereas the customs of the Kandyans, now considered as the law regulating the contract of marriage, permits a man to have more than one living wife, and a woman to have more than one living husband; and whereas this custom is wholly unsuited to the present condition of the Kandyans; and is in no way sanctioned by their National Religion; and whereas such custom is a great hardship and oppression to the industrious classes, and the frequent cause of litigation, leading to murders and other crimes; and whereas from the circumstances aforementioned, the marriage custom of the Kandyans is become a grievance

and an abuse, within the meaning of the Kandyan Convention of 1815, and a large and influential portion of the Kandyan people have petitioned for redress and reform of the same. . ."

Notwithstanding this legal prohibition, polyandry and polygamy survived even upto the early part of this century. In 1905 the institution of polyandry was described in the following terms: "Polyandry, though illegal, continues to exist among the Kandyan peasantry, especially in the case of the brothers. The law against polyandry is evaded by not registering the union at all or by registering it as with one brother only. In all cases the ceremonies of marriage are performed with one brother only. The association of other husbands follows by consent of parties but when once established, becomes a matter of public notoriety, and no disgrace attaches to it. The progeny of the woman is deemed the progeny of each husband individually and collectively, and the property is conserved in the family"[72]. Though polygamy too had existed it has been said that "the feeling of the Sinhalese in regard to the plurality of wives is very strongly adverse".[73] It has been suggested that polygamy may have been practised to prevent subdivision of property, especially in those cases where a man has married not one but several sisters "to prevent the family estate going to outsiders."[74] With the gradual disappearance of polyandry and polygamy the institution of marriage would have become more stabilised and the problems in determining the paternity of the off-spring would have been eliminated.

Section 18 of the Marriage Registration Ordinance enacts that "no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved". The term "marriage" excludes "marriages contracted between persons professing Islam".[75] According to the Kandyan Marriage and Divorce Act no Kandyan marriage is valid "(a) if one party thereto has contracted a prior marriage; and (b) if the other party to such prior marriage is still living, unless such prior marriage has been lawfully dissolved or declared void".[76]

The Penal Code makes it an offence to contract a second

marriage while the first marriage still subsists. Section 362B of the Code states that "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished..." This section is subject to two exceptions: (i) where the marriage has been declared void by a court of competent jurisdiction and, (ii) where at the time of the subsequent marriage the former husband or wife has been continually absent from such person for a period of seven years and has not been heard of as being alive. It would thus appear that this prohibition would not apply only to two categories of persons, namely those who came within one of the two exceptions and those whose second marriage is not void. A person who contracts a marriage under the Muslim Law but after conversion marries for the second time (while the first marriage still subsists) under the general law is guilty of bigamy.[77] In *Attorney-General* v. *Reid*[78] the Privy Council held that a non-Muslim, in this case a Christian, could by conversion become a Muslim and contract a second marriage under the Muslim Law while the first Christian monogamous marriage still subsists. The Privy Council in its judgment observed as follows: "Ceylon is a country of many races, many creeds and has a number of Marriage Ordinances and Acts... Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there... In their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none."[79]

The Report of a recent Committee on Muslim Marriage and Divorce Laws makes the following observations regarding polygamous marriages contracted by persons who till such time were non-Muslims: "The increase in this type of marriage has

caused considerable concern among Muslims who fear that their personal laws will be brought into disrepute by persons who profess to be Muslims not from conviction but out of the unscrupulous desire to utilise to their advantage certain provisions of the Muslim Law of marriage which are in practice used by Muslims in exceptional circumstances. When a person finds that his marriage has broken down and is unable to obtain its dissolution in view of the restricted grounds of divorce available under the general law, which is based on Roman Dutch principles, he conveniently resorts to this dubious practice, which has become more frequent after the decision in *Reid's* case".[80] The Report cited with approval an observation made by a Committee appointed in 1939 to the effect that "It is desirable to discourage polygamy in certain cases, in order to ensure the welfare of the existing family or families of the man desiring to contract another marriage, by the force of public opinion".[81]

Section 9

Laws Relating to Matrimonial Obligations and the Protection of Children:

The obligation to look after the wife or children is on the husband or father who is regarded as the head of the family. A woman, if she has separate property, is independently liable to maintain her children and also her husband if he, due to illness or otherwise, is unable to maintain himself.[82] A person who neglects to maintain his wife or his legitimate or illegitimate children, could be ordered to pay maintenance to the wife and children.[83] The amount that has to be paid, would be determined by the Court.[84] A child could receive maintenance till he reaches the age of 31 years.[85] A person who defaults in paying maintenance is liable to undergo a sentence of imprisonment. Questions relating to the custody of minor children either during the subsistence of the marriage or upon its dissolution are not governed by any statutory provisions and are determined on the basis of Roman-Dutch principles.[86] The father is considered to have a preferential right to the custody of minor children but courts could grant custody to the mother if such a course

of action is warranted in the best interest of the child.

The Penal Code has made infanticide a criminal offence.[87] A nineteenth century study reveals that among those who had practised infanticide in this country were certain parents who had numerous offspring whom they could not maintain.[88]

The exposure or abandonment of a child under the age of 12 years by a person who has the care of such child is an offence under the Penal Code.[89]

The Adoption of Children Ordinance of 1944[90] provides for a person over the age of 25 years to make an application to court to adopt a child under the age of 14 years.[91] An adoption order would not normally be made if the sole applicant is a male and the child in respect of whom the adoption order has been made is a female.[92] The consent of the parent or of the guardian is normally, but not always, required before an adoption order is made.[93] If the child is over 10 years of age the child's consent has to be obtained. The effect of an adoption order would be to transfer to the adopter all the rights, duties and obligations of the natural parents.[94] The adopted child is deemed in law "to be the child born in lawful wedlock of the adopter"[95] but unless the contrary intention appears from any instrument such adopted child does not become entitled to any rights, titles or interest in so far as succession to the property of the adopter is concerned.[96] An adoption order does not deprive the adopted child of any right to or interest in any property which he would, but for the order, have been entitled to.[97]

The exact population implications of adoption laws are not quite clear. If liberal adoption laws permit the adoption of even illegitimate children there is likely to be a drop in the incidence of illegal abortions. If childless couples or families with few children adopt children especially from families with a large number of children, the chances of ensuring the future welfare of such children would be greater. The State would also have to incur less expenditure on public welfare schemes if children, especially abandoned children, are adopted by persons who have the means to do so. In recent years a number of local children have been adopted by foreigners.

The Children and Young Persons Ordinance[98] contains elaborate provisions for the establishment of Juvenile Courts,

the supervision of Juvenile offenders, the protection of children and young persons and prevention of cruelty and exposure to moral and physical danger. A parent, having sufficient means for the purpose, who fails to maintain a person under the age of 16 years by neglecting such person in a manner likely to cause injury to his health by failing to provide adequate food, clothing, medical aid or lodging for him is liable to a penalty.[99]

The Employment of Women, Young Persons and Children Act of 1956 regulates the employment of women, young persons and children by restricting the categories of people who could be employed in certain trades or occupations. Regulations have been enacted; for instance, to absolutely prohibit the employment of children below 14 years of age in certain types of employment. These restrictions would have had the effect of reducing to a certain extent the economic value of children to parents.

Section 10

Discrimination against Women in Penal Statutes:

Article 7 of the Declaration on the Elimination of Discrimination against Women states that "all provisions of penal codes which constitute discrimination against women shall be repealed".

According to section 25 of the Penal Code[100] "when property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of this Code". It is submitted that this same rule should apply even when the property is in the possession of a person's husband. With the exception of this provision almost all the other provisions in the Penal Code do not discriminate against women—on the contrary some provisions are designed for the protection and benefit of women. Some of these provisions are considered below.

No sentence of death could be pronounced on or recorded against any woman who is pregnant at the time of the conviction. Instead the court could sentence such person to simple or rigorous imprisonment for life or for any other time.[101] No

female could also be punished with whipping[102]. It is an offence to cause a miscarriage except in "good faith for the purpose of saving the life of the mother."[103] The Penal Code treats as an offence any assault or the use of criminal force on any woman with the intention of outraging her modesty.[104] A female under sixteen years of age cannot be taken away from the custody of her lawful guardian without the consent of such guardian.[105] No woman could be kidnapped or abducted with a view to compelling her to marry any person against her will or be forced to illicit intercourse.[106] It is an offence for any man to induce any woman who is not lawfully married to him to believe that she is in fact married to him and to cohabit or have sexual intercourse with him.[107] Rape,[108] defilement of girls between twelve and fourteen years[109] and the procuration of women for sexual intercourse[110] have also been made offences. Acts of gross indecency between males,[111] but not between females, is an offence under the Penal Code.

Other statutes, besides the Penal Code, which contain penal provisions also do not discriminate against women. On the contrary many statutes contain provisions to safeguard and promote the interests of women. An example is the Money Lending Ordinance[112] which has made it a criminal offence for a money lender to visit the residence of a married woman and induce her to contract a loan without the written consent of the husband.[113] The rationale underlying this section was explained by the Supreme Court in the following terms:

> "These words contemplate a visit in the absence and without the knowledge of the person who is the natural protector of a wife and child, and the whole provision is evidently intended to prevent a wife or child being tempted to contract a debt."[114]

The view has been expressed that "at a time when women in Sri Lanka are successfully competing with men, in the educational, social, political and cultural spheres. the retention of such a provision could hardly be justified".[115]

Section 11

Traffic in and Prostitution of Women:

In terms of article 8 of the Declaration on the Elimination of Discrimination against Women national governments have to take all appropriate measures, including legislation, to combat all forms of traffic in women and exploitation or prostitution of women.

The Penal Code contains five provisions[116] relating to procuration. Under the Code it is an offence :

(i) to procure or attempt to procure any girl or woman under twenty-one years of age to leave Sri Lanka (whether with or without her consent) with a view to illicit sexual intercourse with any person outside Sri Lanka, or to remove or attempt to remove from Sri Lanka any such girl or woman (whether with or without her consent) for the said purpose;

(ii) to procure or attempt to procure any girl or woman to leave Sri Lanka (whether with or without her consent) with intent that she may become the inmate of, or frequent, a brothel elsewhere, or to remove or to attempt to remove from Sri Lanka any girl or woman (whether with or without her consent) for the said purpose;

(iii) to bring or attempt to bring into Sri Lanka any girl or woman under twenty-one years of age (whether with or without her consent) with a view to illicit sexual intercourse with any person, whether within or without Sri Lanka;

(iv) to procure or attempt to procure any girl or woman (whether with or without her consent) to become, within or without Sri Lanka, a common prostitute;

(v) to procure or attempt to procure any girl or woman (whether with or without her consent) to leave her usual place of abode in Sri Lanka (such place not being a brothel), with intent that she may for the purposes of

prostitution become the inmate of, or frequent, a brothel within or without Sri Lanka.

The Code provides for a maximum sentence of two years for offenders. If the offender is a male the court could order that he be whipped.

The first statute having a bearing on prostitution was enacted as far back as 1842. The Vagrants Ordinance[117] made prostitution an offence if done in particular circumstances e.g., in public streets, highways, public places etc. The Court has the power to order any parent or guardian of a girl over the age of sixteen years[118] to execute a bond for the exercise of due care and supervision in respect of the girl if there is evidence that with the knowledge of the parent or guardian she is "exposed to the risk of seduction or prostitution, or of being unlawfully carnally known, or is living a life of prostitution".[119] The Brothels Ordinance[120] is designed to suppress brothels.[121] The Children and Young Persons Ordinance[122] imposes a duty on persons having the custody of young persons under the age of sixteen years to ensure that they do not reside in or frequent brothels.

Section 12

Educational Opportunities:

Article 9 of the Convention deals with the right to educational opportunities in the following terms:

"All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels, and in particular:

(a) Equal conditions of access to, and study in, educational institutions of all types, including universities and vocational, technical and professional schools;

(b) The same choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are coeducational or not;

(c) Equal opportunities to benefit from scholarships and other study grants;

(d) Equal opportunities for access to programmes of continuing education, including adult literacy programmes;

(e) Access to education and information to help in ensuring the health and well-being of families.

The sisterhood of nuns was established in 307 B.C. and according to certain Buddhist writers women appear to have been sufficiently literate enough to read and write. Historical records also indicate that during the reign of Kandyan Kings women have been taught sciences such as astrology and medicine. During the Dutch period attempts were made to make education facilities available to women but these attempts had not met with such success.[123] The British period witnessed a rapid expansion in female education though this was a process which took time. For instance, in the early years of British rule a Joy Tax (tax on the wearing of ornaments by females) was imposed as a revenue measure but it acted as a deterrent to the promotion of the education of females as many parents were reluctant to send girls to school without jewellery.[124] The Director of Public Instruction stated in his Administration Report for 1903 that:

> "It may be inferred that 25 per cent of the female population of this country get something in the way of education. . . It would be unwise at present to attempt to carry out any wholesale measure for compulsory female education. It is one of the things to which the Oriental mind requires to be habituated gradually; when the villagers have seen voluntary girls' schools at work for semetime, and good instead of harm resulting from them, they become anxious to have girls' schools in every village".[125]

The demand for the expansion in educational facilities for women was not confined to only Colombo and the other big cities. As the Census Report of 1911 pointed out "everywhere there are signs of the demand for female education". It is of

interest to note here what a chief headman in the Kurunegala District had to say about female education:

> "In olden days girls were taught only to read, but not to write. This I presume is to prevent them from writing love letters. I think this is a mistake. At present they marry in haste and in some cases they are in a hurry to get a divorce".[126]

A comparison of literacy rates among males and females indicates that over the last ten decades a large number of females have become literate. The following table sets out the percentage of literacy by sex at the various censuses :

TABLE VII

Percentage of Literacy in Sri Lanka 1881—1971

Census Year	*Percentage of Literates*		
	Both Sexes	*Males*	*Females*
1881	17.4	29.8	3.1
1891	21.7	36.1	5.3
1901	26.4	42.0	8.5
1911	31.0	47.2	12.5
1921	39.9	56.4	21.2
1946	57.8	70.1	43.8
1953	65.4	75.9	53.6
1963	71.6	79.3	63.2
1971	78.1	85.2	70.7

Source: *The Population of Sri Lanka*, 1974 p. 54.

Statistics regarding enrolment by grades and curriculum streams show that there is no imbalance between the sexes in the enrolment rates.

TABLE VIII

Enrolment by Grades and Curriculum Streams 1975

Grades	*Percentage of Girls*
1 — 9	48.5
10 — 12	52.1
1 — 12	48.6
10 — 12 (Arts)	57.1
10 — 12 (Science)	44.7
10 — 12 (Commerce)	49.7

Source: *Women of Sri Lanka*, 1975, p. 51.

An analysis of the education level of the population of Sri Lanka in 1970 showed that more then 75 per cent of female had received some kind of formal education.

TABLE IX

Education Level of Population 1970

Level of Education	*Male*	*Female*	*Total*
No Schooling	11.6	23.4	17.5
Primary	47.9	41.3	44.6
Middle	32.4	28.4	30.6
G.C.E. (O.L.)	7.1	6.1	6.6
G.C.E. (A.L.)	1.0	0.8	0.9

Source : Jayaweera, S., "Education and Employment", *Economic Review*, Vol: 2(6), 1976, p. 6.

The most phenomenal development in enrolment has taken place in the sphere of university and higher education. In 1942 only about 10 per cent of the students in the universities were females. By 1972, due to the expansion of the free education system, the introduction of Sinhala and Tamil as the media of instruction and the gradual disappearance of social disapproval

of females receiving higher education, the percentage of females receiving university education had increased to 42.2 per cent. In some faculties, such as medicine and dentistry, nearly half the students are females.

High literacy rates and education levels among females in Sri Lanka have certain demographic implications.[127] Women with some educational background are more likely to be in a position to make rational decisions regarding the number and spacing of children than those who do not have any educational background. The following table based on information collected at the 1953 Census of Sri Lanka from a one per cent sample tabulation of the data shows that the average number of children per every married woman decreases according to the level of education of the mother.

TABLE X

Level and Type of Education	*Average Number of Children per every Married Woman*
Illiterate	6.7
Standard 1 — 3	6.5
Standard 4 — 7	6.0
Junior and Senior	5.5
Intermediate and Higher	3.9

Source: Kumaraswamy, S., *Fertility Trends in Ceylon: 1953 Census*, table 15 and 16.

A more detailed analysis (vide Table XI) has been attempted of the 1971 census using a ten per cent sample tabulation and these figures also substantiate the results set out in Table X.

In 1975 a Committee of the UNESCO National Commission for Sri Lanka conducted a study on "Educational Opportunities and Employment Opportunities Open to Women in Sri Lanka". The Report dealt with aspects such as technical and vocational

TABLE XI

Number of Live-Births Borne By Every Married Woman According to Age and Educational Attainment and Fertility Indices Considering Live-Births Borne By Women with no Schooling as Equivalent to 100

Age Group	No Schooling	Grade (1—4)	Grade (5—9)	Passed G.C.E. (O.L.)	Passed G.C.E. (A.L.) and over
		Live Births per Every Married Woman			
15—19	9.633	0.624	0.534	0.380	—
20—24	1.681	1.634	1.365	0.942	0.519
25—29	3.100	3.077	2.480	1.580	0.940
30—34	4.463	4.426	3.665	2.415	1.859
35—39	5.706	5.450	4.593	3.221	2.561
40—44	6.035	5.687	5.080	3.594	3.099
45—49	5.973	5.758	5.084	4.094	3.240
		Indices			
15—19	100	98.6	84.4	60.0	—
20—24	100	97.2	81.2	56:0	30.0
25—29	100	99.3	80.0	51.0	30.3
30—34	100	99.2	82.1	54.1	41.7
35—39	100	95.5	80.5	56.4	44.9
40—44	100	94.2	84.2	59.6	51.4
45—49	100	96.4	85.1	68.5	54.2

Source: *The Population of Sri Lanka*, 1974, p. 22.

educational facilities within the educational system now available to women; current education and training facilities outside the system; employment opportunities; relationship between education and training opportunities and employment opportunities; and future trends and projections. The conclusions of

the Committee on the present situation and the future are worth quoting at length:

(*a*) *The Present* :

"Women in Sri Lanka have benefited greatly by the policies implemented in recent years with regard to education, health and welfare and have extended their educational and economic activities into new and stimulating fields of action. The present situation with regard to the training and employment of women, however, reflects also the general economic impasse in the country caused by an undiversified economy precariously dependent on the vagaries of the world market and a foreign exchange crisis of great magnitude. An imbalance between employment and educational opportunities created by the slow growth of the economy and the unplanned expansion of the education system over the past two decades have led to unemployment specially educated unemployment, and a shortage of skills in productive occupations.

Cumulatively, therefore, more women are employed than ever before; more woman are breaking into new fields, but about a quarter of the female labour force is unemployed; and rising educational levels and spiralling cost of living impel more women to seek employment. The frustrations and tensions evident among unemployed youth affect the younger generation of women who feel they have been deprived of their legitimate place in the socio-economic structure."

(*b*) *The Future:*

"Equal access to education has already been ensured to women. Adequate vocational training facilities for those intending to seek employment; access to employment in areas where physical and practical circumstances permit it; and equal promotional facilities and satisfactory working conditions are desirable goals.

The many variables that affect women's "employment behaviour", however, make any quantitative assessment and qualitative judgments both difficult and futile. While some

measures directed towards removing barriers to training and employment (could be) suggested it has also to be noted that factors relating to women's employment do not operate in a vacuum. Two major obstacles to present and perhaps future access, for instance, arise from the pressures of the economic situation and from the social matrix.

If Sri Lanka had full employment, women could have availed themselves of expanding vocational opportunities and made rapid and continuous progress in social and economic life. But in view of the volume of unemployment in the country, the problem of women's employment is likely to be considered as a matter of secondary importance in comparison with the "prior" claims of unemployed men. The fact that women are also human resources, forming nearly half the "human capital" in the country which could be utilized for development purposes tends to be overlooked. Social values and attitudes also create lags which can be reduced most effectively, by long term policies such as universal education and literacy. A literacy rate of over 70 per cent among women may be considered "advanced" for a developing economy but it is still a long way from universal literacy.

Continuing research based on empirical data and reliable statistics are necessary to evaluate the situation relating to women's employment in changing perpectives and circumstances. Presently three areas of conflict are visible underneath the institutional superstructure, viz., conflict between:

(i) traditional values and modernization; particularly the task of selecting the elements of the traditional culture that are worthy of preservation and that would help to re-integrate a society that must necessarily adapt to change;

(ii) aspirations and opportunities—the need for personal adjustment as well as the social problems connected with the status and reward structure; and

(iii) the demands of home and employment, and the problem of reconciling these two areas of life satisfactorily.

It should be said that in particular that the concept of family life in Sri Lanka and the importance attached by women to home and children above all other considerations is a valuable heritage which will help to encourage stability in a changing social order. But women also find fulfilment in vocations for which they have special attitudes and skills, and have often also to seek employment as the "bread winner" in the face of economic stress or personal loss.
Adequate training and employment opportunities enable them to function effectively in these multiple roles and will further provide them with an opportunity of participating creatively as agents of development in a society in transition".

Section 13

Right to Employment

Article 10 of the Declaration on the Elimination of Discrimination against women states as follows:

1. All appropriate measures shall be taken to ensure to women, married or unmarried, equal rights with men in the field of economic and social life, and in particular:

   (a) The right, without discrimination on grounds of marital status or any other grounds, to receive vocational training, to work, to free choice of profession and employment, and to professional and vocational advancement;

   (b) The right to equal remuneration with men and to equality of treatment in respect of work of equal value;

   (c) The right to leave with pay, retirement privileges and provision for security in respect of unemployment, sickness, old age or other incapacity to work;

   (d) The right to receive family allowances on equal terms with men.

2. In order to prevent discrimination against women on account of marriage or maternity and to ensure their effective right

to work, measures shall be taken to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment, and to provide the necessary social services, including child-care facilities.

3. Measures taken to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory.

The Constitution of the Republic of Sri Lanka of 1972 provided that no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like shall be discriminated against in respect of such appointment on the ground of sex.[128] However, this was subject to the proviso that "in the interests of such services, specified posts or classes of posts may be reserved for members of either sex". Under this proviso a ceiling was imposed on the number of women who could be recruited to the Sri Lanka Administrative Service and the General Clerical Service. The Constitution of 1978, however, does not contain any provision in terms of which a ceiling could be imposed. The following table sets out the number and percentage of male and female employees in state services.

Though the number of female employees in State Service is limited yet there are a number of occupations in which the majority are women. Among these occupations are the following[129] :

(i) nursing and midwives (94% over the last ten years);

(ii) plantation labour—plucking tea leaves, stripping tobacco leaves (over 90%);

(iii) weaving and spinning in the handloom and powerloom industries, and since 1963, garment industries (75% approximately);

(iv) packing and labelling, and since 1963 assembly work in industries and beedi manufacture (60% approximately);

(v) teaching (48% in 1963 and 54% in 1972).

TABLE XII

Male and Female Employees in State Services

Category	MALE		FEMALE		
	Total	Percentage	Total	Percentage	
Administrative, Professional and Technical Grades	7,025	86.5	1,079	13.5	100
Middle Grades*	74,308	78.1	20,595	21.5	100
School Teachers	49,831	47.7	53,928	52.3	100
Minor Employees	48,430	92.4	3,985	7.6	100
Labour Grades	60,084	92.7	4,717	7.3	100
Unspecified	758	76.4	227	23.6	100
Total	240,436	73.9	84,531	26.1	100
					324967

*Includes clerical, non-staff technical, stenographers, typists, storekeepers.

Source : *Women of Sri Lanka*, 1975, p.69

(vi) rubber cultivation
(vii) agricultural farm work
(viii) telephone operators
} 30%—40%

(ix) stenographers and typists

(x) doctors and medical technicians (5% in 1963)
(xi) coconut cultivation—manufacture of coir and other fibres
} 30%—40%

At the same time there are also many types of occupations where the number of women employed is even less than 10 per cent. Such occupations are the following:

(i) technicians, draughtsmen, technologists, engineers.
(ii) high level government and management executives.

(iii) police service.

(iv) artists.

(v) banks, insurances.

(iv) manufacture of wood, furniture, leather, paper, cement, fabricated metal work products, sugar, transport, equipment.

(vii) construction.

(viii) machanist, plumber, welder, electrician.

(ix) service in hotels, restaurants, cafes.

(x) hairdressers, caretakers, cleaners, labourers.

In 1963 no women were employed as—

(i) architects, engineers, surveyors, veterinarians.

(ii) in the armed services, as ships' pilots, air pilots, barge crews, navigators.

(iii) railway firemen, engine drivers, guards, brakesmen, road transport drivers, bus conductors.

But it is very likely that during the last few years a limited number of women would have secured employment in some of these spheres. In fact by 1975 the situation has completely changed in respect of certain types of employment e.g., the percentage of female medical practitioners had increased to 35.3. The number of female Attorneys-at-Law between the period 1932 to 1975 was 6.5 per cent but during the last two years about half of those enrolled by the Supreme Court as Attorneys-at-Law[130] are females.

In many occupations men and women receive the same wages, but there are some occupations with a large number of women, in which there is discrimination in wage rates. [131] In 1980, for instance, the following daily wage rates were operative:

TABLE XIII

Trade	Male	Female
Tea growing and manufacturing	13.16	10.85
Rubber growing and manufacturing	13.40	11.25
Coconut	13.41	11.09
Coconut manufacturing	11.69	10.10
Cocoa, Cardamom, Pepper, growing and manufacturing	10.55	8.33

Source : *Labour Gazette*, January—June 1980.

A recent study on "Education and Employment" has identified certain current socio-economic developments and policies that have led to the emergence of new programmes which may help towards integrating women into the economic structure.[132] Four examples which indicate this trend are the following:

1. The National Apprenticeship Scheme was organized in 1972/73 to provide vocational training in trades for secondary school leavers with the co-operation and voluntary participation of employers. In its first year only 5 per cent of the applicants were girls and three fourths of them applied to be trained as weavers and as fitters in the weaving industry. The number of persons interested in other trades were small but even they were rejected by employers who had definite views as to the areas in which girls should be employed.

   The situation today is more encouraging and the National Apprenticeship Board seems to be consciously attempting to overcome those cultural barriers. While only ten of the eighty six trades on the Board's list have any women apprentices, and while half the women apprentices are in the field of textile printing, it is heartening to note that women have entered the printing trade (hitherto a male preserve) as compositors and book-binders, and more women than men have been placed in radio mechanics (another male preserve).

2. The Ministry of Education is engaged in organizing short-term "job-entry" courses for General Certificate of Education (Ordinary Level) school leavers since approximately 80 per cent of school children do not proceed beyond this stage in the education system. These courses are conducted in schools and although the sex-based diversification of courses persists in the policy of reserving electrical wiring, car repairs, printing and sugarcane cultivation for boys, and sewing and lace making for girls, women have ventured into two new areas—radio and the leather industry.

3. In the field of agriculture too, recent land reforms have been accompanied by the establishment of youth settlement schemes in which women are active participants. It is estimated that 35 per cent of the youth in the Janawasas of the National Youth Service Council and the Land Reform Commission are women who work on either mixed farms or on women's farms.

4. A fair proportion of women (i.e., youth between 18-35 years) are also involved in the projects of the Divisional Development Councils especially in garment manufacture, cottage craft industries, sand mining and in agriculture projects.

The Maternity Benefits Ordinance,[133] the Medical Benefits Ordinance[134] and the Shop and Office Employees Regulation of Employment and Remuneration) Act[135] contain a number of statutory provisions designed to enable pregnant employees to get leave and other benefits before and after confinement. Under the Maternity Benefits Ordinance a female employee is entitled to a cash benefit for a period of two weeks before and four weeks after her confinement.[136] The Medical Wants Ordinance requires employers to provide rice rations or money for female employees during the period of confinement. The Maternity Benefits Ordinance provides for the establishment of creches where working mothers could keep their children during working hours. These laws contain certain restrictions on the termination of services of female employees who are in a state of pregnancy. No employer is entitled to contract out of these statutory obligations relating to meternity

benefits. It is significant to note that a female employee is entitled to these generous benefits irrespective of the number of pergnancies she may have had. In 1971 the UN Inter-Agency Team on Employment Opportunities pointed out "the liability of the employer for paid maternity leave is a cause of discrimination against female labour, particularly married women. Given the volume of unemployment in Sri Lanka, however, it is questionable whether this is on balance socially damaging."[137] According to a recent research study working women prefer a no-baby bonus scheme beyond their second or third child.[138]

Section 14

Conclusions:

This survey of the legal and demographic dimensions of the status of women in Sri Lanka indicates that while within the legal framework there is hardly any significant discrimination (with the exception of a few instances), no coherent legislative policy has been formulated as yet to integrate women into the development process so as to improve the quality of life both at the micro-level of the family unit and at the macro-level of the community or nation.

Studies done in many countries have clearly indicated that an improvement in the status of women results in low fertility behaviour among such women. Women in Sri Lanka have gradually come to enjoy equal educational opportunities, and the unrestricted right to social, economic and political emancipation. But despite these changes in the status of women there has been no appreciable decline in fertility rates. Improvements in the status of women are unlikely to have any direct impact on fertility rates unless women, especially those who are married and those who are about to get married, are aware of the need, and have the access to the means, to regulate the number and spacing of children. A woman must be in a position to communicate to the husband her own views on the number of children desirable for the family from a long term point of view. Unless the necessary attitudinal and behavioural changes take place,

improvements in the status of women in the sense of providing them with more opportunities for educational advancement, employment mobility and for social and political emancipation will not guarantee the desired result of lowering fertility rates. Social, economic and political emancipation would not mean anything to a society if every high birth rates persist without a corresponding increase in the availability of employment, food, clothing and shelter. What needs to be accorded priority is the formulation of socio-economic and educational strategies which would provide women with a sound cognitive and attitudinal basis that would contribute to rational decision-making in so for as family planning and other matters which affect the quality of life are concerned.[139] Legal changes, except in the limited areas of liberalising the provisions relating to abortion and increasing the age of marriage,[140] cannot guarantee any far-reaching changes in fertility behaviour. In the ultimate analysis it is clear that law is only one of those inputs in a mix of policies which contribute to significant changes in the role of women in the development process.

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difficulties in the admission of children to schools. They seldom raised communal slogans. The most effective *peramuna* was that of the CP, which provided instruction classes to the members of its graduates' union. Large numbers of women attend the *kantha peramuna* meetings; they made a especial impact in the Colombo Constituencies.

The United National Party too had a string of *kantha Samithiyas* and *kantha balamandalayas* (women's organisations) working for it. It had the support of the powerful Lanka Mahila Samitiya, a middle-class women's organisation with branches throughout the country. Although this organisation did not officially canvass against the UF, most of its office bearers were well known for their UNP sympathies. Its president in fact actively campaigned for the UNP". (Wilson, A.J., *Electoral Politics in an Emergent State*: *The Ceylon General Election of May 1970*, 1975, pp. 90-91). See also Jayasuriya, D.C., "The Few and the Many: Status of Women in Sri Lanka", *People*, Vol. 7(3), 1980, p. 20.

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118. Section 25(a).

119. Section 12(1).

120. Ordinance No. 5 of 1889 (Cap. 31 of the LEC).

121. In the recent case of *Dorothy Silva* v. *Inspector of Police*, (1977) 78 NLR 554 the Supreme Court had occasion to consider the definition of the term "brothel" in the Brothels Ordinance. Justice Pathirana in the course of his judgment stated as follows: "While a "brothel" for the purposes of the Brothels Ordinance is certainly what the word is understood in common parlance, namely, a place where persons of both sexes resort to for the purpose of prostitution in the place itself, in my view, it also means a place where arrangements are made whereby women living at the premises or elsewhere are supplied for the purpose of prostitution, that is to commit acts of indecency or sexual intercourse either at the premises itself or elsewhere. If the definition is restricted to what is understood in common parlance only it would give the green light to houses of ill-fame to mushroom and proliferate like hawkers' sheds using the method adopted in the present case where girls are openly offered at one place for prostitution or for sexual intercourse or acts of indecency to be committed elsewhere. Such a construction of the word 'brothel' would fail to achieve the manifest purpose of the legislation and reduce the legislation to futility. The wider consideration I have put on the word

would bring about the effective result aimed at by the legislation, namely the suppression of prostitution, by suppressing "subtle inventions and evasions for the continuance of the mischief" by adding "force and life to the cure and the remedy according to the true intent" of the Brothels Ordinance. This construction, to borrow the words of Schneider A.J., keeps abrest "with local ideas and conditions" and "renders the Ordinance more effective in its operation" to meet newer and subtle methods calculated to circumvent the Ordinance".

122. Ordinance No. 48 of 1939 (Cap. 23 of the LEC).

123. Op. cit., note 73, pp. 424-425.

124. Jayasuriya, J.E., *Educational Policies and Progress during British Rule in Ceylon*, 1977, p. 41.

125. Op. cit., note 73, p. 424.

126. *ibid.*, p. 426.

127. See further Jayasuriya, D.C., "Population Implications of Laws and Regulations pertaining to Education in Sri Lanka", *Report of the National Seminar on Law and Population in Sri Lanka*, 1974 and Wijemanne, E.L., "Population Growth and Educational Development", *Population of Sri Lanka* (ESCAP), 1977, pp. 208-233.

128. Section 18(1) (h).

129. *Women in Sri Lanka*, 1975, pp. 61-63.

130. At one stage there was some doubt as to whether females could be enrolled as Advocates or Attorneys-at-Law and to clear these doubts the Six Disqualification Removal (Legal Profession) Ordinance No. 25 of 1933 (Cap. 65) was enacted.

131. See further Jayawardena, K., "Women and Employment", *Economic Review*, Vol. 2(6), 1976, pp. 14-15 and Mathew, Betsy "Working Women on Estates", *Economic Review*, Vol. 6 (10 & 11), 1981, pp. 5-7.

132. See further Jayaweera, S., "Education and Employment" *Economic Review*, Vol. 2(6), 1976, pp. 6-7.

133. Ordinance No. 32 of 1939 (Cap. 140).

134. Ordinance No. 9 of 1912 (Cap. 226).

135. Act No. 19 of 1954 (Cap. 129).

136. It is of interest to note that in 1949 an attempt was made by Dr N.M. Perera, in the House of Representatives, to pass a resolution to the effect that "in the opinion of this House all expectant mothers in employment should be granted six weeks' leave with full pay before child-birth, and six weeks with full pay after child-birth". In seconding this resolution, Mrs Florence Senanayake stated that

"the efficiency of a Government can be measured by the importance that is attached by it to the care of the young children" (*Hansard*, 30 March 1949, Cols : 2136 and 2137). The resolution was, however, not accepted.

137. *Matching Employment Opportunities and Expectations* : *A Programme of Action for Ceylon* (Technical Papers), 1971, p. 82.

138. Jayasuriya, D.C., R.K. de S. Sarathchandra and T.M.S. Tennekoon "Legislation on Maternity Benefits : A Study of Population Implications and Attitudes to Law Reform", *Population Law Research Papers*, No. 1, 1978.

139. See further Jayasuriya, D.C., "Beyond Family Planning", *Seminar on Women, Home and the Community*, 1975, p. 4.

140. On the relationship between population change on the one hand and liberalization of abortion laws and increase in the age of marriage, on the other, see Jayasuriya, D.C., *Legal Dimensions of Population Dynamics* : *Perspectives from Asian Countries*, 1979, pp. 30-66 and pp. 120-124.

3

CONSUMER PROTECTION : LOOKING BEYOND 'BRAS AND THOSAI'

Section 1

What is Consumer Protection ?

It was not so long ago that 'Contact' who writes the item 'Roundabout' in the *Sunday Observer*[1] turned his attention to brassieres and thosai. This is what he had to say:

Of Bras and Thosai

"Some years ago when brassieres were banned and Lankan lasses were squirming and protesting about local bras, the Bureau of Standards standarised it.

We remember one of those bright young technocrats explaining to us on how the elasticity of the strap, the texture of the lining, padding, etc., would be specified. We don't know what happened to the Lankan standard brassiere with inflation, introduction of the free economy, and imported bras. But our point is that if an imponderable, undefinable thing such as the bra could be standardised, why not a cup of tea, a thosai, stringhopper and the like ?

We pose this question as the price of a cup of tea has gone up as much as 15 to 20 cts. in the Fort cafes after a price hike of 60 cts. a pound of sugar last week. Even a child could point out to the super-profits that are being raked in if he knows how many cups of tea could be made from one pound of sugar.

> This is not a new phenomenon. Each time sugar, flour, petrol or some essential commodity goes up say by 5 cts. the profit margin made by some hoteliers, caterers etc., reaches astronomical heights.
> Can't the Consumer Protection Chief Mr M. Ramalingam, tap the think tanks like the CISIR and research departments of universities to standardise these foods essential to the life of the communtity ? We quite often speak in adulatory terms of those Phds from Imperial College, Cambridge etc. Why not use their talents in this direction ? Many US firms have standardised their hamburgers, we are told. Why not a cup of tea and the thosai ?"

Consumer protection is more than determining the size of a cup of tea, the weight or dimensions of a thosai; or the colour or texture of a brassiere. As pointed out by Anwar Fazal, the President of the International Organisation of Consumers Union:

> "today many consumer organisations approach consumer problems as problems concerning the conscience, as problems concerning social justice, as problems concerning human rights, as problems concerning survival".[2]

The 'rights' to which consumer organisations address themselves have been classified as—

> *Firstly*, the right to safety, to be protected from hazardous goods.
> *Secondly*, the right to information, the right not to be misled by lack of information or misinformation.
> *Thirdly*, the right to basic services, fair prices and choice—to have access to a variety of products and services, and where monopoly prevails a minimum guaranteed quality at reasonable prices.
> *Fourthly*, the right to representation, to be consulted and to be involved in decisions affecting the consumer.
> *Fifthly*, the right to redress, to have access to a complaint machinery and fair and speedy compensation procedures.

Sixthly, the right to consumer education, life-long consumer education; and
Seventhly, and one that is of increasing concern, the right to a healthy and safe environment.

If consumer protection is viewed from a broader and functional perspective rather than from the traditional approach that has been adopted so far, it would be possible to articulate certain other 'rights' which too have a bearing on the day-to-day life of consumers and on the attainment of a high quality of life. Among those rights which could be articulated are—

Firstly, the right to comfort;
Secondly, the right to privacy; and
Thirdly, the right to an adequate and reasonable standard of living.

The right to 'comfort' envisages not merely physical comfort but also being free from onerous duties which may be cast upon an individual by the State or by any similar entity. The right to 'privacy' would cover a wide spectrum of social and economic attributes and activities. How relevant is it, for instance, to require a prospective traveller who applies to a Bank for the purchase of travellers cheques to disclose his monthly income ? Could a consumer of contraceptives be asked to disclose his age or marital status ? These are some of the issues relating to privacy which are now emerging and which have to be satisfactorily resolved to accommodate the consumer perspective. The right to an adequate and reasonable standard of living is growing in importance not only in Third World countries but also elsewhere. Isn't there a right to be able to purchase food of a high nutritional value at low-cost or for that matter food which is not contaminated ? Similarly, cannot a consumer who is called upon or 'pressurised' to pay a water tax or electricity tax expect to have an uninterrupted supply of water or electricity ? There is no doubt that as the consumer movement gathers momentum in the '80s, these rights will become more recognised and entrenched.

The expression 'Consumer Protection' covers all those measures taken by the State and individuals, either individually or collectively, to safeguard and advance the 'rights' of consumers and that of the economy. These measures may be legal, educational, social, economic or even cultural.

Section 2

Genesis and Scope of Consumer Protection Laws :

There is no society and there is no generation which did not face many of the problems faced by the consumer of today. The only difference however is that many problems have become complex, grown in intensity and assumed greater significance with the passage of time. Some problems have totally disappeared while others still linger around casting an ominous shadow on the well-being and happiness of the people of this world and of generations yet to be born. Every society has had its own control mechanisms and sanctions to provide relief or protection to consumers. It has been said that—

> "the Hittites of Anatolia now in Turkey, a civilization 3,500 years ago had a consumer code of sorts on food matters. The code said 'Thou shalt not poison thy neighbour's fat' meaning food should be safe and wholesome. The code also said 'Thou shalt not bewitch thy neighbour's fat' meaning 'you should not mislead or cheat'. There is also a theory that the Roman Empire collapsed because of lead poisoning arising from the use of lead pipes for their water supply system. There are reports that bakers who cheated in the Middle Ages were put in cages and completely immersed in water and taken out when they were on the point of drowning."[3]

Several countries have had for many centuries statutory enactments designed to protect consumers. In England, for instance, a statute of 1709 required bakers to mark loaves of bread with the size and quality. Sri Lanka too has a long history of legislative intervention for the protection of consumers.

Among the more ancient regulatory provisions in this country enacted to protect consumers are the following:

1. Proclamation of 18th December 1798—"Whereas it has been represented to us that the price of various articles of Provisions has risen to an exorbitant rate, highly oppressive to the inhabitants of this Colony, and occasioned in a great measure by the speculation of individuals. We have thought it necessarry to prohibit until further orders the Exportation of Coconut, Copra and Coconut oil . . ."

2. Proclamation of 1st April 1800—"Whereas it is our wish that the contributions necessary for the maintenance of the State should fall as lightly as possible on the People of these settlements or be levied rather upon luxuries, than upon the necessaries of Life, we have determined to farm out a Tax on Joys and Ornaments on the following conditions . . ."

3. Regulation No. 2 of 1818—"For the prevention of smuggling or other frauds" this Regulation made it an offence punishable with fine and imprisonment, to manufacture salt in any place which has not been approved by the Government.

4. Regulation No. 21 of 1813—With a view "to restraining the practice of stealing the Salt belonging to the Government from the Lewayas in which it is manufactured (and to give) every encouragement to persons giving information so as to detect the offenders" this Regulation provided for the forfeiture of all cattle and carriages employed in stealing or conveying stolen salt and for the imposition of any fine, imprisonment or corporal punishment. Rewards for informants consisted of half the value of all cattle and carriages and part of the value of the salt recovered.

5. Regulation No. 3 of 1814—With a view to preventing the stealing and privately killing of cattle which had resulted in 'the great loss of individuals and injury of husbandry" this Regulation required prior notice to be given to the

Magistrate before any cattle were slaughtered. Any person who cannot satisfactorily explain the possession of any beef by proving that notice of killing was given was liable to theft even though no owner complained or claimed the property.

Every Butcher had to have a licence and send a weekly return of the description of the cattle slaughtered by him together with the name and address of the person from whom such cattle were purchased or obtained.

6. Regulation No. 3 of 1816—"Whereas it is conducive to the public advantage that the measures in use should be regulated by a fixed standard easily obtained and generally understood" various standards of measurement were stipulated.

7. Regulation No. 5 of 1820 provided for a tax to be levied on owners and occupiers of buildings in Colombo Fort and for such tax to be used "for the purpose of keeping the roads in good repair, and providing lights therein".

8. Regulation No. 2 of 1822 imposed a tax on trees that were felled. A licence had to be obtained for the felling of timber in Government Forests or private lands.

9. Regulation No. 2 of 1824—"Whereas it appears by information conveyed to Government that at several periods at.....death has been the consequence to several persons from eating the fish called Sardine during the months of January and December" this Regulation prohibited the catching of this variety of fish in January and December.

10. Regulation No. 11 of 1824—"Whereas it is necessary to prevent frauds on the public from altering or falsifying the current coin of this Island by the making of Copper coin so as to resemble Silver or of Silver Coin so as to resemble Gold or by the uttering of any such altered or falsified coin . . ."

11. Proclamation of 1 February 1825 prohibited the

construction of any houses or buildings which have a roof of thatch, leaves, straw, grass in order to prevent fires.

12. Regulation No. 14 of 1824—"Whereas a fraudulent practice prevails in this Island, of wetting Coffee grown therein previously to selling the same to merchants, which practice has been proved highly injurious, not only to individuals . . . of the exporting merchant, but to the general prosperity of the Island, by debasing the quality and injuring the character of its exportable produce . . ."

Most of these proclamations and regulations were in operation only for a limited period of time and lapsed thereafter.

In modern times, until the enactment of the Consumer Protection Act in 1978, there were several separate statutory provisions in Sri Lanka designed for the protection of consumers.[5]

The history of the legislation dealing with consumer protection Act in Sri Lanka starts with the year 1863. In that year the Nuisances Ordinance[6] was enacted to provide for the better preservation of public health and the suppression of nuisances. The sale or exposure for sale of food and drink which have become noxious or unfit for consumption was declared an offence under this Ordinance. This was followed in 1865 by the Bread Ordinance[7] which was enacted for the purpose of ensuring the sale of bread of the correct weight and to prevent the adulteration of bread offered for sale. The Ordinance contained penal sanctions for contravention of its provisions. An interesting feature of this Ordinance is that it required the Minister to be kept informed of every conviction so that he could "cause the offenders' names, places of abode and the offences to be published in the towns or places where the offences were committed in such manner as to secure the greatest publicity thereto."[8] Provision was also made empowering courts of law to recover the costs of such publications. This Ordinance is still operative though recourse is no longer had to the provision regarding publicity.

The following is a brief survey of the other significant statutory provisions designed to protect consumers:

1. The Food and Drugs Act[9]: Until its repeal in 1980 it contained elaborate provisions for the regulation and control of the importation, sale and distribution of food and drugs. This Act was enacted in 1950. During the course of the debate on the bill one Member of Parliament remarked that "there has been all sorts of muck, if you will permit the use of the word, labelled under the name of drugs in this country".[10] Another Member said that all manner of drugs which could cure in one day every conceivable illness that a man has are being foisted upon the public under various names.[11] The Act contained provisions regarding the sale of adulterated or impoverished foods; sampling of milk and other products; labelling and handling of food; preparation and storage of food; conditions to be observed in manufacturing certain products and the use of certain ingredients; notification of cases of food poisoning etc. A large number of regulations were enacted under this Act. The regulations specified, *inter alia*, requirements to be observed in labelling and advertising.

2. *Control of Prices Act*:[12] The control of the price of commodities and the requisition of certain articles other than articles of food or drink are regulated by this Act. The Controller of Prices, if he thinks that there is likely to be any shortage of any article or any unreasonable increase in the price of any article, could fix the maximum price above which that article should not be sold. He could also prescribe the conditions for the sale of that article including conditions as to the time and place of the sale and its quality and quantity. The sale of certain types of drugs without a prescription has been prohibited under the Act. The Controller by paying compensation could requisition any article, other than any article of food and drink, in order to secure its sufficiency or its equitable distribution or its availability at a fair price. Some of the provisions in

this Act were modified by the National Prices Commission Law.[13]

3. *The Food Control (Possession) Act :*[14] This Act was enacted in 1956 and it empowers the Food Controller to restrict the possession of certain articles of food by producers, wholsale dealers, retail dealers and consumers.

4. *The Penal Code:*[15] The Code has declared as offences the sale of noxious and adulterated drinks, food and/or drugs. The sale of any drug as a different drug or preparation is also an offence.

5. *The Poisons, Opium and Dangerous Drugs Ordinance :*[16] This Ordinance consolidated the law relating to poisons, opium and dangerous drugs. Certain requirements have to be observed regarding the storage, use, supply and sale of opium, poisons and dangerous, drugs. Many of its provisions are anachronistic. In December 1980 a Committee headed by the present writer drafted a bill to replace this Ordinance.

6. *Weights and Measures Ordinance:*[17] The inspection, stamping and verification of weights and measures are governed by this Ordinance. The Penal Code too has made it an offence to fraudulently use false weights or measures or false instruments.

7. *Merchandise Marks Ordinance:*[18] This was enacted in 1889 to prevent fraudulent marks on merchandise. Under this Ordinance it was an offence to forge trade marks, apply false trade description to goods etc. Provisions relating to infringement for trade marks were also contained in the Trade Marks Ordinance of 1927.[19] Both Ordinances were repealed by the Intellectual Property Code[20] which came into operation in 1980.

8. *Credit Councils Law:*[21] This law was enacted in 1975 and it provided for the establishment of Credit Councils in all Government Departments for the purpose of granting credit to their members. The functions of these Councils are, *inter alia* :

(a) to educate and assist members to live frugally and within their means;

(b) to promote thrift and savings habits among members; and

(c) to assist in the rehabilitation of indebted members.

9. *Bureau of Ceylon Standards Act*:[22] This Act was enacted for the establishment of a Bureau of Ceylon Standards. Among the objects of the Board are (a) to promote standardisation in industry and commerce; (b) to prepare specifications and codes of practice; (c) to provide facilities for the examination and testing of commodities; (d) to encourage or undertake educational work in connection with standardisation; and (e) to assist in the rationalisation of industry by coordinating the efforts of producers and consumers for the improvement of appliances, processes, raw materials and products. No commodity which is subject to a compulsory standard specification could be sold unless it conforms to such specifications.

10. *National Prices Commission Law*:[23] In November 1975 an important Law was passed for the establishment of a National Price Commission. The Commission consists of seven members appointed by the Minister for a period of three years. The Commission at the request of the Controller of Prices or that of a manufacturer or importer or distributor or a public corporation or Government Department could fix the maximum factory wholesale or retail prices above which certain articles cannot be sold. Any Minister, whether of his own motion or on representations made to him by any person or any body of persons, could refer any question relating to the price of any article or the charge for any service to the Commission for examination and report. The Commission has the power to require manufacturers, importers and distributors of certain articles and Government Departments or Public Corporations engaged in the provision of certain services to maintain

records and to furnish to the Commission various returns. The Commission could hold inquiries necessary for the discharge of its functions and the failure to appear before it or to produce any document is punishable as an offence of contempt against or in disrespect of the authority of the Commission. On the question of fixing of or varying the prices the Commission is entitled to receive representations from persons interested in submitting their views and comments. In making any order fixing or varying the price of an article the Commission could prescribe the conditions of the sale of the article specified in such order, including conditions as to the time and place of the sale and the quantity and quality of the article to be sold. Orders made by the Commission could be rescinded or varied by the Minister.

As far as enforcement is concerned most of the statutory provisions were never enforced on a scale wide enough to have any appreciable impact. The absence of any coordinating mechanism to receive and channel consumer complaints; shortages of technical expertise, manpower and other resources to test products and check on contraventions of statutory provisions; absence of minimum standards on the quality of a number of products; shortages of consumer goods resulting in consumers being reluctant to complain about quality or any other defects or deficiencies, and ignorance on the part of consumers about the legal safeguards and legal rights—all these factors have had the cumulative effect of defeating the objectives which were sought to be achieved by these statutes which admittedly were designed to afford a greater degree of protection to consumers.

The Consumer Protection Act provides for the appointment of a Commissioner of Internal Trade. The Commissioner has the power to formulate schemes of distribution of products including the labelling, price-marking and packeting of articles. Once a price is marked on an article (defined in the Act to mean an article of food, drink or merchandise) it is an offence to sell the item above that price. The Commissioner could entertain complaints regarding the standard or specification of

any article in respect of which standards or specifications have been determined by the Commissioner or by the Bureau of Ceylon Standards.

The Act has imposed on traders numerous duties such as to display price lists and to issue receipts to purchasers. It is an offence for a trader to refuse to sell an article in his possession or to hoard any article in excess of the normal personal requirements of such trader. No trader could in the course of a trade or business engage in conduct that is misleading or deceptive. It is an offence for a trader to make false representations regarding goods and services. Exclusive dealing in any trade or business is not permitted unless the prior approval of the National Prices Commission has been obtained. Price discrimination between purchasers of goods of like grade and quality is not allowed. No trader could either by himself or with any other person exclusively control a market for goods or services by eliminating other competitors or preventing another from engaging in competitive behaviour in that or in another market. However, in the interests of the national economy, the National Prices Commission could allow a trader to have a monopoly.

Certain provisions relating to warranties are contained in the Act. According to the Act in every contract for the supply by a trader in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. The term 'services' has been given a broad interpretation to include the construction, maintenance, repair, treatment, processing, cleaning, alteration, distribution and the transportation of goods.

The Consumer Protection Act has conferred wide powers on the Minister of Trade. If the Minister is satisfied that any person has contravened any provision of the Act or any price control order or any other order the Minister could order the forfeiture of all or any of the assets of such person. However, there is a right of appeal to a court of law.

The provisions of the Consumer Protection Act apply only in respect of those articles of food, drink or merchandise as is,

in the opinion of the Commissioner, essential to the life of the community. Every such article has to be specified by the Commissioner by notification published in the Gazette. Notifications have been made in respect of a large number of articles ranging from squatting pans to electric cake mixers.

In many countries the pressure exerted by business syndicates and traders has resulted in delays in the law-making process. This is a trend which began long before the emergence of powerful multi-national firms and major business syndicates which are often considered as the main agents who could wield power. Collective action on the part of individual traders could constitute an effective break on the law-making process. The extravagantly alarmist warnings which are now heard whenever some consumer protection measure is gaining currency were heard even a century ago. For instance, when the Weights and Measures Bill was introduced in England more than one hundred years ago, a newspaper in Bristol (2 November 1878) made the following comment :[24]

> "An Act of Parliament comes into force on the first of January, which may take many by surprise, and cause no little consternation among the trading class. If strictly carried out the provisions of the Weights and Measures Act will make it one of the hardest and most vexatious statutes that has ever harassed the commercial life of England".

From the 1960s onward there has been a proliferation of legislative instruments on consumer protection in several countries in the world. In the U.K., for instance, the following main statutes deal with a wide range of matters affecting consumers:

Subject matter	Regulation
1. Inaccurate Quantities	Weights and Measures Act, 1963; Theft Act, 1968; Trade Descriptions Act, 1968; Sale of Goods Act, 1979.

2.	Prices—Maximum/ Statement of	Trade Descriptions Act, 1968; Mock Auctions Act, 1961, Prices Act, 1974; Counter-Inflations Act, 1973.
3.	Food Quality and Hygiene	Food and Drugs Act, 1955; Food and Drugs (Control of Food Premises) Act, 1976; Sale of Goods Act, 1979.
4.	False or Misleading Description	Trade Descriptions Act 1968, Trading Representations (Disabled Persons) Act 1958; Food and Drugs Act, 1955; Agriculture Act 1970; Fabricos Misdescription) Act, 1913; Misrepresentation Act, 1967; Sale of Goods Act 1979.
5.	Unsolicited (unordered) Goods and Services	Unsolicited Goods Acts, 1971 and 1975.
6.	Consumer Credit	Consumer Credit Act, 1974; Hire Purchase Act 1965.
7.	Faulty Goods/Services	Sale of Goods Act 1979; Supply of Goods (Implied Terms) Act 1973; Unfair Contract Terms Act 1977.
8.	Consumer Safety; Licensing and Labelling Dangerous Products	Consumer Protection Acts 1961 and 1971; Diseases of Animals Act 1950; Petroleum Act 1928; Explosives Acts 1875 and 1923; Poisons Act 1972; Medicines Act 1968; Farm and Garden Chemicals Act 1967.
9.	Road Safety	Road Traffic Act 1972.
10.	Insurance Policy Holders' Protection	Insurance Companies Act 1974; Policy Holders' Protection Act 1975.

11.	Trading Stamps	Trading Stamps Act 1964.
12.	Hallmarking of precious metals	Hallmarking Act 1973.
13.	Handling Stolen Goods	Theft Act 1968.
14.	Traders' Agreement and Practices	Restrictive Practices Act 1976; Resale Prices Act 1976; Fair Trading Act 1973.

Section 3

Cost-Benefit of Consumer Protection Measures:

It is easy to legislate in respect of measures designed for the protection of consumers. The problem lies in implementing or enforcing such measures. Implementation and enforcement require substantial inputs and resources, the availability of which leaves much to be desired in many Third World countries. The operational costs involved in implementing and enforcing consumer legislation have posed problem even for developed countries.

In England the Molony Committee on Consumer Protection dealt with the numerous suggestions for reform which appeared to be extravagant in terms of money cost as well as conception and stated as follows:

> "The consumer unlike some classes with claims on public bounty, is everybody all the time. The consumer is the tax payer, and we see small merit in creating an elaborate new system to assist him in one capacity when he would have to pay for it in the other. In so far as any increased cost fell on industry, recoupment from the consumer would be no less inevitable. Further, in considering bold suggestions for reshaping consumer protection arrangements it wasnecessary in our opinion, not merely to balance the money cost, but also the degree of interference with production and distribution methods, against the benefits to the consumer claimed by the proponents of reform.
>
> These factors have weighed with us in favouring more

stringent legal provisions in aid of the consumer rather than an extensive protective machinery, operating administratively at considerable cost."[25]

Harvey has pointed out that "over-regulation can kill the goose that lays the golden egg"[26] and has illustrated this point with reference to stringent fire regulations which have resulted not only in many hotels which were unable to find the capital for improvements going out of business but greater safety in fact being substituted for the choice of less safe but cheaper hotels. Attempts have been made to construct models to analyse the cost component. According to one such study:

"Where legislation is concerned, more is not necessarily better. For the total cost of corrective action is made up of at least three elements. First there is the transactional cost that the customer incurs in terms of searching time (the cost of ascertaining the quality of goods or services by the acquisition of information about them, including the resources spent in testing alternatives), inconvenience and risk; a cost which is presumably reduced as the intensity of regulation increases. But with the extension of legislation, a second cost becomes significant, that of enforcing and implementing the newly enacted orders. In turn, this spawns a third expense—that associated with the additional costs incurred by the business community in complying with all the relevant legal provisions. It would seem that in assessing any programme of consumer protection, we must consider the total of all three of these action components and seek to establish that particular balance between exploitation and over-protection that yields the minimum social cost to the community."[27]

Section 4

Towards Legal Reforms:

Subject to considerations of cost-benefit and cost-effectiveness, any government has a choice of several models to select from in order to provide greater protection to consumers. The

survey of the laws in England (vide Section 2 of this Chapter) for the protection of consumers shows the range of activities which could come under the umbrella of protection. Despite the impressive range of laws in England there is no room for complacency as much still remains to be done to regulate by law several other activities in respect of which consumers need greater protection. In Australia, for instance, there is legislation dealing with matters such as Door to Door Sales; Pyramid Sales; Book Purchasers Protection Act; Flammable Clothing; Fruit and Vegetable (Grading); Footwear Regulation; Packing and Packages; Marketing of Eggs; Second-Hand Motor Vehicles; Second-Hand Dealers; Stock Foods; Stock Medicines: Unfair Advertising; Textile Products Description, etc. England is considering the enactment of similar laws.

Some measures which would bring immediate benefits to consumers in Sri Lanka are:

(a) creation of 'Small Claims Tribunals' or a 'Consumer Ombudsman';
(b) recognition of 'class actions'; and
(c) imposition of strict liability in respect of defective products.

Small Claims Tribunals:

Tribunals have been set up in several countries including Australia, to specifically deal with claims of consumers. The experience of Hong Kong with Small Claims Tribunals is most revealing.

Small Claims Tribunals were set up in Hong Kong under the Small Claims Tribunals Ordinance of 1975. Legal claims not exceeding H.K. $ 3000 are heard by these tribunals. The following claims and disputes, however, have been specifically excluded from the jurisdiction of Small Claims Tribunals :

(a) Disputes between employers and employees over wages and salaries;
(b) Claims for the prossession of land;
(c) Tenancy disputes;

(d) Claims for alimony and maintenance;

(e) Claims by money lenders;

(f) Claims for damages for libel and slander.

Hearings before these Tribunals are conducted in an informal atmosphere. No lawyers are permitted to be present at any hearing though with the permission of the Tribunal a party may authorize another to represent him or her. An appeal lies to the Court of Appeal on a question of law or on the ground of excess of jurisdiction. Experience has shown that thousands of consumers have benefited by the availability of legal relief through this institution which is outside the formal judicial structure.

The Consumer Ombudsman is a model tried out in European countries with some degree of success.

Class Actions:

A 'Class Action' is instituted when a substantial number of consumers have similar complaints. On behalf of the members of a class, an action is instituted by one or two members. In the event of a successful judgment the defendant business becomes bound to pay damages or to grant other relief, if so ordered to do so by Court, to all the members of the class. Class actions have several distinct advantages—small claims can be aggregated; no settlement is possible without court approval; and they attract publicity. With the availability of class actions the tendency is for consumers to form themselves in to groups and for business interests to voluntarily regulate their conduct by formulating codes of practice. Class actions are common in the United States and there has been a great deal of agitation for the recognition of such actions even in other jurisdictions.

In this connection it is useful to note the warning sounded by Ross Cranston:

> "Class actions are not a universal panacea for consumers. They are only possible where there is a worthwhile claim in law and cannot be used to overcome problems of proof or deficiencies in private law doctrines. Class actions still

require consumers to take the initiative and too much should not be made of the United States experience where the society is more litigation-minded, the contingent fee system provides an incentive to lawyers to instigate legal actions and consumer groups and consumer advocates are more established and more familiar with test case strategy. Much in class actions depends on the persons who take the initiative, and there is no guarantee that their interests coincide with those of the class or that they are competent to represent the class."[28]

Consumer Protection and Liability for Defective Products

An English writer remarked in 1969 that the rise of the consumer movement is "one of the most remarkable social developments in recent history".[29] Though eleven years constitute only a microscopically insignificant period in the life span of a consumer, the last eleven years which have gone by since this remark was made, however, have witnessed the consumer movement in the United States, Europe and Australia making great and significant strides. With the recent enactment of a Consumer Protection Act[30] and the creation of administrative structures and a network of institutional mechanisms Sri Lanka is now attempting to find solutions to the problems and challenges faced by consumers in a world in which galloping cost of living and depletion of resources loom large. While some of the measures taken in recent times to protect consumers are showing signs of reaching fruition, there is no room for complacency as much still remains to be done to formulate a comprehensive and coherent consumer protection framework. An attempt is made here to identify, very briefly, one possible area in which law reform ought to be accorded priority to ensure greater protection to the Sri Lankan consumer. The parameters of laws reform are considered in the perspective of the common law principles applicable and the possible conceptual and functional limitations which tend to have a negative or retarding influence on policy and legal innovations in the sphere of consumer protection.

Besides the warranties contained in the Sale of Goods

Ordinance[31] of 1896, in Sri Lanka, as indeed in several other jurisdictions into which English common law principles of tortious liability have infiltrated, the decision of the House of Lords in the cause celebre, *Donoghue* v. *Stevenson*[32] formed the foundation of the liability of manufacturers in relation to defective products. According to the principle propounded by Lord Atkin—

> "A manufacturer of products which he sell in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care."[33]

Through judicial decisions the manufacturer's liability was subsequently extended by insisting on not mere "*possibility* of intermediate examination but "*probability* of intermediate examination" to absolve him.[34] The burden of proving negligence was on the consumer to whom the maxim *res ispa loquitur* was of no avail. Not every consumer who suffered damage due to a defective product was able to succeed in a court of law. Firstly, the injured consumer should have been the person who actually purchased the defective product. Secondly, the manufacturer's liability was conditional upon proof that the defective product was manufactured negligently. The position in English law left much to be desired but very little support was generated for changes in the law.

With the recognition that it is a positive social policy to afford some protection to an injured consumer without being hamstrung by the rigid technicalities of the law, the concept of strict liability of manufacturers of defective goods come to be evolved in the United States of America. Judicial decisions going as far back as the first decade of this century appear to lend support to the view which was gaining currency at that time that a manufacturer might be subject to strict liability in tort without proof of negligence and without requiring privity

of contract.[35] This principle, which had its genesis in cases involving food and drink, was gradually extended and in the 1940s there was sufficient support for a complete extension of this principle and for its entrenchment in the general law of torts. One advocate of this approach was Justice Traynor who in 1944 in the case of *Escola* v. *Coca-Cola Bottling*[36] stated thus:

> "In my opinion, it should now be recognised that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market."[37]

The case, however, which is regarded as having caused "the fall of the citadel of privity"[38] and heralded the general theory of strict liability in tort is *Henningsen* v. *Bloomfield Motors Inc.*[39] In this case the Supreme Court of New Jersey granted relief to the owner of a new vehicle who was injured as a result of the failure of the steering mechanism ten days after he had purchased the vehicle from a dealer.

In 1965 a significant development took place in the United States with the promulgation of Section 402A of the Restatement of Torts (Second) in the following terms:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm

thereby caused to the ultimate user or consumer, or to his property, if—

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in sub-section (1) applies although—

(a) the seller has exercised all possible care in the preparation and sale of his product; and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The burden of proof continued to rest on the consumer but he was entitled to rely on the maxim *res ipsa loquitur*.

The 'strict liability theory' has not had a smooth journey. It has had to weather severe storms and hurricanes. According to Prosser, Courts have generally viewed with much favour the following three policy justifications:

"(a) The public interest in life and safety demands the maximum possible protection against dangerous defects in products which consumers must buy and against which they cannot protect themselves. This justifies placing full responsibility on suppliers for harms which their products cause, even when they have done their best to avoid such harms;

(b) The manufacturer has placed his product on the market and has invited its purchase. The purchaser has relied on its safety in buying it. When the product causes harm, the supplier should not be allowed to avoid responsibility because of lack of privity, where the middleman is only a conduit;

(c) Strict liability can already be enforced against the

supplier by a series of successive actions based on breach of warranty. But this is wasteful, expensive and time consuming. Moreover, there are always the possibilities of intervening insolvency, lack of jurisdiction, disclaimers, running of the statute of limitations, and the like."[40]

Despite the proliferation of judicial pronouncements and the burgeoning literature on this subject many conceptual and functional issues still remain to be resolved. Eight such key issues which have emerged so far are the following:

"(a) How strict really is strict liability?

(b) Should the economic feasibility of improving a product constitute the outer limit of strict liability?

(c) Should the manufacturer be held liable when "no developed human skill and foresight" could ensure safety?

(d) Should a manufacturer be able to protect himself against allergy claimants by a warning?

(e) Can a workable theory be devised as to who is best able to gather and distribute the risk of harm from defective products?

(f) Should the middleman, as well as the manufacturer, be held strictly liable?

(g) Should disclaimers or limitations of liability be allowed?

(h) How should the problem of economic loss be handled?"[41]

Apart from the United States several other countries too have taken measures to protect consumers from defective products. Within the European Economic Community countries such as France, Belgium and Luxembourg adopt a system of strict liability. The 1977 Strasbourg Convention on Products Liability in regard to Personal Injury and Death based on the

strict liability theory has already been signed by four countries. In the United Kingdom the 1962 Molony Committee on Consumer Protection and the 1978 Pearson Commission on Civil Liability and Compensation for Personal Injury have both made far-reaching recommendations regarding the measures which could be taken to protect consumers. In 1975 the English and Scottish Law Commissions prepared a Working Paper on Liability for Defective Products. Indications are that an articulate body of opinion is now emerging in England in favour of legal changes to impose strict liability for defective products. In Australia, certain territories such as New South Wales, South Australia and the Australian Capital Territory have from time to time introduced legislation to impose a duty on manufacturers of defective products. New Zealand blazed a new trail in 1972 by enacting a Compensation Act under which compensation from a fund administered by the State could be obtained in respect of any injury arising from an accident without proof of negligence or the defect of a product. In so far as the economic costs and benefits are concerned the view has been expressed that:

> "In terms of the overall cost to the community, the benefits of imposing strict liability upon manufacturers would outweigh the costs, because the ultimate cost of defective products, whether in terms of personal injury, property damages or other loss, could be spread more evenly throughout the community by means of insurance; and the total cost would be reduced because the number of parties to any litigation arising out of defective products would be reduced."[42]

The developments and trends that have taken place in other countries in the sphere of product liability are quite significant and far-reaching. A consumer in Sri Lanka who has become the victim of a defective product has to seek his relief under the provisions in the Sale of Goods Ordinance and the common law principles of tortious liability. From a comparative perspective it is clear that the Sri Lankan consumer is at a definite disadvantage. Sri Lankans have never had a tradition of

pursuing their remedies against some manufacturers who with impunity have been releasing products to the market without proper quality control. A law similar to the Strasbourg Convention based on strict liability for defective products would go a long way towards maintaining a balance between the duties of manufacturers and the rights of consumers.

Section 5

Beyond Consumer Law:

Besides enacting legislation for the protection of consumers what else could be done to protect consumers?

Several measures have been tried out in various countries. While there is no guarantee that any particular measure which has yielded rich dividends in a particular country could be replicated elsewhere to achieve the same degree of success, yet such experiences provide useful insights into what could be accomplished for the benefit of consumers. Among the possible measures the following four merit special attention:

Firstly, the creation of consumer organizations;
Secondly, the formulation of Voluntary Codes of Practice;
Thirdly, the development of programmes for Consumer Education;
Fourthly, the formulation of standards and the promotion of testing of consumer products.

(1) *Consumer Organizations:*

The last few years have witnessed the proliferation of consumer organizations in different parts of the world. The establishment of many organizations is due mainly to the efforts of the International Organization of Consumers Union (IOCU).

What is IOCU?

The International Organization of Consumers Unions (IOCU) is an independent, non-profit and non-political foundation. It promotes world-wide cooperation in the comparative testing of consumer goods and services, and in all other aspects

of consumer information, education and protection.

Founded in 1960, by five consumers' unions (of the USA, UK, Australia, Netherlands and Belgium), IOCU's membership today includes 112 consumer associations in 46 countries, as well as government-financed consumer councils and consumer bodies supported by family organizations, labour unions and similar groups.

Originally set up as a clearing house for test methods, IOCU has developed over the years into an international forum for all kinds of consumer problems. In addition, it represents consumers' interests in the international agencies, and is in consultative or liaison status with ECOSOC, UNICEF, FAO (in particular the FAO/WHO Codex Alimentarius Commission) UNESCO, ISO, IEC, and the Consumer Protection Committee of the Council of Europe.

IOCU publishes on a regular basis the *International Consumer* which deals with various special topics. The *IOCU Newsletter* is published every month and contains information of activities of member organizations and of developments in the field of consumer protection.

In 1974, IOCU set up a Regional Office for Asia and Pacific. The headquarters of IOCU are at the Hague, Netherlands while the Regional Office is at Penang, Malaysia.

As at present the Regional Office is involved with the following on-going activities:

(i) issuing a quarterly magazine, *Asia/Pacific Consumer* on consumer themes;

(ii) issuing an informal monthly news digest called *Consumer Currents* with information on consumer activities in the area, news from IOCU and other news of consumer interest;

(iii) collecting and disseminating information on the full range of issues of interest to consumers;

(iv) encouraging the development of new consumer groups;

(v) representation of the consumer interest at various international and regional organizations;

(vi) preparing prototype consumer education material;

(vii) preparing a common test programme for small consumer goods in consultation and cooperation with the longer established testing agencies;

(viii) preparing texts for short radio programmes;

(ix) organizing regional seminars; and

(x) organizing and conducting workshops and training sessions.

During the past six years the Regional Office has organised several workshops and seminars dealing with aspects such as consumer testing; consumer education in food and nutrition; and consumer law.

In the Asian and Pacific region consumer organizations have been set up in Bangladesh, Fiji, Hong Kong, India, Indonesia, Iran, Japan, Korea, Malaysia, Pakistan, Philippines, Singapore and Thailand.

Consumer organizations in the region are at different stages of development. Most organizations have a strong consumer information and education component. The more developed organizations even have their own physical and manpower resources for carrying out advanced testing and research activities, while those which are not so developed have provided for the channelling of consumer complaints to the authorities concerned. Consumer libraries and documentation centres and consumer guidance and advice centres are among the facilities available in some organizations. A number of organizations have their own publications which are published on a regular basis.

It is significant to note that under the Consumer protection Act it is the duty of the Commissioner of Internal Trade to promote, assist and encourage consumer organizations to undertake research studies of distribution of articles.

(2) *Voluntary Codes of Practice*:

The proliferation of commercial and industrial activities has had both a positive as well as a negative impact on the formulation and implementation of voluntary codes of practice.

On the credit side of the ledger one finds that the formulation of new codes and the modification of existing codes are on-going processes in many parts of the world, while on the debit side of the ledger one notices a trend towards the significance of voluntary codes of practice in relation to certain activities or trades being devalued. The trend towards the significance of voluntary codes being devalued could be partly attributed to criticisms that have been advanced from time to time about the functional utility or value of voluntary codes. The absence of any legislative sanction, the absence of mechanisms to monitor the degree of compliance and the absence of any institutional structures which provide for deviations and non-conformity to be censured are a few of the many weaknesses inherent in a system of voluntary codes. Another reason which has led to the importance of voluntary codes being devalued is the expansion of commercial and trading activities. There are a number of trades which have been followed by certain families or communities for several generations but over the years other too have infiltrated into such trades with the resulting position that self-regulatory norms designed to promote goodwill and business reputation which operated within those families or communities have begun to wither away. Rival business establishments have been set up by employees of one-time reputed business enterprises and in order to generate a high turn-over within a short span of time new and questionable business strategies have been deployed by them.

It is in this back-drop that one should consider the strategies which consumer associations or groups should deploy to stimulate the formulation and implementation of codes. The mechanics of intervention have to be carefully worked out for the reason that in-roads have to be made into the business world characterized by rivalries and vested interests with scant regard being paid to norms or standards or ethics which might have been adhered to in the past.

While the identification of trades or activities or professions in respect of which codes do exist is the starting point of any project to stimulate the formulation of codes it is necessary to underscore that even where codes do exist it is necessary to make an in-depth study of the content of such codes. This has to be

underlined for the particular reason that it could be legitimately claimed that a Code is being enforced even though in reality in the process of enforcement the responsibility cast on those covered by the Code is absolutely insignificant or at the most marginal.

The adequacy or otherwise of existing codes needs to be examined in relation to factors such as the general principles relating to evidence, especially the shifting of the burden of proof; legal maxims which are common to legal systems such as 'what is not prohibited by law is permissible' and cannons of interpretation etc.

As regards trades or activities not covered by voluntary codes, consumer associations or groups by an analysis of consumer complaints of goods and services recorded over a period of time, should identify those trades or activities in respect of which the formulation of codes could be initiated on a priority basis. Consumer groups need to have modest targets with a proper perception of the pressing needs of consumers and the policy-options available. Consumer organizations must identify possible access points to generate some action which might eventually result in the formulation of a code. Access may be formal institutionalized access (i.e., structural access) or it could be informal political participation (i.e., political access). Who should seek access, at what point(s) should they try to gain access and how they could maximize their influence are matters which merit the attention of consumer groups. On the question as to who should seek access two options are available—an association on its own initiative could invite the participation of interested individuals or groups with a view to formulating a code. In Singapore, for instance, the Advertising Standards Authority was set up as an advisory council of the Consumer Association of Singapore which enlisted the support of relevant organizations and government departments. On the other hand, an Association could identify key personnel in the activity or trade to be covered by the Code and seek to influence them about the need for a code. This type of influence could be wielded through institutional mechanisms such as Chambers of Commerce and Industry, Federation of Employers etc., as well. Ministers and key government officials could be persuaded to highlight the need for such

codes in speeches they might make to audiences consisting of those in a particular activity or trade sought to be covered by a code.

There are no state of the art studies as to what stimulates an activity or group to regulate itself. Fear of legislative intervention with legal sanctions and control mechanisms and the desire to conform to high professional standards prevailing in the country and elsewhere are undoubtedly two motivating factors. There might well be other factors which could act as a catalyst to promote the formulation and implementation of codes. Tax incentives to those who have regulated themselves might be a possible inducement to stimulate the preparation of codes. Considering the fact that the total cost of consumer law enforcement efforts is very minimal—in the U.K., in 1975, for instance, the local authority cost was only 72 p. per head—tax incentives might be warranted for efforts culminating in the formulation of codes. Probably there is no single factor which might act as a catalyst and it is really a mix of factors which operate in a given situation at a given time. However one thing is clear. If consumer groups are to make any appreciable headway in this direction these groups must have sufficient knowledge and information about all aspects of codes—their content, functional utility, control mechanisms and sanctions etc. This information has to be transmitted to those who are to be influenced and motivated, to those whose services are to be enlisted in the preparation of codes.

(3) *Developing Programmes for Consumer Education*:

It was mentioned earlier that the rise of the consumer movement has been quite correctly described as "one of the most remarkable social developments in recent history."[43] Over the years there has been a phenomenal increase in the interest shown by governmental and non-governmental agencies in consumer protection activities. From the outset, consumer movements have been primarily concerned with improving the standard and quality of consumer goods and services and in providing the necessary legal measures to ensure greater protection to consumers in various spheres of activity. In recent times,

however, the high cost of living—which is now a characteristic of both developed as well as developing countries—and the widespread prevalence of certain diseases arising from malnutrition and food poisoning and also from the exposure to various health hazards consequent upon industrialization, urbanisation and environmental pollution in general, have led to the realization that consumer protection agencies should expand the scope and ambit of their functions and deal with a wider gamut of aspects which were not hitherto considered as essential components of any consumer protection movement.

United Nations Declarations on the Standard of Living:

The United Nations Declaration on Human Rights, for instance, proclaims that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services."[44] The International Covenant on Economic, Social and Cultural Rights of 1966 uses virtually the same phraseology with the additional words ". . . and to the continuous improvement of living conditions."[45] This Covenant, however, goes further than any other international document. After declaring the right of everyone to be free from hunger, this Covenant imposes an obligation on member states to take measures, including specific programmes, "to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and the utilization of natural resources."[46] Article 12 enshrines the right of everyone to the enjoyment of the highest attainable standard or physical and mental health. Among the steps to be taken by the State Parties to the Covenant to achieve the full realization of this right include those necessary for:

(a) 'the provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

The Need for Consumer Education:

'Consumer Education' which is increasingly becoming popular in many countries in the world is a relatively recent development in the sphere of curriculum innovation in so far as educational institutions are concerned. The need for introducing consumer education into the curricula of educational institutions and into the programmes of education for out-of-school youths and adults arises from the realisation that consumer education could make a very significant contribution towards improving the qualitative aspects of life by helping individuals to reap the maximum benefits and advantages of life—an enlightened awareness, however, rudimentary it be, about aspects such as nutrition, hygiene, housing, prevention of certain common diseases, and the legal rights and duties of consumers, for example, it is anticipated, would lead to certain behavioural and attitudinal changes in individuals which in turn would, at the micro-level of society, enable every man, woman and child to achieve 'the highest attainable standard of physical and mental health', and at the macro-level of society, enable every country to achieve total national development with the aid of a healthy, happy and prosperous citizenry.

The Content of Consumer Education:

Since consumer education is a concept which is unhallowed by antiquity, it is somewhat difficult to demarcate its exact scope and content.

It has been said that "the content of consumer education must endeavour to give opportunities in developing an understanding of a market economy, knowldge of legislation and agencies that serve consumers, a general understanding of the

legal rights of consumers, sufficient knowledge of standards of quality and ability to understand the technical terms used by manufacturers, and an awareness of fraudulent and misleading advertising, packaging and other dishonest practices."[47]

As far as the content of any course on consumer education is concerned, it would seem that it is essential to include within its scope the broad spectrum of topics which are logically related to the objectives to be achieved by consumer education. The levels of sophistication at which these topics should be discussed depend not only on the specific outcomes desired but also on the nature of the learner and, for example, the knowledge possessed by the instructional staff. Furthermore, once the teaching material has been tried out, by constant evaluation of the material used it should be possible to select the material that is most useful and also identify the motivational issues, and the content of the course itself could be accordingly modified. In view of differential levels of literacy and access to educational facilities not only the objectives and goals to be achieved but even the very content of the subject-matter of consumer education cannot be similar or identical in any two societies. Each country has to develop different modalities to implement courses on consumer education. Subject to the above qualifications and limitations, it is possible to list the following areas and topics as suitable for the content of a 'possible' course on consumer education—it must be mentioned that the subject areas listed here are meant as suggestions and make no pretensions to comprehensiveness.

(*a*) *Health*:

—nutritional value of different types of food (preservation of the nutritive value of food by adopting different methods of cooking; low-cost cooking recipes; substitute foods; changing eating habits to prevent wastage of food)

—toxic factors in foodstuffs (symptoms of food poisoning; detection tests relating to adulteration)

—uses and abuses of drugs

—environmental sanitation (housing-acoustical, olfactory,

tactile, thermal, visual, hygienic and safety requirements)
—conservation of natural resources.

(*b*) *Consumer Law*

—knowledge of basic legal concepts in relation to business and commercial transactions;

—the rights, duties and liabilities of consumers, sellers and manufacturers;

—remedial measures available to ventilate grievances and to enforce legal rights.

(*c*) *Financial Management and Budgeting*

—realistic levels of consumption and considerations relevant to decision-making regarding purchases, investments and savings.

—advantages in credit and loan transactions, insurance policies etc.

—evaluation of advertisements regarding products or services.

The acquisition of an insight into and a knowledge of the various aspects covered by a course as outlined above would provide the consumer or learner with a sound cognitive and attitudinal basis that would contribute to rational decision-making as a consumer of products and services.

Developing Programmes on Consumer Education

In developing courses or programmes on consumer education it is essential to take into consideration several factors. No educational programme could be formulated on a purely pedagogical basis; this is especially true regarding those educational programmes with the objective not merely to help the learner to accumulate knowledge on some abstract subject which has absolutely little or no social relevance. It is necessary, therefore, to examine the considerations relevant to developing programmes on consumer education both from a theoretical as well as functional perspective.

Some of the considerations that have to be taken cognizance of in developing programmes of an educational nature are the

target groups to be exposed to the educational programme, the precise nature of the objectives to be achieved and the content of the programme in respect of each such group, the instructional staff to be used for reaching each target group, the instructional strategies to be used, the mechanisms for the production of instructional materials, and research and evaluation.

As far as the categories or groups of people to be exposed to programmes on consumer education are concerned, it would appear that the following four categories could be regarded as the main target groups:

(a) Students attending primary or elementary educational institutions;
(b) Students attending secondary education institutions;
(c) Students attending tertiary level institutions;
(d) Out-of-school youth and adults.

While it would be easy to reach categories (a), (b) and (c) reaching category (d), however, would be a problem as far as many developing countries are concerned and special strategies would have to be evolved to overcome the difficulties that have to be encountered in reaching this target group. One of the possible means by which out-of-school youth and adults could be reached is by the extensive use of mass-media. But certain limitations in the use of mass-media have to be recognised—most developing countries do not have any nationwide communication system and the financial resources needed to expand or develop existing facilities are simply not available. Attempts could, however, be made to utilize radio programmes for consumer education purposes, though there is no guarantee that such programmes would attract the attention even of the small percentage of people who do have access to radio sets. Difficulties in reaching out-of-school youth and adults should not be made use of as a pretext for neglecting this category altogether. In the context of developing countries in Afro-Asia this category is one of the most important target groups, for it consists of a large percentage of consumers who will stand to benefit from consumer education programmes.

The resource personnel needed to conduct programmes on

consumer education would undoubtedly be in short supply at least for a few years. With the help and guidance of those who have the necessary expertise and experience, it should be possible to train a number of interested and enterprising persons who in turn could train more consumer educators. Consumer associations could help in the training of consumer educators by assisting at pre-service and in-service training course that may be conducted.

Various factors have to be taken cognizance of in arriving at decisions regarding the instructional strategies to be adopted to reach the different target groups. An important issue that would have to be determined is whether consumer education should by itself form a separate subject in the school curriculum and in the programmes for out-of-school youth and adults or whether material on consumer education should be introduced into various curricula areas. If any educational institution finds it difficult to accommodate consumer education as a separate subject, then material on consumer education could be introduced through other relevant subjects in the curriculum. Already in several countries material on drug abuse preventive education and population education has been successfully incorporated into the existing curriculum of educational institutions.

As far as production material is concerned, it would appear that books, films, charts, posters etc., would have to be prepared in connection with the different training programmes. In simple and non-technical language, books and pamphlets should attempt to deal with the material and information that is relevant to the content of programmes on consumer education. It is hardly necessary to stress here that the instructional strategies to be used must be carefully planned well in advance to avoid unnecessary duplication of work.

Research and evaluation form an integral part of any long-term educational programme. Consumer education programmes should be reviewed at periodic intervals to determine the adequacy or otherwise of the content of the courses, the instructional strategies to be used, methods of training personnel, communication techniques, etc.

The formulation and implementation of consumer education

programmes involve careful planning and thinking. In countries where consumer education has not yet been recognised, it should be an important function of consumer associations to convince decision-makers in the field of education of the urgent need to introduce consumer education. National, regional and international seminars and conferences on consumer education would serve a very useful purpose in popularizing the concept of consumer education. International agencies and organizations should be urged to implement some of the recommendations at the Seminar on Community Education for Consumer Protection held in Singapore in 1974. The preparation of a Source Book on Consumer Problems appears to be another matter to which the highest priority should be given. It would serve the purpose of making available to educators information and data on consumer problems in different parts of the world, so that on the basis of this information programmes on consumer education could be formulated. In view of the lack of awareness regarding consumer problems and also due to the newness of the field of consumer education, many countries find it difficult to formulate courses on consumer education and this difficulty could be circumvented if a source book could be made available for easy reference.

(4) *Standards and Testing*

A standard has been defined as a published document which sets out to achieve four things :[48]

> It is a tool of measurement against which many vague concepts of quality and safety can be crystallized. For example: What is quality? How do you define it when several billion people have several billion assessments of quality? A standard is a specific declaration in technical terms of acceptable levels of quality (which often implies safety) at reasonable cost.
>
> A standard is a tool whereby production processes can be simplified and quality control made more easy to achieve.
>
> A standard is a means of rationalizing industry and avoiding confusion in research and technology.

It is a means of ensuring that a sector of industry—and thus the nation—is using its imported and raw materials with the minimum waste and is therefore a formidable economic tool.

There are eight steps involved in testing products for the user:[49]

Step 1 : Discover how the users use the product.

Step 2 : Identify the parameters, and sub-parameters, which are important to the user.

Step 3 : Discover how the user population values these parameters.

Step 4 : Devise test methods to evaluate the products in terms of each parameter.

Step 5 : Carry out the tests.

Step 6 : Evaluate the results.

Step 7 : Compare the results for each brand with the 'value satisfactions' expected by the user.

Step 8 : Use the results.

Much could be achieved for the protection of consumers by formulating standards and by conducting tests to ensure that goods are of the requisite standard.

Section 6

Conclusions

A recent research study conducted by the present author in the municipal areas of Colombo and Mount Lavinia revealed that the Consumer Protection Act requirement regarding price marking has resulted in consumers not been able to bargain for price reductions—traders, it was alleged by a large number of consumers who were interviewed about the problems they face as consumers, refuse to reduce prices on the ground that what is indicated on price tags are the "fixed prices". It is disturbing to note that several State sponsored organizations continue with

impunity to violate the provisions of this Act. One public corporation which found it difficult to dispose of a large consignment of 'Lady Hamilton' sarees refused to sell more than one yard of certain curtain material unless one saree was purchased—the price of the saree was more than twenty times that of one yard of the curtain material. Many consumers has to buy this material from private traders who made an unconscionable profit of twenty rupees on each yard sold by them. Another corporation still refuses to sell certain drugs unless a prescription is produced—the requirement for a prescription was withdrawn nearly two years ago when the Price Control Order relating to the prices of drugs was rescinded by the Government. The network of State sponsored co-operatives also leaves much to be desired in several respects. Hoarding of goods and the sale of adulterated or inferior quality goods are rampant. Even if this situation could be tolerated still a consumer would have to face the indignity of being addressed to in insolent language—it is the experience of large numbers who have had dealings with co-operatives that it is difficult to find even many employees in a co-operative store who will show the same degree of cordiality as in private sector commercial establishments.

The Consumer Protection Act has provided the framework within which a consumer oriented programme could be implemented. It is impossible for the officials concerned to monitor the activities of every trader to see that there is compliance with the law. There is therefore an obligation on the part of traders including State sponsored commercial organizations to voluntarily comply with the requirements of the law and offer the best possible goods and services to consumers.

Consumer law is no panacea for the ills and evils which bedevil consumers. While pricing policies are inter-woven with domestic and international economic realities and there is precious little which any government could do in a short time to afford relief to consumers, there is much which could be done to improve the lot of consumers if traders, manufacturers and consumer leaders get together and identify mutually beneficial programmes of action. The proliferation of consumer laws without this type of collaborative arrangement will only result

in a bumper crop of new problems while at the same time accelerating the costs of enforcement.

The basic legal framework for protecting consumers is now available and the challenge we face in the 80s is to obtain the optimum results through collaborative arrangements and through a more educated and sensitized public—a public consisting of traders and consumers who will make the 'rights' (set out in section 1) of consumers a reality within this decade.

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4

ABORTION : FOR ALL OR ONLY FOR THE RICH ?

Section 1

Developments Since 1955

Twenty-five years ago, in 1955, after a protracted trial a registered medical practitioner who was a licentiate of the Royal College of Physicians and Surgeons (Edinburgh) and a licentiate of the Royal Faculty of Physicians and Surgeons (Glasgow) was sentenced to 10 years' rigorous imprisonment for causing the death of a pregnant woman with five children by inserting certain instruments into her vagina.[1] A nurse employed by the doctor testified that during the ten months she was employed under him there were some 150 to 185 cases in which he caused miscarriage by using the same instruments and by resorting to the same procedure.

This case assumed sensational dimensions at that time not only because of the evidence that was forthcoming of the brutal manner in which instruments had been inserted into the vagina without the patients having been anesthetized but also because of the startling disclosure of the incidence of similar abortions done during a short period by one doctor in the city of Colombo.

The appeal to the Court of Criminal Appeal was unsuccessful and the Court affirmed the verdict of the jury. With that all the gossip about the case at cocktail parties and in medical circles came to an abrupt end and the whole episode became a

closed chapter. The law continued to be restrictive as before permitting a pregnancy to be terminated only to save "the life of the mother". For a long time a certificate from a psychiatrist on suicidal tendencies was regarded as providing the 'green-light' to a gynaecologist to terminate a pregnancy. This was a welcome safety valve for those women who came from certain socio-economic groups with sufficient financial resources to consult qualified psychiatrists and gynaecologists and thereafter seek admission to good hospitals and nursing homes. The poor continued to patronize quacks who with impunity continued to gain more dexterity in inserting all conceivable kinds of instruments and gadgets into the vagina in order to evacuate a foetus. Several succumbed while many more sustained injuries of a permanent nature. Occasionally an odd quack was prosecuted but such prosecutions neither received adequate publicity to prick the conscience of a sleeping public nor resulted in remedial action being taken by the legislators. The few grass-roots level social and voluntary organizations in the country and medical men who knew of the problem blissfully continued to be oblivious to the existence of the problem.

In 1972 the United Nations Fund for Population Activities sponsored a research project on Law and Population in Sri Lanka. This provided an opportunity to examine, in depth, the legal and social dimensions of abortion from a comparative perspective. The Medico-Legal Society of Sri Lanka which was also alerted to the need to examine the legal provisions relating to abortion formed a group of lawyers and doctors to study this matter. By the latter part of 1973 the Society finalized a set of far-reaching recommendations to make the existing provisions less restrictive. Under the sponsorship of the Law and Population Project a National Seminar on Law and Population in Sri Lanka was held in Colombo in February 1974. Among those who addressed the Seminar on abortion were Dr S. Rajanayagam, a distinguished gynaecologist, and Dr W.D.L. Fernando, a highly respected Judicial Medical Officer with long years of experience. Dr Rajanayagam was of the view that illegal termination of pregnancy has reached "epidemic proportions"[2] and pointed out that it was inequitable that women from upper socio-economic groups should be able to get an abortion done

by a qualified doctor after a psychiatrist has advised termination of pregnancy while others should be denied this privilege. Dr Fernando revealed that quacks perform abortions under the "most primitive and unhygienic conditions resulting in high mortality and chronic ill-health."[3] The recommendations for law reform made by the Medico-Legal Society were endorsed at this Seminar. The papers presented at and the recommendations of the Seminar were widely disseminated among legislators, policy-makers, doctors and lawyers. Around this time Dr Rajanayagam in his Presidential Address to the Ceylon Medical Association made a plea for abortion law reform. The stage was set for action to be taken to amend the law but nothing happened in that direction. At Seminars held in 1975,[4] 1976[5] and 1978[6] papers have been presented underscoring the need for law reform. Some of the recommendations made at subsequent seminars go far beyond the recommendations of the Seminar held in 1974. A questionnaire that was administered in 1976 on a group of doctors and lawyers indicated that more than 95 per cent were of the view that the existing law should be amended.[7] A study of the social profile of women who have sought termination of their pregnancies in the city of Colombo revealed that more than 60 per cent did not want to have a child for financial reasons.[8]

Section 2

The Religious Dimension to the Problem

Since the inception of the national family planning programme in the mid-1960s one consideration which has time and again remained in the forefront of all attempts to accelerate the pace of the programme has been the possible "opposition" from religious leaders.[9] At no time whatsoever has it been possible to identify who these "religious leaders" were. Occasionally one read in a newspaper an account of a speech made by a Buddhist or Hindu or Catholic priest condemning the weightage given to the national family planning programme. The speeches that did receive publicity in the newspapers (sometimes quite out of proportion to the quality of the arguments that were advanced

or to the intellectual standing of the speaker) failed to articulate in concrete terms the objection to family planning programmes. A prominent Buddhist monk, with considerable influence among the middle and upper-middle class Sinhalese elite, condemned the national family programme as he felt that the Sinhalese race might, in course of time, be exterminated in the event the present population growth rates and levels of family planning acceptance continued. His masterly solution to the problems was to abandon the family planning programme unless it was possible to motivate the non-Sinhalese population too to accept fertility control measures. What the family planning programme had to do with the Buddhist religion was not quite clear—inasmuch as the Sinhalese do not have any preferential right to be the exclusive adherents of that religion it was difficult to establish a causal nexus between family planning acceptance by the Sinhalese and the religion of Buddhism. Buddhist priests were not alone in making ex-cathedra pronouncements on how the national family planning programme should be developed. A Catholic priest condemned family planning programmes as he felt that before such programmes are implemented the people must be adequately informed of the religious perspective. A Hindu leader who was also a prominent politician condemned even an increase in the minimum age of marriage on the ground that from ancient times early marriages have been the norm among Hindus.

In 1979 a Member of Parliament announced in public that he would introduce in Parliament a Private Member's Bill to amend the provisions relating to abortion in the Penal Code. The question of abortion was also discussed at some of the preparatory conferences held in Colombo in connection with the Parliamentarians Conference on Population (August 1979). While case studies on abortion evoked much sympathy there was no consensus of opinion as to whether the socio-religious climate prevailing in the country would permit the introduction of measures designed to liberalize the existing statutory provisions.

Why do religious leaders condemn the family planning programme ? What precisely is their objection to abortion being permitted in a limited number of situations or circumstances ?

What is the mandate for some of the so-called 'religious leaders' to make such pronouncements ? Are such pronouncements being made by a well-informed and responsible representative sample ? These are some of the questions which ought to have been asked and answered before responsible politicians (among them being several ministers) and influential members of the public insisted on a low profile being adopted in considering proposals for the expansion of the national family planning programme together with a new emphasis on liberalized abortion procedures.

It is in this context that in 1979 and 1980 the Environmental and Population Law Committee of the Family Planning Association conducted a very limited research study to ascertain the views of religious leaders on the question of liberalizing the laws relating to abortion. Due to limitation of funds the scope of this research study had to be kept within narrow limits. The persons whose views were to be sought was restricted both in terms of number as well as geographical location. The administration of the questionnaire was confined to those living within the municipal areas of Colombo and Kandy—essentially urban areas. The four religions considered for purposes of this research study were Buddhism, Hinduism, Christianity and Islam. While it cannot be gainsaid that the samples are inadequate to make generalizations it is not without significance that more than 65 per cent of those whose views were sought responded positively to amendments to the existing law. They were of the view that the law should be liberalized to permit the termination of a pregnancy if the woman had conceived as a result of having been raped. Some were prepared to concede that abortion should be made available to women who are likely to give birth to physically or mentally retarded children. The results of this study demonstrate that the so-called opposition from religious leaders is more of a convenient excuse to procrastinate a decision than a genuine concern for the welfare of unborn children.

In societies where the large-family norm prevailed the necessity for an abortion did not arise unless the pregnancy endangered the health of the woman or the pregnancy was due to rape or sexual inter-course from a pre-marital or extra-marital

association. As the small-family norm gained currency (mainly due to family planning propaganda but sometimes due to personal experience of the disadvantages of large families) recourse to abortion became necessary for other social and economic considerations as well. The necessity for abortion has therefore arisen both as a response to the growing realization of the need for smaller families as well as due to the absence of other methods of fertility control. Abortion has over the ages become a social necessity to prevent a social evil. Though these and other arguments in favour of abortion law reform have been advanced yet there are many governments which are still reluctant to open a new battle front by advocating liberal policies. No country has ever found a perfect solution to any major social problem. Any solution that is devised would have its share of supporters and critics. Solutions—whether they be medical, social, educational or legal—to the abortion problem are no exception to this rule. Throughout the ages there have been many questions and problems which have not yielded to any definite and all-embracing answers and solutions. The debate on these questions and problems has gone on for several centuries and would probably continue so long as mankind exists or a law is enacted prohibiting any public discussion on such questions and problems. As to whether a foetus has 'life' and whether the termination of a pregnancy results in the foetus being 'killed' are two such questions which are not capable of any definite and conclusive answers. A government which pays heed to arguments based on such questions will not be able to formulate any worthwhile policies at all so long as the debate on such questions continues. The approach that needs to be advocated is one which views the problem of abortion from a pragmatic perspective.

—Is the *de facto* situation at variance with the *de jure* situation?

—If so, what policy options are available to remedy the situation?

These are two questions which should form the basis of any discussion as to the need for abortion law reform. The limited resources available in Asian countries for research activities

must be geared towards finding answers to these questions and not for undertaking laborious in-depth studies in an archives or in a monastery in some part of the country to unearth information about the views expressed by religious and national leaders on abortion. Such views no doubt merit some attention but not at the cost of thousands of women being compelled to die or suffer as a result of illegal abortions. In the ultimate analysis it is evident that all religions have sought to lay-down certain guide-lines or tenets to enable the adherents of such religions to improve the quality of life both at the micro-level of the family unit and at the macro-level of the community or nation. In country after country in the Asian region where abortion law reform has to be accorded priority but is opposed on religious grounds the failure to take remedial action is causing untold misery and suffering to millions. Surely the day should dawn soon when religious leaders would realize that in the name of religion the poor should not be made to die or suffer as a result of resorting to illegal abortions under unhygienic conditions while the rich get their pregnancies terminated in ultra-modern air-conditioned operation theatres with a host of qualified medical and auxiliary personnel in attendance.

Section 3

The Necessity for Law Reform

By the end of '70s the momentum for law reform generated since the beginning of that decade was on the wane. Abortion law was hardly a topic that came up for discussion at local and regional seminars and conferences. In March 1981 several private practitioners in Colombo received a letter marked 'confidential' about the availability of menstrual regulation facilities in a clinic. The headline of the *Ceylon Daily Mirror* of 20 March 1981 dealt with the question of abortion. Under the caption "500 Abortions a day in City" the following item appeared:

"Over 500 illegal abortions a day are performed in various private hospitals in the city and the suburbs. Police said

in one instance over 70 cases were done in a day by a certain well-known private hospital in the city.

According to police the age group ranges from 14 years to 45 years. The fees charged for each abortion are in the region of Rs 500 to Rs 1,000 depending on the period of the pregnancy.

Police said that in certain instances, women on whom abortions had been performed had even lost their lives while in others the women had been in a serious condition and their lives had been saved because they were rushed to government hospitals in time.

However it was difficult to bring such cases to book as the operations were done under strict secrecy. The doctors concerned and the hospital authorities had evolved a system whereby no outsiders could get any information as to what went on inside the operating theatre of a private hospital.

Illegal surgical termination of pregnancies in the outstations were mostly performed by certain retired private medical practitioners and hospital staff. According to a top police source the police will shortly launch an island-wide operation to arrest those who are involved in performing illegal abortions".

Quite apart from the question of the legality or otherwise of abortions which are being done, a matter of some concern is the charges payable for such abortions. According to the newspaper report quoted above the charges range from Rs 500 to Rs 1000 but charges going upto Rs 2000 are not an unknown phenomenon. But how many women from middle or low-income groups could afford such high fees? Those who do not have the necessary financial resources still get abortions done but at a price—a price which could be costly in terms of mortality and morbidity. As the late W.D.L. Fernando once pointed out such abortions are done by unqualified quacks under primitive and unhygienic conditions.

Equality before the law, a concept which has now found its way even into the Constitution, does not mean that the rich could circumvent the penal laws of the country with impunity

while the poor should be forced to go in search of quacks and risk their lives. The legislative policy must be clarified for once and for all—if the restrictive laws are to operate a certificate from a psychiatrist cannot always hold good and in cases where there is little or no justification for such a certificate to be issued penal action must be taken against those who have transgressed the law. If the law is to be liberalized then those who cannot consult private psychiatrists and gynaecologists should not be penalized—abortion facilities must be made available in government institutions free of charge for those who are entitled under the law to get their pregnancies terminated. The choice before the legislators is clear and the sooner a decision is made the better it is for all concerned. We should not let it be said that there is even one statute in our statute book which helps the rich and those who 'have' while discriminating against the poor and the 'have nots.'

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5

DRUG ADDICTS : ARE NOT JAILS SUFFICIENTLY OVER-CROWDED ?

Section 1

Genesis of Regulatory Measures:

All over the world drug abuse is rapidly emerging as a major problem which has failed to respond to social norms and other forms of control. Attention is increasingly being focussed on the role which law could play in regulating the use of narcotics and drugs.

The genesis of statutory provisions relating to narcotics and drugs in Sri Lanka goes back to a period much longer than in most other countries in the world. The earliest statute on this subject appears to have been enacted some 300 years ago.[1] By a proclamation issued some time in 1675 trafficking in opium was prohibited by the Dutch rulers. The proclamation provided, *inter alia*, severe penalties for offenders, including banishment from the country in the case of foreigners. Historical evidence which is forthcoming indicates that this piece of legislation was motivated not by any concern for the misuse of opium in the country but with a view to promoting the commercial activities of the Dutch in commodities such as opium. There is no evidence of the Portuguese, who ruled from 1505 to 1656, having promulgated any legislation on opium. But it seems that the demand for opium had been so much that the Portuguese had realised that the Sinhalese "would be bound to come to terms" if the Portuguese banned or restricted the import of

opium (and also salt and cloth) for about five years."[2] The policy adopted by the Dutch appears to have been followed even by the British from 1796 until the early decades of this century. A regulation enacted in 1829, for instance, announced concession for the encouragement of the cultivation and export of certain agricultural products including opium. By 1867 there was adequate recognition of the potential of opium as a revenue earning measure. An Ordinance enacted in that year introduced a system of licences to restrict the use and sale of opium and bhang except by those who had obtained a licence for a fee. With a view to generating more revenue a system of public auctions at which licence could be granted to the highest bidder was subsequently introduced.[3] However, the numerous measures taken by the colonial government to augment the financial returns from the opium business were not without critics both in Sri Lanka as well as in England. For instance, in 1893, a member of the Legislative Council submitted to the Government a Petition signed by over 27,000 persons urging the authorities to take immediate measures to keep under control the habit of using opium which would otherwise rapidly spread. A few years later, in 1908, the subject of state monopoly in opium in British colonies was debated in the British Parliament. It is thereafter that the British Government adopted a low profile in promoting the opium business as a revenue earning measure.

Section 2

Existing Legal Framework

The Poisons, Opium and Dangerous Drugs Ordinance was enacted in 1929 to amend and consolidate the existing laws which were, in the words of the Attorney-General of that time "in a very confused state"[4] and to introduce control systems in accordance with international conventions. This Ordinance[5] has been in operation since 1936, with amendments introduced to it being few and far between. Apart from the Poisons, Opium and Dangerous Drugs Ordinance there are four other states which contain provisions relating to drugs, namely the Penal Code,[6] the Cosmetics, Devices and Drugs Act[7] which repealed

the Food and Drugs Act[8], the Control of Prices Act[9] and the Ayurveda Act.[10] The Penal Code contains a number of provisions relating to the adulteration of drugs and medical preparations; the sale of any drug or preparation as a different drug or preparation; and negligent conduct with respect to any poisonous substance. These provisions have remained a dead letter for a long time. The Cosmetics, Devices and Drugs Act provides for certain control systems to regulate the sale, distribution and advertising of drugs. All drugs have to be registered with the Cosmetics, Devices and Drugs Authority before they are sold. The Act also lays down standards for certain drugs and preparations. The Control of Prices Act was intended only to regulate the price structure of drugs but for several years it had the effect of restricting the sale of certain types of drugs without the authority of a prescription issued by a medical practitioner. The Price Control Order through which this restriction was operated was rescinded in 1979. The Ayurveda Act was enacted in 1961 in response to certain demands that were made by ayurvedic physicians, who constituted an important pressure group in the local political arena since the 1956 general elections. Immediately after the elections they agitated for the immediate implementation of measures which would enhance their status. The Act repealed and/or modified a number of those sections in the Poisons, Opium and Dangerous Drugs Ordinance which had restricted to varying degrees the entitlement of ayurvedic physicians to obtain opium. The Customs Ordinance does not contain any specific provisions relating to drugs but it deals with certain operational matters such as the import and export of substances, the right to seize contraband (including drugs) and to forfeit the contraband concerned as well as any vehicles or equipment used in connection with smuggling operations.

Section 3

Substances subject to Control Regimes:

As regards the substances which are subject to national control regimes these could be divided into the following five categories:

(a) Poisons;
(b) Poppy, Coca and Hemp plants;
(c) Opium;
(d) Dangerous Drugs; and
(e) Other Drugs.

The Poisons, Opium and Dangerous Drugs Ordinance contains provisions relating to the sale, dispensing, labelling and storage of poisons. The Minister is empowered to add, from time to time, the names of other poisons to be brought within the purview of control regimes. The provisions in the Ordinance also deal with the poppy, coca and hemp plants, including the seeds, pods, leaves and flowers of such plants. Some of the definitions of substances contained in the Ordinance leave much to be desired. For instance, the definition of "poppy plant" does not cover all species of the genus Papaver but only the Papaver Somniferum. As regards the definition of "hemp plant" doubts have been expressed in certain judicial decisions as to whether the definition is wide enough to cover ganja plants. As far as opium is concerned the Ordinance recognises three kinds of opium, namely, raw opium, prepared opium and medicinal opium. The dangerous drugs covered by the Ordinance have been divided into five categories. The significance of this division is that in respect of the different categories of drugs differential regulatory provisions relating to importation, exportation, wholesale trade and retail trade apply. Some of the drugs covered by the Poisons, Opium and Dangerous Drugs Ordinance also came under the purview of the Food and Drugs Act which was repealed in 1980. The Penal Code does not contain a definition of the expression "Drugs". Its provisions would extend even to drugs covered by the other statutes as well. A large number of natural and synthetic substances have been made subject to control regimes by the Single Convention on Narcotic Drugs of 1961 and the Convention on Psychotropic Substances of 1971. Sri Lanka is a signatory to the former Convention but not to the latter. A number of substances therefore still remain outside the purview of domestic control regimes. There is no reason why Sri Lanka should not subscribe to the Convention on Psychotropic substances.

Section 4

Prohibited Articles

Under the Poisons, Opium and Dangerous Drugs Ordinance the importation of the poppy, coca and the hemp plants is absolutely prohibited, while with a licence the preparations of or extracts from the hemp plant could be imported. The sole authority entitled to import opium into the country is the Director of Health Services while the distribution of opium is handled by the Superintendent of the Civil Medical Stores. Certain types of drugs listed in the Ordinance cannot be imported at all while others could be imported if a licence has been granted. Adverse balance of payment conditions resulted in a system of import licences being operated for several years. Under this system whenever foreign exchange had to be utilised for the import of drugs an import licence had to be obtained. The mechanics of working this system was such that it became possible to regulate and monitor the type of drugs which were imported into the country. The Civil Medical Stores, the State Pharmaceuticals Corporation and the Ayurvedic Drugs Corporation also exercised a monopoly over the importation of certain drugs, thus facilitating efforts at regulating the type of drugs which are to be exposed for sale and to be used to manufacture other preparations. With the liberalization of trade since the mid-1970s after the change of Government several drugs which were not hitherto imported into the country without a licence came to be imported without any restriction. The exportation of the poppy, coca and hemp plants and of opium is absolutely prohibited. Certain types of drugs could be exported only if prior sanction is obtained. The manufacture of dangerous drugs has also been absolutely prohibited. Without a licence no person could sow, plant, cultivate, obtain or have in his possession any poppy plant, coca plant or hemp plant or collect or have in his possession the seeds, pods, leaves, flowers or any part of any such plant. The Ordinance provided for a system of registering consumers who required opium for personal consumption. It was an offence for any person to have in his possession any opium obtained from any other source of supply. The system of registering consumers and of supplying opium to them was

discontinued more than two decades ago. The position now is that with the exception of medical practitioners registered under the Medical Ordinance and ayurvedic physicians registered under the Ayurveda Act it is an offence for any other person to use or sell or have in his possession any quantity of opium. It is also an offence to possess dangerous drugs except in accordance with a licence issued by the Director of Health Services or on the authority of a prescription issued by a medical practitioner. Ganja is a substance which is necessary for several ayurvedic preparations but the Ordinance does not provide for ganja to be supplied to ayurvedic physicians through any legitimate means. Ganja is still used for several ayurvedic preparations, the necessary requirements of ganja being met by illicit supplies. Besides the restrictions mentioned above the Poisons, Opium and Dangerous Drugs Ordinance has made it an offence for any person to use any premises as an opium divan, that is, as a place of resort for the purpose of eating or smoking opium. There are no signs of any recognised or well established outlets being regularly patronised by addicts—supplies are obtainable mainly through street vendors.

Section 5

Penalties

The Ordinance does not specify individual penalties for the different offences. An accused therefore runs the risk of being charged in the High Court or in the District Court or in the Magistrate's Court. If convicted by a Magistrate a fine not exceeding one thousand rupees and/or a sentence of imprisonment (either simple or rigorous) for a period not exceeding one year could be imposed. The maximum penalties that could be imposed by a District Judge are a fine not exceeding Rs 5000 and a sentence of imprisonment not exceeding 3 years. A High Court Judge could impose a fine not exceeding ten thousand rupees and/or a sentence of imprisonment not exceeding ten years. This represents the highest penalty that could be imposed on a drug offender. The sanction of the Attorney-General is necessary before any action is instituted in a District

Court or High Court. By and large offences under this Ordinance are tried by Magistrates. Instances in which the sanctions of the Attorney-General has been sought are few and far between. Most of the charges that are framed under this Ordinance are for possessing or selling opium and ganja and for cultivating ganja. During the period 1970/71 in the Colombo District there were some 2900 prosecutions in respect of ganja offences and about 300 in respect of opium offences. The number of persons who were sentenced to imprisonment was, however, negligible—120 in the case of ganja offences and 6 in the case of opium offences. In 1974/75 the number of persons sentenced to imprisonment had dwindled to 10 in the case of ganja offences and 1 in the case of opium offences. Prosecutions in respect of ganja offences are higher in those districts where ganja is cultivated. The first and only occasion when law enforcement agencies were able to detect any major attempt to smuggle opium from Sri Lanka was in 1958 when a consignment of 1700 lbs of opium of Persian origin was detected while being exported to Singapore for re-sale.

Section 6

Operational Difficulties

In considering Sri Lanka's narcotic and drug laws reference must necessarily be made to certain operational limitations which have curtailed law enforcement efforts. The main limitations are with regard to the inadequacy of sophisticated equipment to facilitate detection operations and the shortage of skilled manpower to carry out enforcement activities. Attempts at eradicating ganja plantations have been few and far between. Substances that are detected are sometimes found to be so adulterated that it becomes difficult to analyse them and identify the substances in respect of which legal proceedings could be instituted. An indigenous preparation for asthma patients was found on analysis to contain a large number of substances—indigenous ayurvedic, western and homoeopathic—including codeine and prednisilone.

Law enforcement is only a partial solution to the problems

associated with the abuse of narcotics and drugs. There are certain preventive as well as palliative measures which could be taken to facilitate law enforcement efforts. For instance, crop substitution programmes could be introduced to induce ganja cultivators to cultivate cash crops which are not socially harmful. Drug abuse preventive education programmes could be introduced for target groups such as school children, out-of-school youth and adults, parents, teachers and community leaders. Due to operational difficulties in eliminating the sources of supply of narcotics and drugs, one of the strategies that is available and which is being resorted to by several other countries to provide for the compulsory or voluntary treatment of drug dependants. Compulsory treatment has been provided for in drug laws in addition to or in lieu of other forms of punishment such as imprisonment or the imposition of a fine. Legislation could, however, provide for compulsory treatment only in the event that the existing health infra-structure of the country permits such treatment facilities being made available. While there is no doubt that Sri Lanka has many difficulties in providing treatment facilities such as over-crowding of hospitals, shortages of drugs, the non-availability of qualified medical and para-medical personnel still it would appear that some attempt must be made to provide institutional as well as out-patient compulsory treatment facilities.

Intelligence reports indicate several new trends in trafficking operations. More and more foreigners are now involved in trafficking operations. In 1980, for instance, nearly 100 foreigners were arrested in respect of drug offences. An effective intelligence system designed to facilitate monitoring and detection will make it possible to identify and take legal action against foreigners who contravene the drug laws of the country during sporadic visits to the country. Without severe penalties including deportation there is no likelihood of a sudden downward trend in the involvement of tourists in trafficking operations.

It is important to highlight a popular misconception entertained in this country, namely that it is the responsibility only of the law enforcement agencies to fight drug abuse. Law enforcement is only a partial answer or solution to this problem which

has so many facets and dimensions to it. Nowhere in the history of drug abuse control work is there any instance where law enforcement agencies alone have been able to effectively keep under control for any reasonable length of time the problems relating to drug abuse. Efforts of law enforcement agencies have to be supplemented by other measures. Perhaps there is no other area of law enforcement where there is a greater need to supplement the work of law enforcement agencies. Voluntary organizations dedicated to the control of drug abuse are essential if the national drug policy is to reach fruition with a short span of time. The public appears to be unconcerned about what is happening to that unfortunate lot of people who have become dependent on narcotics and drugs. Unless a child, a brother or a family friend is suspected of being a drug dependent no one cares about the existence of the drug problem in the community. Social attitudes in this country to the drug problem leave much to be desired. The drug problem needs to be viewed as a social problem, as a community problem, as a problem which requires the assistance and support of every responsible member of society.

Section 7

What have we achieved so Far ?

It is as far back as 1973 that the Government set up a National Narcotics Advisory Board. The Board was hurriedly set up on the eve of the arrival of the UN *Ad Hoc* Mission on Drug Abuse in South Asian countries. The Colombo Plan Bureau sponsored in October that year a National Seminar on Drug Abuse in Sri Lanka. In the same year Dr P. Hughes, an internationally recognized drug expert was sent by W.H.O. to make recommendations regarding treatment and rehabilitation facilities for drug dependents. The report of the Seminar received wide publicity while the report submitted by Hughes was kept as a closely guarded confidential document but none of the recommendations contained in either report were destined to reach the stage of implementation. In 1977 the present writer published a book entitled *Narcotics and Drugs in Sri Lanka : Socio-Legal Dimensions*. This book contained a number

of suggestions for formulating a national narcotics and drugs policy. Among the suggestions made were the following:

(a) Amend the existing legislation to provide for more effective control mechanisms and more severe penalties, including life term sentences and the death penalty for traffickers as in the case of Thailand, Singapore, Malaysia and the Philippines;

(b) Institutionalise the National Advisory Board and augment its powers so that it could function as a permanent policy-making and monitoring mechanism;

(c) Introduce compulsory treatment procedures for drug dependents;

(d) Introduce crop substitution and drug abuse preventive education programmes on a national scale; and

(e) Mobilise public support for anti-drug abuse activities.

In 1978 the Ministry of Health appointed a Committee to revise the existing legislation. The report of this Committee is awaited.

In 1980 a drug expert from Malaysia, Dr V. Navaratnam, Director of the National Drug Dependence Research Centre in Penang visited Sri Lanka. He submitted a report entitled "A Preliminary Assessment of the Extent and Nature of the Drug Abuse Problems and an Evaluation of Current Activities to its Control". Among the matters he highlighted was that with the minimum of effort anyone could purchase in the streets of Colombo any quantity of opium, morphin, heroin and hashish. He also estimated that annually nearly 1.2 million kg. of cannabis from Sri Lanka enters the illicit international market. His report also referred to the fact that interviews with children of school going age indicated the existence of "a wide experience in the experimental use of psychoactive substances as well as cannabis". This statement is likely to be an exaggeration of the situation—there is no other evidence that the use of these substances is widespread among school children. There are children who are alcoholics and drug addicts but without any proper and systematic research survey one cannot.

on the basis of a few interviews held during a short period spent in the country, conclude that the incidence of drug abuse is widespread among school children. But it cannot be gainsaid that there is no room for complacency—with the incidence of trafficking being on the increase there is every possibility of drug pushers making inroads into the student population.

What Sri Lanka urgently needs is a carefully worked out national policy. *Ad hoc* administrative decisions made by the National Narcotics Advisory Board since its inception in 1973 have not had even a modicum of success. A comprehensive national policy with long term perspectives should deal with legal as well as non-legal measures which could be implemented to minimise the drug problem. Our jails are already over-crowded. Sending drug dependents and drug pushers to jail will not be the final solution to the problem. It is a mistake to think that any country could eliminate the drug problem by putting all drug pushers and drug addicts behind bars. There is ample research data available from all over the world which clearly and unequivocally demonstrate that it is through a mix of policies that the drug problem could be successfully managed. Death penalty for the large scale trafficker; compulsory treatment for the drug addict; drug abuse preventive education programmes for potential addicts and for those in a position to influence them; crop substitution programmes in areas where ganja is cultivated—these are some of the policies which merit attention. There was a time when drug policies were formulated with jail capacity in view but much water has since flown under bridge. Jail sentences except for traffickers and repeat offenders are becoming more and more alien to drug management philosophy and this is an encouraging and positive trend. Let us perceive the drug problem as a human problem, as a potentially serious national problem and let us activate and mobilise all those who matter—doctors, lawyers, parents, teachers and community leaders—to give the lead and augment the work of law enforcement agencies. A new law however well drafted it may be, however drastic it may be and however wide its scope may be, will not be worth even the paper on which it is printed unless we have the will and the determination to translate its provisions into action. It is that will and determination that we have lacked

so far. There is no compelling reason why we should continue to lack that will and determination. Otherwise the drug problem will overtake all of us casting an ominous shadow on the well-being and happiness of the present generation as well as of generations yet to be born.

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Mr D.C. Jayasuriya is a 31-year-old Sri Lankan lawyer attached to the Attorney-General's Department of Sri Lanka as a Senior State Counsel. He is the author of five other books and of more than sixty articles which have been published in the USA, England, Switzerland, Netherlands, West Germany, Malaysia, Thailand, India and Sri Lanka. Several of his publications in fields such as drugs and pharmaceuticals, population control, consumer protection and environmental education have been cited with approval in authoritative works on these subjects. Mr Jayasuriya has held positions of distinction in international activities and has been an adviser to several UN agencies. In 1978 he was in Bangladesh as the Leader of the International Planned Parenthood Federation Family Planning Evaluation Mission. In 1979 he was the Chairman of an Inter-departmental Committee set up to revise Sri Lanka's drug laws. He has attended international conferences held in USSR, England, Switzerland, Hong Kong, the Philippines and Thailand and has been a visiting lecturer at several institutions.

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ASIAN HIGHLAND SOCIETIES
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In the present volume a number of anthropologists with first-hand experience of Asian highland societies describe social and cultural configurations which have grown up in various parts of the Himalayas and some other hill-regions within the South Asian subcontinent. Their analyses range from such subjects as the trans-Himalayan trading system to the intricate kinship organization of high altitude dwellers on the borders of Nepal and Tibet. Indigenous curing systems and problems of public health are discussed with a view to the changes brought about by recent development activities, and the effect of tourism, partly beneficial and partly disruptive, is assessed in studies of Himalayan communities that have emerged only recently from their age-old exclusiveness. A study of aspects of traditional Nepalese law reveals the conservative nature of a legal system which retains up to our days features traceable to ancient Hindu scriptures.

Several of the chapters are based on papers presented at a symposium held in New Delhi within the framework of the Tenth International Congress of Anthropological and Ethnological Sciences under the joint chairmanship of Professor Christoph von Fürer-Haimendorf and Dr Roy Burman.

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This book is an important extension of the traditional function of anthropology, and will be of great importance to anthropologists, moral philosophers and students of religious ethics.

Christoph von Fürer Haimendorf, Professor Emeritus of Asian Anthropology in the University of London, has been associated with field-research in South Asia since 1936, and between 1953 and 1980 he undertook a number of studies in the Nepal Himalayas. He has authored a number of books.

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