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JUSTICE & PRACTICE

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Justice



This issue of the Voice of Women examines Woman and Law to reveal the non recognition of major issues affecting woman, issues which sprang into existence by the gradual build up of patriarchal interests. It has clearly robbed her of her human rights and turned her into a prop that upholds patriarchy.

Man made law protects, strengthens and keeps him in comfort while she toils, nurtures and spends her time in domestication which is called her natural work. She has to struggle against masculin violence, battery, drunkenness rape, torture and marginalization; The law has not helped her in her devaluation and prohibited the dowry system. It has not recognised the demand for abortion, the right to her children, marital right to years of unpaid labour running a house.

The story of "Maintenance" granted by the law is described by Flavia Agnes (in this issue p.2) who says "The onus of preserving the moral fibre of society, is of course to be shouldered by women alone".

She proposes that legislatures should have a separate section on legislation for women. Special training should be imparted to the concerned officials of the law ministry so that they could draft legislation that does not interpret law prejudicially to women's interests. She adds "(In a rape case) the most important question is whether a judgement delivered after 2-3 years with an option of going in appeal, can ever give justice to women.....should the demand now be for setting up special courts with more sensitive judges and a strict time limit set for the trial of all sexual offences?"

Elsewhere in this issue is a pathetic story of a woman who sought the help of the law to protect her child from sexual abuse and was remanded for throwing hot water on the would be rapist. This highlights the turns and twists of the law, to which Mervyn Casie Chetty rejoins in a poem published in the Sunday Times dated 29.11.98 on a case 'Sexual Abuse' p. 29

Ghostly flaw in the Law

*The Law's an ass, there is no doubt,
From every roof-top let us shout.
The mother of age seven child
Who found her child had been defiled
By an uncle who took in his van
The innocent to rape did plan,
But failing, forced to oral sex-
All decent human beings to vex-*

*In frenzy threw some water hot
Upon the suspect on the spot
Was charged and remanded to jail,
The suspect being enlarged on bail.*

*The victim's father is abroad
And she perforce a hapless ward
Of Aunt, the very suspect's wife,
By a strange quirk of cruel life.
If such occurs within the law,
Revise with speed the ghostly flaw.*

The need to keep women economically dependent is closely linked to the conservative fear of women's sexuality and a corresponding hostile notion that an independent woman may go astray. This fear of women's sexuality continues to govern social norms.

Social conditions are created and nurtured to keep women perpetually in economic bondage in order to maintain the male control over their sexuality. It is within this framework of economic dependency that a need to pay maintenance to women arises. The issue of maintenance is intricately linked to the denial of property rights and job opportunities to women.

The dual male need for sexual control and economic subordination makes marriage appear to be an ideal proposition for women. Women are conditioned to view marriage as the only option for sexual expression, emotional anchor and material needs like food and shelter. The extent a marriage can fulfil these aspirations depends on the will and whim of individual husbands.

To perpetuate the economic subordination of women within marriage, woman's role as a housewife is glorified giving a false sense of security to married women. Neither the law nor society recognises the role of women as home makers in monetary terms. The Indian law on the marriage breaking down recognises only the husband's title to the house despite the fact that a woman has looked after the home for several years and brought up the children with love and care. All the family income and assets become the exclusive property of the man. The non-recognition of women's contri-

Flavia an eminent feminist lawyer from Bombay in pursuit of the objective of demystifying laws and procedures deals here with the issue of maintenance. "The legislature has so structured the divorce laws that the economic security which a marriage promises is a more attractive proposition. The underlying concept seems to be that if a woman is wanton enough to opt for divorce then she should be brave enough to opt for poverty".

Some references to Indian laws may not be applicable in Sri Lanka.

bution to the marriage and home reduces women to a state of destitution.

A popular myth prevalent in society is that liberalised divorce laws will drive women to a life of freedom (read easy virtue) and thus corrode the moral fibre of society. (The onus of preserving the moral fibre of society, is of course to be shouldered by women alone, right from the time scheming Eve tempted poor Adam into sin!).

In order to prevent this corrosion of the moral fibre of society, the

Maintenance

legislature has so structured the divorce laws that the economic security which a marriage promises is a more attractive proposition. The underlying concept seems to be that if a woman is wanton enough to opt for divorce then she should be brave enough to opt for poverty.

An apt example is the right to the matrimonial home which is ensured by a marriage contract is terminated as soon as a woman is divorced. A woman also loses all rights to inherit her husband's property. It comes as no surprise that women opt for divorce only when all endeavours to reconcile the marriage fail.

The state being forced to recognise the poverty which is a consequence of desertion and divorce has statutorily provided a meagre dole to keep a woman's body and soul together. A duty is cast on husbands to maintain their wives by paying them this subsistence dole. While enacting this provision, the concern of the state has been towards prevention of social evils such as vagrancy and prostitution rather than any real concerns for the dignity of women.

The maintenance dole is kept at a minimum so that divorce does not become an attractive alternative and the institution of marriage is preserved and strengthened. Several judgments on maintenance actually state this ideology.

In regard to determining what is required by the wife to maintain herself, court has to steer clear

of two extremities, viz., it must not give maintenance which would keep her in luxury and would make judicial separation profitable and also impede any future reconciliation. It must also steer clear of the other extreme viz. penuriousness.

[M. Ponnambalam V. Saraswathi
AIR 1957 Mad. 693]

The alarming factor is that this right to meagre maintenance dole is not adequately by the courts. No one takes the orders passed seriously, not the courts, nor the husbands, nor the lawyers which results in the statutory provisions being violated more often than enforced.

Since the statutes are based on erroneous presumption and are also full of loopholes. Even a vigilant lawyer or a committed activist cannot bring justice to women within the existing frame work. Women cannot get justice unless these laws are changed.

Equality

The issue of maintenance with its implications of economic subordination arises several questions.

Firstly, whether the maintenance provided by the courts is adequate to maintain the women and their children.

Secondly, whether it is possible to enforce these rights within the existing legal system where the onus is on the woman to prove the husband's income. Further, the burden of enforcing the order is thrust on the woman.

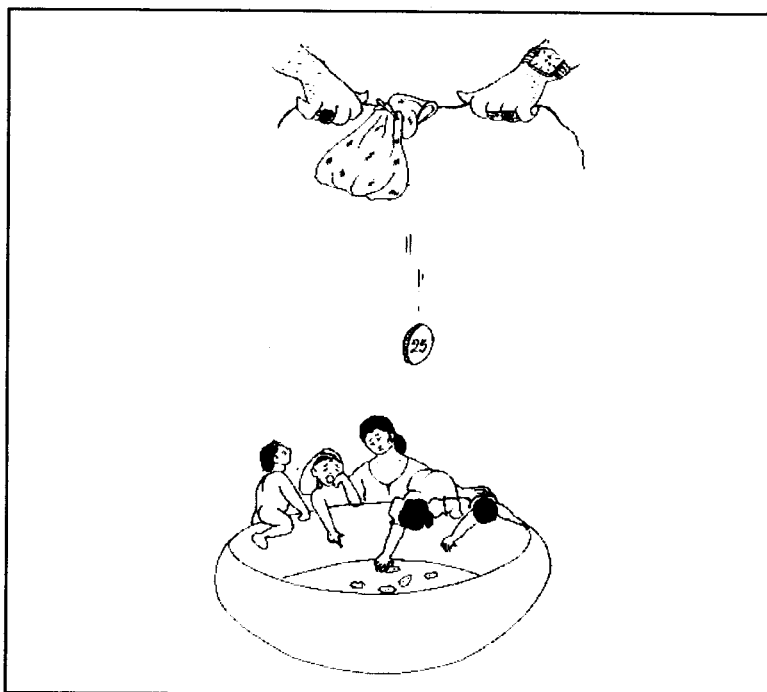
Practical experiences prove that the legal system is inadequate to meet the challenge of saving women and children from destitution.

At the third level, propogators of equality wonder why men should be

saddled with the duty of maintaining the wives who are supposedly equal partners in the marriage. According to them it is a clear case of wanting to have the cake and eating it too.

And lastly, whether maintenance will perpetuate economic subordination of women. The prevailing concept upon which maintenance is based clubs women with the aged, the minors and the handicapped persons all of whom are incapable of maintaining themselves. This is de

subistence level wage and the meagre maintenance dole because the law will not let them have both. Whatever she chooses, under the present economic, social and legal systems she is rendered destitute because neither alternative is adequate to meet the basic requirements of a woman-headed household. Sociological studies have confirmed the hypothesis that women-headed households are the poorest of the poor.



grading and in reality not true. The meagre dole promised by the statute, even if received regularly, is far too inadequate to help women to live a life of dignity. In any event since most husbands do not pay, the women are forced not only to maintain themselves but also their children.

Women carry on the task of maintaining their families by working low paid jobs in the unorganised sector. Since women are not recognised as heads of households their earnings continue to be below the subsistence level. They have to choose between a below

While divorce reduces women to poverty, conversely it improves the economic status of the husbands. The salaries which men are paid in the organised sector are based on the requirements of the entire family.

The man's earnings and dwelling house has a certain sanctity under the law. Protecting the family against creditors is one of the basic premises of civil law. Certain percentage of salary, dwelling house and provident fund are protected against outside creditors in order to protect the family.

Unfortunately the same criteria is applied even when the creditor in question is the man's wife or his minor child. The protective mantle meant to safe guard the family is today used against the family itself. A man can throw the wife and children out and then claim protection from attachment and defeat the woman's and the children's claim for maintenance.

Any statute which intends to protect women's rights will have to take into consideration these social, historical and economic factors which contribute to women's destitution after divorce or desertion. To achieve a balance between men and women, certain Western countries have introduced the concept of community of property and assets and property are divided equally between the spouses upon divorce. A woman is also permitted the use of matrimonial home as long as the dependent children are in her custody.

The recent feminist legal theory has gone even beyond the concept of equal sharing of property. Martha Albertson Fineman in her book *Illusion of Equality* (University of Chicago Press, 1991) argues that the concept of community of property is based on a false presumption of equality between men and women. Since men and women are not equal either in society or within marriage, this presumption also contributes towards widening the gap between men and women.

When women are disadvantaged in the labour market and are simultaneously entrusted with the major role of domestic responsibility, result-equality should have been the object of matrimonial reform she stresses. Within this framework she advocates an instrumental rather than symbolic understanding of equality as the basis

for reform which will lead towards restructuring social relationships. Rather than being treated as equal or same the two groups need to be treated differently so that they may end up at the same level. She therefore advocates a larger share for women which is need based rather than equality based in order to achieve equality.

As stressed here the concept of maintenance is linked to sexual control and economic subordination of women. Therefore only a chaste woman is entitled to maintenance. Remarriage or unchastity results in the denial of maintenance. Within a patriarchal system, the criteria of sexual purity can never be applied to men. Even hypothetically if maintenance to men is linked to their sexual purity it would not have the same social implications.

If the weak and the powerless need to be maintained, then the minimum criteria for awarding maintenance to husbands would be their restraint from using physical violence which is a manifestation of their superior status within marriage. Sadly such complex layers of power relationships are not accommodated within the canons of matrimonial statutes. While an eighteen year old boy has no right to claim maintenance even from his own father, an adult male has the privilege of claiming maintenance from his wife.

Ironically, even while women are called upon to maintain their husbands, judges, continue to propagate the model of an ideal wife whose husbands in her master.

Factors like age, health, illiteracy and lack of skills also need to be taken into account while deciding maintenance. The men's duty to maintain their children need to be strictly enforced so that women are not left with this additional burden which contrib-

utes further towards their destitution. Today the challenge before the state is to make the rhetoric of equality into a concrete reality. Safeguarding women's economic rights is the first step towards this direction.

Right to Matrimonial Home and Property

The right of shelter to dwelling place is an important right and this right along with the right to maintenance is crucial to the woman's right of survival. As can be observed, the maintenance which is granted is merely sufficient to provide her with food necessary for keeping the body and soul together. It does not have a provision for the expenses necessary for procuring

This is because society does not consider women fit to live independently. They are either supposed to live in their father's house or in their husband's home. Hence women's basic right to shelter is not protected under the statute.

Judges treat the matrimonial home as the exclusive domain of the husband and hold that the wife has a right to reside there only with his permission. If the woman has already left the house most courts refuse to restore her right to enter the matrimonial home. If the woman is living in the matrimonial home it is relatively easy to get a protection order restraining the husband from throwing her out or from assaulting her or causing any harm to her. In spite of such injunction, the husband may continue to beat the woman but a case pending in court usually acts as a restraint.

A woman can initiate criminal proceedings against a violent husband. But the civil courts tend to be hostile towards a woman who has filed a criminal case against her husband.

Flavia.

CHILD RIGHTS

Prof. SAVITHRI GOONESEKERA

In the past, the family support system within low income families encouraged wider parental support for children born outside marriage. Women domestic servants were often young girls who entered residential employment after placing children with other relatives. Some caring unmarried mothers continue to leave their child in a receiving home for children managed by non-governmental organisations, even paying a modest sum for those residential facilities. [Goonasekera & Abeyratne 1987; Wijetunge, 1991]. The situation of low income families has changed over the years due to the economic pressures of survival and the enormous attraction of overseas employment as migrant workers. Child abandonment today is fostered by a legal system that does not help a woman to obtain financial support for a child and also discrimination against a non-marital child.

The present statute on family maintenance places legal responsibility for family support on a male bread winner and requires a woman to prosecute a man for financial support of his legitimate (marital) or illegitimate (non marital) children. Though summary proceedings in the Magistrates courts can be brought for this purpose and

some free legal aid is available to low income women in the city of Colombo, obtaining child support through the legal system is generally a difficult task. If the man abandons the family, a woman has to cope alone as a single parent. Even if an unmarried mother desires to support and look after a child, the complicated procedures for obtaining birth registration, the need for such a certificate for admission to school, and the negative perceptions of law and administrative regulations in regard to women who are single parent shouldering child care responsibilities impose burdens on low income women.

Laws on illegitimacy must be transformed completely and combined with awareness raising on simplified birth registration procedures. There is also a strong case for expanding the present poverty alleviation programme to encompass a child benefit or allowance system. The government's Foster Parents Scheme administered through the probation and child care department or the Sevana Sarana Scheme now encourages private sector child sponsorship. Nevertheless, coverage is limited. These support the assumption of responsibility for children born to young or teenaged mothers. In some

legal systems, excluding the father of a non-marital child from parental status is considered as essential facet of protecting the interests of the mother and the child. Sri Lanka's legal system already recognises a man's minimal duty to provide financial support even if it excludes a man from parental status. The UN Convention on the Right of the child and Sri Lanka's Charters have now put forward a standard of joint parental responsibility on the right of a child and this provides a value system for initiating creative legal reforms in this areas.

Eliminating the constraints on illegitimacy in the law can help to support and create new value system on the human dignity of a non-marital child and its mother. However unwanted pregnancies leading to abandonment and infanticide by young mothers can only be prevented by awareness raising on family responsibility, an expansion of birth control programmes, and review of the law on abortion. Sri Lanka's law on abortion is contained in the Penal code and is derived from nineteenth century English Common law. It is virtually impossible to obtain a legal medical termination of pregnancy, except on a very narrowly construed ground of

risk to the life of the mother. It is well known that private hospitals have developed various methods by which terminations can be obtained as part of medical treatment. Nevertheless a young mother's life is placed at risk through back street abortions in unhygienic conditions. It has been recently reported that 20% of hospital beds in gynecological wards are occupied by women being treated for septic abortions. (Perera, 1993).

The concept of a legal 'age of discretion' at which parental authority diminishes is now recognised in the law. We have observed that it should be transformed to reflect a standard of gender equity and avoid discrimination between girls and boys. The transformed legal value system must be widely publicised so that parents and family are encouraged to perceive that all children grow through stages of development from childhood into majority. The concept of a rational age of discretion will give a balance to the law on guardianship and the social perception of 'protecting' girls from their immaturity.

We have noted that girls have a right to receive equal opportunities for education. New compulsory education regulations under the Education Ordinance, can help to prevent parental decisions that undermine a girl's right to receive an education. We have observed that education policies have already undermined laws that recognise a low minimum age

of capacity to marry and that reform of existing norms on this subject will only bring law in line with social reality. Most Sri Lankan families utilise the education system for girls, and this encourages late marriages. Nevertheless parents can give a teenager in marriage or even send her out to work as a domestic servant without giving her the right to choose for herself. Sri Lanka courts recognise the decision making rights of girls. They do not recognise marriage brokerage contracts and have emphasised the importance of statutory provisions that make a girl's consent an essential requirement of marriage. A recent case in the courts has underlined that marriage itself confers an independent legal status on a girl that removes parental authority completely. Yet parental pressure can place constraints on the freedom of middle class children, while similar pressures can be made by low income parents to move a young child out of school in to child labour in domestic service. A rationalisation of the age of compulsory education, minimum age for employment and the age of discretion combined with increased public awareness of these legal norms can undermine the prospects for parental and adult exploitation of girls within the family.

Family laws in regard to inheritance and property generally give a legal right to family resources irrespective of gender. A female spouse and girl children governed by the general law of Sri Lanka obtain

the same right to share in family property with a male spouse or boy children. Girls also have legal rights in their own property subject to parental and court supervision of transactions during minority. The parents guardianship powers are subject to the courts power to intervene to protect the best interests of the child. This concept has to be used both in custody disputes and in management of property (Goonesekera 1987).

In recent years, specific problems have arisen in regard to middle class groups because of a transformation of traditional practices, and the emergence of new social customs prejudicial to women and girls. Dowry has been traditionally a gift by parents of family to a daughter. Over the years it has become a gift by the bride's family to the bridegroom. Similarly parents who arrange marriages for their daughters are now insisting on formal solemnisation or registration of marriages and postponement of consummation till after the customary ceremony. The girl then is 'married' and cannot release herself from this relationship if either she or the other party wish to do so, without going through divorce procedures. A custom known as the virginity test to which a bride is subjected to after consummation of the marriage has been recorded in recent medical research. (Basnayake, 1989).

All these practices have a negative impact on girl children. Legislative intervention should

be combined with awareness raising to prevent practices such as dowry and the virginity test as cruel and degrading social practices causing physical and / or emotional trauma to women. Early Roman Dutch law principles are used to recognise civil actions for seduction, on the rationale that a girl has a legal right to claim damages for loss of virginity and the diminution of marriage prospects. This law on seduction gives legitimacy for a practice like the virginity test. We see that it also influences judicial attitudes in rape cases where the violence is perceived only in terms of compensation to the girl for loss of virginity.

Under the present law divorce can only be obtained in the General law of Sri Lanka by proof of fault grounds in an adversarial or contested divorce action in court. Reform of the divorce law so as to recognise the traditional Sinhala law concept of divorce by mutual consent and for irretrievable breakdown of the marriage will facilitate release from marriage in a situation where a marriage has been registered without consummation, under parental pressure, and both the parents and the girl or the girl herself wish to obtain release from the commitments made on paper. The breakdown concept will also help to release a girl from a marriage in a situation where she would not be able to obtain a divorce on the accepted fault grounds, but the marriage has broken down irretrievably for one reason or another. [Goonesekera 1990].

Adoption procedures at present focus of the need to ensure that adoption is in the child's best interests. Yet the failure of the court and probation authorities to monitor local adoptions adequately both prior to and after obtaining the court order exposes the girl child abuse. Girls in particular are sought by childless couples as potential care givers. An unsatisfactory adoption arrangement exposes girls to violence and abuse. A case monitored in the Gampaha courts in 1991 / 92 and reported in this paper indicates how the failure of the judge to obtain adequate information prior to making an order, combined with a failure to follow due procedures for monitoring resulted in a placement that exposed the child to grave physical abuse. We shall observe that, child abuse in situation of foster care or within the family point to the weakness of both existing regulatory controls in the legal system as well as law enforcement.

Exploitation by Family and Community

The new international and national standards on child rights supports the argument that child abuse and exploitation undermine a child's rights of survival and development and his / her right to participate in making decisions that affect his / her life. This perception is particularly valid in regard to girl children who face the risk of exploitation in the family and

the work place. While both sexes are victims of child abuse the weaknesses in the laws and procedures, impact on girls who are particularly affected when child abuse occurs in domestic service or through sexual offences by adults.

Child Abuse

We have observed that a girl child is exposed to particular types of exploitation through the social practices on dowry, the virginity test and solemnization of marriage due to parental pressure. Legislative interventions can take the form of statutory prohibitions on these practices and reforms in the law on divorce. Violence against girl children perpetrated within the family and in the work place constitute areas which require a more complex combination of judicial legal and administrative measures in order to impact effectively on the problem.

Child abuse is treated increasingly in the industrialised countries as an area in which counselling of families and children must replace institutionalisation of children and imposition of punishments on adults for criminal conduct. On the other hand, Sri Lanka's experience suggests that children (the victims) are being detained in institutions while the offence by the adult is 'compounded' or settled. Even when an adult is prosecuted the courts are inclined to impose very low sentences which are often suspended.

Cases of child abuse in domestic service monitored in the Juvenile Court in Colombo in one period in 1991 and newspaper reports of cases in the last five years clearly reveal the leniency of the judicial attitudes in this regard. The case studies reported in this paper bring out the dimension of leniency sharply, and indicate how courts 'settle' or 'compound' cases of child abuse because of concern with protecting adult interests. These receive greater attention than the child's interests which the courts are mandated to protect. The reluctance to impose severe sentences on adults appears to be based on considerations such as the adult's family responsibilities or the time he / she has already spent in remand or their professional standing in the community, and the police perception that these are 'minor' offences. The award of financial compensation to the child is considered adequate relief for the victim and an adequate reflection of the court's and community's disapproval of the conduct.

Compensation is awarded in crimes of violence such as rape and calculated in terms of loss of virginity. The payment is perceived as the adequate and necessary relief that must be granted through the legal system. We have observed that these judicial attitudes are an outcome of values associated with the custom of the virginity test, and the Roman Dutch law perception of seduction as a civil injury entitling a girl to compensation and damages. In

a superior court decision that is an importantly judicial pronouncement on sentencing, several young men who gang raped a young girl of 15 years received reduced sentences on appeal. Several recent cases have reversed sentences on appeal and suspended sentences.

Ironically the child victim of abuse is treated as an offender by judges, lawyers and the police. Case studies reported in this paper indicate how the child victim of abuse is transported to and from the Juvenile Court in the same prison van used for children in conflict with the law. The fact that the victim is placed 'in care' in an institution has created a perception that he / she is detained and is suffering a loss of liberty. The child is often referred to by all the authorities concerned as a child placed 'in remand'. This is a cruel irony in a context where the legal procedure is meant to ensure care and nurturing.

The perception of family privacy prevents intervention by the police and influences the conduct of probation officers. A balance between protecting an accused from false allegation and the victim's interests has been maintained through legal reform in other jurisdiction. The problem in Sri Lanka is that there has been no reform at all and these arguments are invariably used to prevent women obtaining legal redress. Reform in the law on child abuse must be combined with

awareness raising among the judiciary, the police the probation authorities and professional groups like lawyers, doctors and social workers.

The new international and national standards call for a combined and concerted judicial and administrative effort to ensure that the best interests of a child are protected. The basic premises of the Penal Code on sexual offences in general, statutory rape and incest must be altered so that the significance of these offences as crimes of violence can be recognised in the administration of criminal justice. There must be a co-ordinated approach to the problem of violence between the several agencies that impact on law enforcement. Professionals such as doctors and social workers must be encouraged to give commitment to detecting cases of abuse and reporting adequately on them so that a prosecution can be sustained in court.

A new dimension to the problem of child abuse has been added by the recent introduction of Mediation Boards and the requirement that cases of hurt and grievance hurt should be taken before these Boards for 'settlement'. Public concern with the law's delays and the overcrowding of prisons has also created an environment in which the courts are disinclined to impose prison sentences. Will this contribute further to entrenching lenient attitudes to

violence against women and girls? Clearly reforms of the substantive law will have to be accompanied by guidelines to courts on sentencing policies, as well as an assessment of the appropriate areas for media tion.

Exploited Workers

Sri Lanka's early child labour laws and regulations introduced under those laws prohibit the employment of children under 12 and employment of children between 12-14 years during school hours. These laws made the link between education and child labour. Girls have utilised the education system, and children below the minimum age for employment are not part of the labour force in agriculture or industry. Nevertheless girls above the age of 15 are tea pluckers in the plantations and are increasingly employed in industry within and outside the free trade zone. Protection of their rights as workers, and safeguards against health risk and occupational hazards must be addressed in industrial policies and laws on women's work. The problem of the exploitation and abuse of the working girl child often relates to the sphere of domestic work within and outside the family.

Most cases that surfaced in the Juvenile Court 1991-1992 in periods monitored by researchers related to girls used in domestic service. Juvenile Court authorities have also confirmed

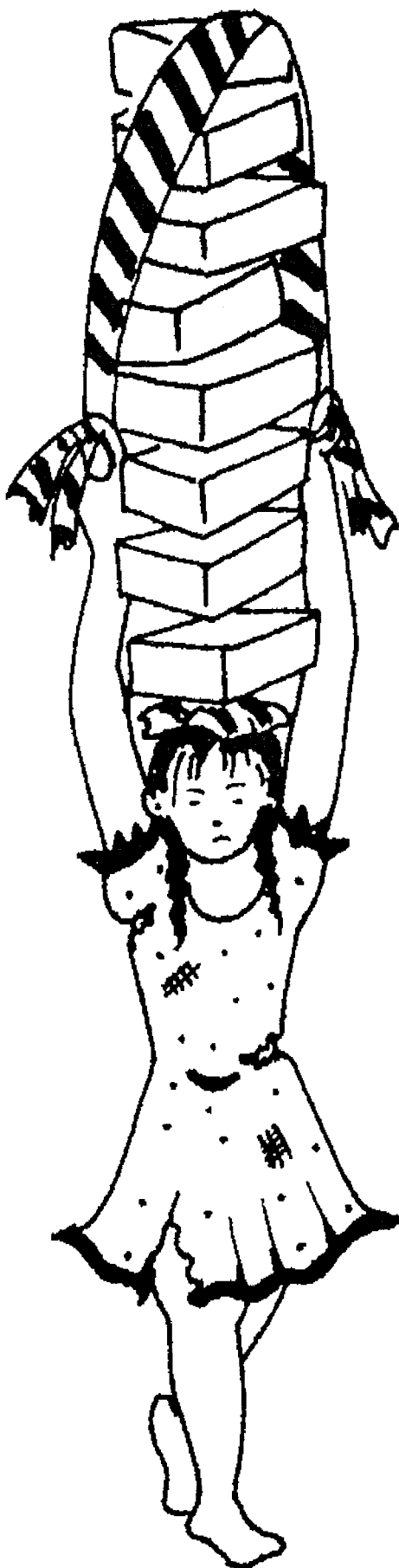
that this is a reflection of a general scenario. Boys were produced before the court for petty offences such as theft or for dealing with drugs. Girls were in the courts as victims of physical abuse in domestic service in violation of labour laws and the criminal law on physical injuries. The case studies considered indicate how ineffective the legal controls have been in preventing these violations and protecting young girls from exploitative child labour in domestic service.

These cases relate to employment of girl children under the minimum age of employment. The Juvenile Court tends to compound or 'settle' these cases and order compensation to be paid to the child victim of exploitation. A sum paid as compensation is usually paid into a bank account in the child's name. As one of the reported cases indicates, the child herself may not desire this compensation and the 'settlement' may be one reached by the adult parties, the probation authorities, the police and the courts. Certain limitations in the existing regulatory controls foster this attitude of leniency and prevent the law operating as an effective deterrent sanction.

The single Juvenile Court which is based in Colombo has no jurisdiction over adult parties. The role of the court is basically to determine the placement of children in conflict with the law or found to be neglected, and abandoned.

Consequently the court seems to feel that efforts to settle cases will ensure that some compensation is paid to the child, and this in itself will be perceived as a punishment imposed on the adult offender. However, the procedure creates an impression of leniency particularly when there are allegations of child abuse in employment.

Serious cases of child abuse in employment may be prosecuted by the Police in separate criminal proceedings in the Magistrate's Court. There appears to be an inclination to compound or settle even these cases unless the child suffers death at the hands of the employer. In that case there can be some pressure on the Police to prosecute for homicide. Unless lawyer groups and non-governmental organisations are vigilant, these prosecutions may not be sustained due to various intervening factors. Besides difficulties of funding evidence and constraints in the criminal law itself hamper effective prosecution. We have observed that if the offence alleged is sexual molestation, the current law on rape and sexual offences does not encourage prosecution of adult offenders in the custodial situation of employment. Statistics in the Women and Children's Bureau of the city police indicate that there have been prosecutions for child cruelty. However, separate statistics on domestic servants have not been maintained. The police approach to these prosecutions reveal the em-



phasis on the aspect of compensation, and the fact is that the cases themselves are considered 'minor complaints'. The bureau has a photograph album of cases of child abuse in domestic service. Many of these victims are girl children.

Prosecution against employers for the simple act of employing children below the minimum age of employment are most uncommon. The Women and Children's Bureau of the Labour Ministry can only recall one case of prosecution in the last five years.

A prosecution requires the consent of the Commissioner of Labour. Police and probation authorities find it easier to bring a child domestic servant before the Juvenile Court for placement in care. In the process, the case against the adult is compounded, and the victim receives some minimal financial compensation.

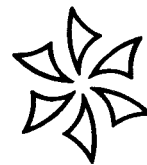
We have noted, in discussing child abuse, that the girl who is brought before the Juvenile Court as a victim ends up being treated as an offender who is placed 'in remand' in a State Institution or one managed by a non-governmental organisation. The concept of detention is reflected in the common use of the word 'remanded' to describe a child placed 'in care' in an institution. One of the case studies reported indicates a child placed in an institution can end up again as a domestic servant.

*Extracted From The Girl Child
- Shadows and Vistas -*

Equality Before the Law and Civil Matters

Equality in Marriage and Family Law

Kishali Pinto Jayawardena



Underlying all CEDAW (Convention on the Elimination of Discrimination Against Women) principles that aim to protect marginalised women is the specific warning that formal equality in terms of law is pointless without fundamental social, cultural and attitudinal change. How has Sri Lanka measured up to this obligation?

Considering the advances that have taken place through the last two decades with regard to empowering the Sri Lankan woman, there are certainly some changes to be applauded. In 1995, 18th century penal laws were amended providing for tougher penalties in the case of rape, and recognising the offences of marital rape (albeit between judicially separated spouses) and sexual harassment. More recently, women rights activists rejoiced when, as the result of their hard fought labour, authorities agreed that the birth certificate of a new born child need no longer contain the information whether the parents were married or not, releasing the child from the social stigma of illegitimacy. Meanwhile, 'protective legislation' that prohibited night work for women had already been re-

pealed (Night Work Legislation 1985) and women public servants brought within social security schemes available to men (Widows and Orphans Pension Fund Act 1983).

Impact of Legal Reforms

These can be seen as significant legal advances. The question now, however, is whether such apparently noteworthy legal reform actually impacts on the marginalised Sri Lankan women. Granted, Sri Lanka does not have to cope with issues of dowry death, though a single case of this was reported recently in Sri Lankan newspapers, sati or female infanticide like in other countries in the South Asian region, but issues of gender discrimination prevalent in this country are nonetheless real.

Indeed, they are all the more dangerous in that they are of a subtle nature, such as overt and covert sexual discrimination. Underpinning all this is a very real crisis of confidence in the country where even those progressive laws that are enacted have had minimal impact on victimised women facing significant societal and structural discrimina-

tion in their struggle to break out of the vicious circle that they are trapped in. To a large extent, the law has become irrelevant to these women.

One example would suffice. The 1995 amendments to the penal laws provided for enhanced punishment for rape. Surveys done since then have shown that the new laws have had minimum effect, due to judicial attitudes that insist on corroboration of the women victim's claim.

(i.e. the victim has to bring forward the testimony of an independent person to support her assertion that an act of rape had occurred) A 1996 case (Punchibandunge Wijesinghe Rajaratne Vs The Attorney General CA 23/01/1996) did hold that this cautionary rule may be ignored so long as the jury is satisfied with the veracity of the evidence).

Commentators, however pointed out that this was a particularly horrific case of child rape in which the Court of Appeal had no option but to make an exception from the general rule. In those rare cases where a judge departs from this conservatism in any bold fashion, the consequences

are not pleasant. The recent furore caused when a feminist High Court judge sentenced a popular film actor to ten years rigorous imprisonment for committing rape on one of his female fans is one good example. The judgement continues to be looked upon as an aberration, and the sentence is considered to be too harsh irrespective of the fact that the 1995 laws stipulate a minimum penalty of seven years rigorous imprisonment for rapists.

Reasoning and Practice.

On the one hand, there are progressive laws in Sri Lankan statute books, and in the other hand, much of their effect is diluted in actual practice. This impotency of the law has had many negative effects. The very discussion of law reform remains a rarefied subject that does not touch the average women, and activists have preferred to focus on a more grassroots approach to tackling gender issues rather than coming before court. It is significant that in all the ten years since constitutional guarantees of equality were enacted in 1978, not a single case of a violation of the fundamental right of equality on the grounds of sex was brought before the Supreme Court. Again, though the 1995 laws brought in a new offence of sexual harassment, not a single case has been filed up to date on the basis of these laws. This despite the fact that a 1996 study conducted by the Conference of Public Service Independent Trade Unions (COPITSU) found that 81.3% of Sri Lankan women are subjected to sexual harassment while using public transport. (WE 06/04/1997)

The existing constitutional guarantee to equality has itself been of minimal effect as far as gender discrimination is concerned. Instances where it is flouted are legion. Employment law is one example, with complaints being rife of women subjected to discriminatory treatment in employment with regard to hiring and firing practices. Often, when women are called for interviews, they are confronted with a barrage of personal questions aimed at finding out whether hiring them would lead to 'excessive' leave being granted on account of marital responsibilities, pregnancy and so on. Instances of maternity leave being denied in spite of statutory rights that give women this right have been found in the public sector. Most often, women are reluctant to come forward and challenge these administrative decisions. (The Thatched Patio May/ June 1990).

Social practices have thus effectively castrated legal guarantees. This is reflected in the high rate of unemployment among young women, estimated at 23% of Advanced Level qualified girls being unemployed, in contrasted to only 9.1% of male unemployment with similar qualifications. Occupational structures and labour market practices have been officially identified as hindering the absorption of educated women into the work force. (ST 21/05/1995)

Acknowledging this fact, the Sri Lankan National Report presented at the UN Fourth World Conference Women in Beijing, China stated that economic liberalisation has had

no significant impact on a majority of women in the country, and that wage structure are generally unfavourable to women. Whatever equality that exists in wage structures exists only with regard to women workers at the higher end of the wage structure, while their more unfortunate sisters are mercilessly exploited. Some specific categories of exploited women are specially worthy of note.

Workers Rights

Female domestic servants is one category that immediately comes to mind. It had been pointed out that laws providing for written contracts in the employment of domestic workers in Sri Lankan households is a dire necessity. At present, domestic helpers do not have regulated working hours, rest days or holidays, medical facilities, gratuity and employment benefits enjoyed by other workers. An old 1871 Domestic Servants Ordinance provides only for the protection of employers in the case of domestic servants with previous convictions.

Other categories of women workers exploited include the garment factory workers in the Free Trade Zone whose plight has often been focussed upon by the media. These workers are compelled to sign contracts that are clearly illegal both according to Sri Lankan labour laws and ILO standards. These contracts stipulate a number of conditions including the following; that they should agree to

work overtime when asked to do so, that they should agree to resign when they get married, and that they will agree not join any labour union; without prior written approval of the managements. Many of these unfortunate women work, sleep and live under appalling conditions, and do not seek recourse from Labour Tribunals due to their ignorance. Their employers can not be called to order under the constitutional guarantees that prohibit gender discrimination, because the latter does not apply to private sector employers. This problem will be remedied if national legislation is brought, extending the prohibition against gender discrimination to all employers, whether public or private.

In as desperate a situation are the foreign migrant workers who travel to the Middle East following contracts entered into with unscrupulous employment agencies, and work in conditions of virtual slavery. A number of whom have been brought back to Sri Lanka in coffins, their deaths causing only a momentary sensation. These women have been acknowledged to be the country's top foreign exchange earners for 1997 and up to June of that year, their remittances have been estimated to amount to Rs. 25, 231 million. An estimated 600,000 foreign migrant workers are reportedly employed in the Middle East and Far East alone. (DN 17/11/1997).

Responding to widespread outrage at the plight of these workers, the Government enacted new laws in

1997 that bring foreign employment agencies under some degree of control. The laws stipulate that contracts entered into by migrant workers and foreign agencies should be binding and embassies in all recruiting countries be compelled to register all foreign agencies with them. It remains to be seen whether the new laws would make any difference.

Violence against Women

Though the problems of these women continue to be highlighted, substantive reform of the conditions under which they work is still forthcoming. Another section of the law that cries out for reform relates to domestic violence, the victims of which transcend social barriers with surveys having shown that women executives are as likely to be abused as their village sisters.



Plantation

Meanwhile, plantation workers continue to struggle under heavy burdens. The so called equality provision operates at its worst here. Surveys conducted in the plantation sector show that several practices exist that are clearly discriminatory. There is no night work by labour regulations for women. They have to work an 8 hour day to get paid the same amount as men working for 6 hours. The retirement age is 50 for females and 55 for males. After privatisation of the plantations, early retirement was encouraged as a policy.

There is no special law at present dealing with domestic violence, the only recourse being through the penal laws. The 1995 amendments provide for the expansion of the definition of grievous hurt to include 'injury in consequence of which the opening of the thoracic abdominal or cranial cavities is performed'. This is an advance over the previous legal position, but the problem remains that in many cases, battered women are reluctant to approach the law due to social

ostracism. Personnel at the Women's and Children's Bureau at police headquarters say that only 25% of those incidents get actually reported. (DI 25/08/1996).

A study conducted in 1993 revealed that 60% of women in Sri Lanka are subjected to domestic violence. (MM 04/06/1997). Confirming this alarmingly high rate, another survey, the contents of which were released at the 107th anniversary sessions of the Sri Lanka Medical Association in 1994 stated that a majority of these women had been assaulted during pregnancy, sustaining head and face wounds. While most of them had sought medical treatment, only a quarter of them had revealed the reason for their injuries. (So 27/03/1994). This reflects the deep sense of social shame that these victims feel, resulting in wife battering being one of our most well kept national secrets. Separate legislation dealing with domestic violence is therefore long overdue.

As was pointed out earlier in this report, judicial attitudes with regard to rape need to be reviewed so that the cautionary rule requiring that there be corroborating of the evidence of the woman victim be relaxed more as the rule rather than as the exception. Legal analysts have in fact called for legislation to be adopted to remove this cautionary rule from the purview of judicial instruction (State of Human Rights Review 1997 / Law and Society Trust).

Meanwhile, laws prohibiting abortion continue to be antiquated in that

they insist that medical termination of pregnancy could take place only to save the mother's life. More liberal laws that allowed medical termination in certain strictly controlled circumstances such as in pregnancies caused by rape and incest were suggested in 1995 but were shot down due to strong Catholic and Muslim lobbying. Commentators pointed out the lack of a consistent policy on the part of legislators, who could agree to new laws that came out forcefully against rape and incest but stopped short at extending that same prohibition to pregnancies conceived out of those forbidden acts. The need for enlightened legislation in this respect remains a dire necessity.

So too it is with present legal provisions relating to sex workers. Sri Lankan law makes prostitution or the act of immoral earnings from sexual services illegal. The relevant law is set out in the Brothels Ordinance and the Vagrants Ordinance both of which are 19th century laws which view the woman as the offender rather than as the victim of sexual exploitation.

Private prostitution is not catered to by the law which deals only with street prostitution. Street prostitutes are considered to be 'idle and disorderly' persons who are 'vagrants and cause a public nuisance by offending public decency and morality'. Every such common prostitute is liable to be imprisoned with or without hard labour for a term not exceeding fourteen days or fined. Any person soliciting any other person for the commission of any acts of sexual intercourse could be imprisoned up to six months or fined.

Arrest could be made without a warrant. Complaints made against this law is that it is heavily patriarchal in that the woman is looked upon as the offender rather than as the victim of sexual exploitation. The pimp, procurer or client who solicits privately and the entrepreneur in the sex industry escapes scot free.

A frequent complaint also made in courts is that it is difficult to bring in modern sex institutions within the outdated definition of brothels as set down in the Brothels Ordinance. The law therefore needs to be righted. Moreover, it has to be pointed out in this context that many of these women have to languish in remand prison due to inability to pay the fine imposed on them. The fine can extend up to Rs. 10,000/=, a princely sum for most Sri Lankans, let alone prostitutes.

In addition to the fine, they are required to produce an official certificate and the entry at the police station, all of which can be obtained only by paying bribes. Meanwhile, court officials themselves ask for handouts. As a result, prostitutes unable to find the necessary cash crowd the remand prisons. Sri Lanka has been identified as being one of the few countries in the world in which the number of remand prisoners exceed the number convicted. Statistics have estimated that only 25% of those remanded end up with a conviction (ST 07/12/1997).

Laws relating to bail were recently amended to provide that the granting of bail ought be the rule rather

than the exception. They have been criticised on the basis that a great deal of power has been given to the police officers who because of the entrenched corruption of the police service, might not be the ideal authority to be vested with such discretion. It remains to be seen whether this fear will be manifested in reality. If so, the laws will have to be amended yet again.

Inability to pay their fines is a problem common to other women brought within the prison system, a considerable number of whom are inside on drug related offences. It has been estimated that in 1994, as many as 79.5% of convicted prisoners were in jail due to inability to pay the fine. A recent report of a ministerial committee appointed to look into the defects in the prisons system urged that judicial officers consider other options of sentencing such as probation orders and community service orders, rather than fining or imprisonment. It was pointed out that this was one way of lessening the severe overcrowding in the prisons, currently estimated at a catastrophic extent 400%.

The other recommendation made by the committee was that judges be cautioned that no person ought to be sentenced to jail for a period less than three months, that no sentence in default of a fine ought to be imposed and that a court passing sentence of imprisonment ought to state its reasons why no other sentence is appropriate. These suggestions were made in the context of 1994 statistics that show that a staggering 82.1% of convicted prisoners

were those undergoing periods of imprisonment up to one year or less.

While conditions are bad for all prisoners irrespective of gender, women prisoners suffer immense hardships. Statutory conditions stipulate that their detention be separate from the males. However, due to lack of resources, basic facilities such as food, water and toilet facilities are hotly contested. Women prisoners look after their children in true 'hellhole' conditions. Young and old, prostitutes, vagrants and terrorists are all put together with predictable hopeless results. (ST 7/12/1997).

Reports of violence on women inside prisons are common, as what occurred recently when on the 12th April 1996, seven women detainees at the Welikada prison were assaulted by suspected drug addicts also in prison at the same time. (VR 22/04/1996).

According to statistics released in 1981 by the Committee on Prison Reform, another ministerial committee whose report is published in the Sri Lanka Sessional Papers 1981 reported specifically on the conditions of women prisoners. The report points out that the numbers of those convicted have remained constant. In 1978, a total of 4,117 females were admitted to prison, of whom 3,706 were remand prisoners. In 1972, the admission figures were 1,610 remand prisoners and 479 convicted.

The majority of female prisoners, according to the report, are housed

in Colombo and Kandy prisons where living conditions are most oppressive. We make a strong plea for a separate women's prison to be established. This was in 1981, more than sixteen years ago. No action on their recommendations appear to be forthcoming by Sri Lankan policy makers.

Equality in Marriage

Proceeding to family law, problems are also obvious with current laws relating to divorce that continue to be based on matrimonial fault. For long, it has been pointed out that they ought to be amended so as to reflect attitudes more in keeping with the times. Suggested amendments to the Marriage Registration Ordinance in 1996 that liberalised existing laws of divorce and provided that a party could request divorce on the grounds of irretrievable breakdown of marriage of which the test shall be actual separation from bed and board for a period of at least seven years were abandoned due to opposition from several groups.

It was pointed out that the amendments were badly drafted and did not deal with legal reform relating to matters ancillary to divorce such as custody to children and financial support. A wider consultative process that would take discussion of these issues into account and put forward revised laws was urged, but has not materialised. This too remains a priority as far

as gender based legal reform is concerned.

Citizenship and Nationality

Meanwhile, what of laws relating to citizenship and nationality? They remain blatantly and impossibly discriminatory in spite of widespread calls for change. Granting of residence visas to foreign spouses of female Sri Lankan citizens. The Controller of Immigration and Emigration has gone on record in stating that he has the authority to inspect the marriage in issue where it is a female Sri Lankan married to a foreigner and determine whether it is even slightly suspicious, in which case obviously, the residence permit will not be granted.

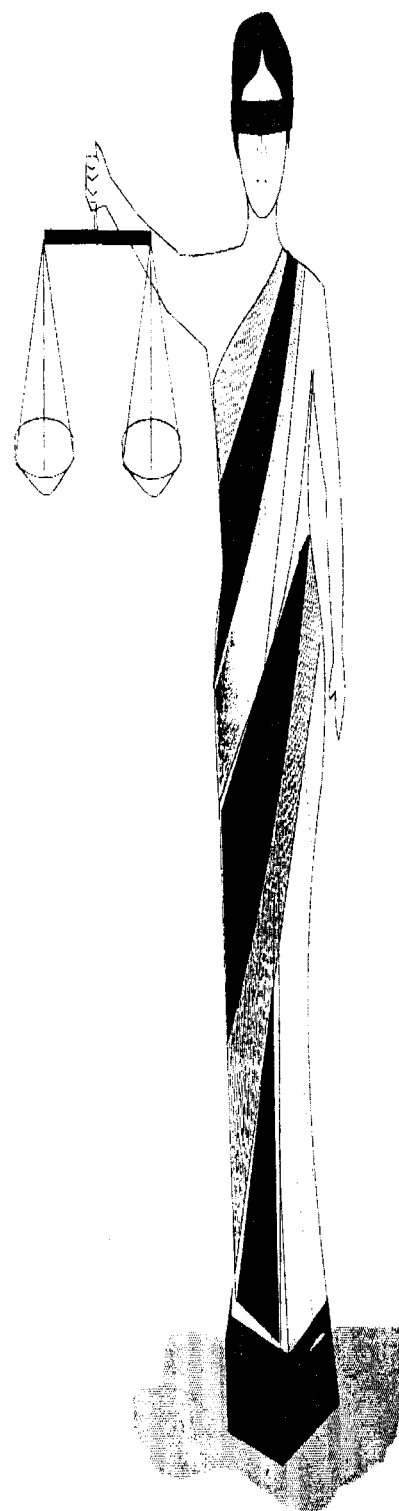
Arguments that this constitutes violation of privacy rights and the right to equality have been disregarded. Again, Sri Lankan women who have foreign husbands are denied the right to pass citizenship to their children automatically, even if they are born in the country and grow to adulthood in the country. The reason for this is that citizenship laws specify that citizenship can pass only through the paternal line and not the maternal line. The Citizenship Act is therefore a clear violator of the constitutional guarantee to equality. It is also a violator of Article 9 of CEDAW that postulates that women have equal rights to those of men, with regard to their children.

In 1995, the Law Commission (an independent legal reform body

constituted within the legal profession) suggested amendments to the Citizenship Act that gave women the power to pass citizenship to their children. Due to bureaucratic red tape, the recommendations have not been implemented to date. Meanwhile, the Act itself cannot be challenged before court due to the fact that the Constitution does not give the Supreme Court the power to challenge existing laws. At present, the proposed constitutional reform package has not changed the position though there is discussion that such obviously discriminatory laws be referred to a committee of the Parliament which would then go into the question as to whether they need to be changed.

The question whether customary laws that discriminate against women should be amended in order to bring it in line with the general law of the country, continues to be a part of the gender rights discourse in Sri Lanka. The most striking example of this is of course those provisions of the Muslim laws that are discriminatory, but continue due to powerful Muslim lobby that looks upon change as undermining their religious identity.

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prepared by SLWNGO
FORUM**



Tesawalamai a Matrilineal Legal System

Dr. Selvy Tiruchandran

The customary laws of the Tamils in Jaffna are called *Tesawalamai*. It literally means "the customs of the land". It is a collection of the customs of the inhabitants of Jaffna pertaining to inheritance, property rights, dowry, adoption laws, laws on slavery and divorce. It was codified by the Dutch Governors in 1706, approved by the local chieftains, later adopted by the British and remains the operational law till now. It is generally accepted that *Tesawalamai* protects the rights of women and indeed may contribute to the better status of women in Jaffna (Tambiah S.J. 1973) (Perinbabayagam, 1982). Some parts of *Tesawalamai* show very clear trends of a matrilineal system favourable to women. An ambivalence towards the patriarchal blend is also visible. *Tesawalamai* insists on the attainment of the age of maturity for marriage for both men and women. This clearly shows that child marriages were not encouraged. According to the Manu *Dharmashastra* the parents are guilty of a heinous sin if the daughters are not married before puberty. In the olden days, as testified to by the *Tesawalamai*, there were no elaborate marriage rites and ceremonies. The central rite was the tying of the *tali* followed by a simple ceremony performed by the elders with a

Pillaiyar Puja. The present elaborate ceremonies with the Sanskritic *mantras* with *homam* is a recent innovation. The *homam* ceremony, the rites accompanied by the recital of the rites connected with the gift of the virgin (*kanya tanam*), the six kinds of gifts and the elaborate rites accompanied by the recital of Sanskrit verses, called *slokas* are super imposed Aryan rites on the simple nuptial ceremony known to the Tamils (H.W. Tambiah, n.d.).

Many of these rites performed at the weddings of the high caste *vellarlars* were probably brought into Jaffna by the later stream of migration of Tamils from South India. However, the introduction of the Brahmanical marriage rites which were legitimised by the Dharmasastras and the *brahmin* priests did not succeed in creating an ideology of a devalued women. The *mantras* are in Sanskrit, an alien language beyond the comprehension of the bride and groom and the congregation. It signified only a process of limitation for the glamour alone and not for the meaning. It became a symbol of high caste social behaviour without the entire ideology behind it being absorbed. Neither did it create role models based on the same value system.

The customs of stepping on the grinding stone as part of the marriage rite which is performed in Hindu marriage is an example of this. This rite represents the fallen status of a woman who was turned into a stone on the grounds of infidelity to her sage husband. This is a *puranic* myth. However, this phenomenon cannot be generalised as an example of sanskritisation in Jaffna. The Brahmanial lifestyle did not have an appeal to the people of Jaffna. There was no ideological conversion to a Brahmanical value system as far as women were concerned. The elaborate colourful and prolonged ceremonies and rites were enacted like a drama with an audience looking on.

As stated by H.W. Tambiah, the formal type of marriage among the Tamils was simple and devoid of religious rites. The marriage rites among the ancient Tamils varied, but in the main, consisted of the tying of the *tali* by the bridegroom, and the gift of a cloth to the bride (*kurai*). The *Tesawalamai* too recognised these ceremonies as the only important rites. On some marriages, Tambiah adds that Ganesha, the God of Nuptials, is invoked by a simple ceremony performed by the elders. The ceremony consists of the planting of a piece of kusa grass in ball of cow dung and invoking the blessings of this deity. (Tambiah, H.W., No. 107).

Among the *vellalars*, these ceremonies were the only ones observed at one time (see Report of the Commissions Regarding the Marriage Ceremonies). Since these simple ceremonies are very similar to those of the Malabars of the south-west coast of India and since *samabantam* is the term used even today to designate the matrimonial alliance in Jaffna, Thambiah H.W. argues that the Jaffna Tamils have more connections with the Malabars of the south western coast of India. The more elaborate form, of *vivaha* practised today is a more recent innovation by Brahmanical priest craft and were brought by the later stream of Tamil migration.

That *Tesawalamai* is a curious co-existence of rites showing tendencies of both matrilineal and patriarchal systems in a society could be explained by the fact that some of the Dharmasastric concepts crept into the *Tesawalamai* laws before they were codified. The impact of the Roman Dutch Law which is visible could have possibly been assimilated during the process of the codification. *Tesawalamai* has been modified from time to time, so that today the impact of the English Law is also in evidence (H.W. Thambiah). This infiltration process has had a negative impact on women. A discussion of *Tesawalamai* as far as how it affects women is essential to exactly determine its progressive trends and the subsequent infiltration of a patriarchal system.

Property Relations

Tesawalamai divides the property into three categories as *mutisam*, *chitanam* and *tediyatetam*. Of this, *mutisam* is the inherited property of a man from his parents, *chitanam* is the property of the woman, given by her parents, when she marries as part of her inheritance and *tediyatetam* is the acquired property of the man and wife in their lifetime. These three types of property remain separate. *Chitanam* belongs to the wife legally, the *mudisam* to the husband and the acquired property belongs legally to both husband and wife. The property is divided between the sons and daughters in the following manner. The daughters get the dowry of the mother, and the sons the *mutisum* of the father. The acquired property is divided equally among the sons and daughters. The daughters get their share when they marry as dowry, whereas the sons inherit their share only at the death of their parents. Women have access to property of any kind, movable and immovable. S.J. Tambiah (1973) argues that *Tesawalamai* has a much stronger notion of female property rights than is contained in the classical Indian *Dharmashastras*.

The woman's *chitanam* reverts, in the event of her dying without issue, to her sisters, sister's daughter and grand daughter, in that order, and does not go to the husband. The wife's *chitanam* is not liable for her husband's debts. The rents and profits of her property are also not liable for her husband's debts. If the wife dies the wife's father remains in possession of her estate. If the man dies

with children the wife takes charge of the whole property and her dowry. The husband manages the property of the wife but cannot take it over, or inherit the property. Hence the property of the husband and wife is kept separate.

Divorce and Remarriage

The *Tesawalamai* itself provides no ceremonies for a divorce and speaks of a separation of the property when the wife or husband lives apart and contemplates remarriage. (Thes. Code. Part IV. Section I and Part I, Section 10). The recognition of polygamy placed no restraint on husbands getting remarried. Some Christian and Victorian ideas were incorporated when the *Tesawalamai* was compiled by the Dutch and hence the absence of any provision that a woman divorced by her husband without formality could contract a legal marriage can be explained.

But when she remarried, she had to give up her right to the hereditary property and half the acquired property of her husband in favour of her children. (Thes. Code, Part I, Section 9 and 10).

When one examines the customary Laws of the Tamils of Jaffna, one is forced to the conclusion that in Tamil society a divorced woman was not prevented from marrying a second time. The *Tesawalamai* permits the remarriage of widows. These factors, it has to be emphasised, are violations of the *Dharmashastric principles*

which categorically forbid widow remarriage and divorce. However widow remarriage and divorce, were / are notably prevalent among the non-Brahmanical low castes. Despite customary and the legal requirements being lifeted in India by law, women are still unwilling to remarry due to the social stigma attached to such practices.

When widows remarry the daughters by both marriages get her property. When a widower remarries he must ensure that the wife's dowry, and fifty percent of the acquired property (till then), should go as dowry to the daughters. It would then mean that, when the wife wants a divorce from her husband she gets her dowry back, and half of the acquired property.

It would be interesting to note that when these customs were codified, women were not gainfully employed. Hence her entitlement to the fifty percent of the acquired property is for the services rendered as a housewife and mother and to the general upkeep of the family which she maintains (wages for household labour!).

The *chitanam* or dowry is divided into three parts, cash, jewellery, land or house. While the movable property can be mortgaged or sold by the wife, the immovable property can be sold, mortgaged only with the consent of the husband. This could be an infringement on her property rights, considering the fact that the husband can sell his *mutusam* and the *tediyatetam* which he has earned, without the consent of

the wife. It was probably believed that women who are not world-wise need to be checked and authorised before they undertake major transactions. Disposing of land or house by women was brought under patriarchal control. "A married woman governed by *Tesawalamai* is not a *femme sole*. She is subjected to the marital power of the husband". The right of the husband to give his consent to the alienation or mortgage of his wife's separate immovable property is an incidence of his marital power" (Sri Ramanathan : 1972). This concept is alien to *Tesawalamai*.

More importantly the unique advantage of *Tesawalamai* for women is in the situation of divorce or separation. The Tamil women governed by *Tesawalamai* in the event of a divorce or separation from their husbands get their entire dowry and half the acquired property of the husband. "If the husband squanders the dowry and the dowry is diminished during marriage the same must be made good from the acquired property (*tediyatetam*) of the husband (Tambiah: H.W. 1965). The right of the women to their *chitanam* and *tediyatetam* has reduced to a great extent their dependency status on others and this in fact accounts for the status of the single women in the community.

The idea of having a separate property and having exclusive rights on their property have also other results for the women. Women as wives live on their property with their husbands. This frees them in-law intervention. The oppressive domination mother-in-law syn-

drome which is found in the Indian scenario is not a problem for the Jaffna wives. The conflicts they have with their mother-in-law are conflicts in terms of generation gap. But there is no domination by the mothers-in-law. The dowry as spelled out in *Tesawalamai* has a strong similarity to the Malabar system and has very little in common to the *stridhana* known to *Dharmasastras*. *Tesawalamai* recognised the right of women to her own property - towards the upkeep of the property whereas the notion of female property right is alien to the *Dharmasastras*.

Thus the Tamil customary law recognised the economic independence of women. Her dowry property, gifts received by her and property inherited by her were her separate property. In this respect the customary laws of the Tamils are superior to some of the texts of the *Dharmasastras* which were reluctant to recognise the separate property of the wife.

There are other significant differences between the *Dharmasastras* and *Tesawalamai* codes:

The adoption of a son by a sonless couple among Brahmanially influenced Indians is done in order to provide a son to perform the funeral rites. But under *Tesawalamai*, both women and men are given the right to adopt only to provide an heir (Tambiah, H.W. n.d.); barrenness or absence of a son are not grounds for divorce. Sons and daughters are treated alike in terms of love and child care needs; girls are not devalued in day to day liv-

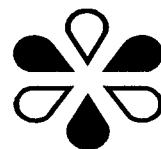
ing (Thiruchandran, 1984). Selective abortion and sex selection by amniocentesis in India are symptomatic of the residual ideology of infanticide. The recent phenomenon of dowry deaths and the revival of "*satI*" are a sad twist of a religious identity crises and an oppressive dowry system to suit the demands of consumer capitalism. A testing of this phenomenon by an analysis of the situation against the socio-economic totality should finally lead to the concept of a devalued woman. This phenomenon is not overtly expressed in the socio-religious patterns of existence of Jaffna.

Apart from these legal concepts and the ideology behind them which has successfully contributed to diminishing the sufferings of the female, there are a few social structural elements which helped this process. Certain "uniquely Dravidian institutional features" (Obeyesekere 1987) have also left an ideology behind them which help to treat women better even to the present day. They help to adjust her social roles. Cross-cousin marriage which was the norm in olden days took away much of the alienation, tension and feelings of strangeness of the women

when she entered the folds of the newly acquired relationship - husband, father-in-law, mother-in-law, sister-in-law and brother-in-law. In a cross-cousin marriage the husband is known to her from her infancy and the husband's parents were her aunt and uncle who have now acquired the new kinship label of mother-in-law and father-in-law. She has moved with them from infancy and she is aware of and used to their temperament.

The system of child marriages by which little girls are burdened with the heavy responsibility of married life, a Brahmanial custom, is totally absent in Jaffna.





The two children were huddled together, fast asleep, exhausted in their misery. Mala lay down on the bed beside their limp bodies, and closed her tired eyes. Her world had turned into a dark abyss. The light of her life had been taken away. Through the blackness all she could see was the face of Sarath. His dark eyebrows and gentle eyes, and his mouth which so often smiled lovingly at her. She could not stop the tears which flowed not only from her eyes but from deep down inside her.

The army jeep had dropped him off near the *del* tree at the top of the hill. The children, Sugath and Kanthi, were playing in the garden. She heard them shouting and went out to, see what the commotion was all about. Then she saw his tall lanky figure walking down the incline, his bag held over his shoulder, and that unruly lock of hair falling across his wide forehead. Sugath and Kanthi were running to him calling *Thaththi, Thaththi*. She came out and stood at the little picket gate they had fixed at the entrance of their garden. The children were leaping on him and he had put his bag down to hug them both. He looked at Mala over their heads and they smiled at each other. He was coming home after almost four months. Her happiness at seeing him again was indescribable.

Sarath comes from a different caste, her father had said. After all, lamented her mother,

you must remember that your uncle is a Member of Parliament and your brother is the Managing Director of a big company. Sarath was from the suburbs. He attended a Colombo school because he was granted a scholarship when he was twelve. Mala and Sarath met soon after they had started working at a Government Corporation in Colombo. We have nothing to do with you, her father had proclaimed. You have disgraced our whole family. Her mother wept as though there was a death in the house. My life is over, she had mourned, through her tears.

Mala was heart broken that her family treated her so. Caste, status influence, wealth - words that caused her so much hurt and bitterness. She and Sarath had a quite wedding. The first few years were difficult. Money was scarce, barely enough for their daily needs. Then suddenly good fortune struck. Sarath, with his Economics Degree, was offered a high position in the Government Bus Company at Kelaniya. After years of hard work they had managed to build a house; a home for their family. Sugath was now twelve, tall and lanky like his father; Kanthi at five was a delightful child, with a mop of curls that gave her that special angelic look.

The country was shattered in the constant strife of war. Every evening they would sit be-

fore their little TV set and watch the news. Most of it was about the war. The papers were bursting with the details of each conflict. Wherever they went people spoke about the war. The brutal ruthlessness was incomprehensible. So many killed, so many maimed and so many homeless. Such hopelessness.

Sarath was often full of silent thoughts. He would sit on his *haansi putuwa* on their little verandah and look out at the trees in their garden. The *del* tree was in flower and the *jambu* tree was already laden with succulent red fruits. The cup of tea she had brought him was left untouched on the table; cold and tasteless.

What it is? She asked him, breaking through his silence.

He sighed. I have been thinking about this war. Two boys in the office have resigned their jobs to join the army. I met Sunil mama in town today and he told me his son is now a Major in the army. I was thinking, I can't just sit here, enjoying life like this, when all my friends around me are doing something worthwhile for their country.

Mala was silent. A sharp frosty chill ran through her body.

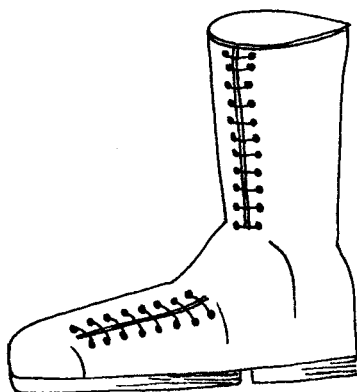
Hardly a month had gone by when Sarath had registered to join the Army. He had to go out of Colombo for his training

programme. Mala and the children missed him so much! But they knew he was safe. Then came the real thing. He had to go to the front to engage in actual battle.

She watched him silently as he packed his bag, getting ready to go. The army jeep would pick him up at 6.30. It was now 6 in the morning. Sugath and Kanthi were at the well, having their early morning baths before they left for school. They were splashing each other with water, shouting and laughing loudly. She went out and told them not to make such a noise. Can't you see your father is getting ready to go - must you shout so much? They had looked at her with surprise; this was their daily routine. They could not understand her irritation. They came quietly into the house and dressed in a hushed silence. Sarath asked them about school. So Putha soon you will do the Scholarship exam - you might get a chance of going to the big school in Colombo! Sugath looked serious. Aiyo! I don't like to be away from home, he said to his father. Sarath placed his hand on his son's head. "At a certain time in one's life one had to move away", he said seriously, "that's the only way to make progress".

The toot of a horn made them look up. The jeep had come to collect Sarath. Mala watched him, her spirit weighted down with the sadness of seeing him leave. She tried to be light-hearted. She smiled as though she did not have a care in the world. Sugath asked excitedly, "Thaththi are you going in one of those new planes? I saw them on TV the other day and they looked really marvellous!"

"Thaththi don't forget to bring us some sweets when you come back", pleaded Kanthi in her high pitched voice. Sarath looked at them lovingly as he held them in his arms. "Now go to school", he said softly, "and remember not to worry Ammi when I am away". The children ran off skipping, dressed in their spotless white uniforms and Sugath with his navy blue shorts. They chattered without pausing to each other as they made their way out of the compound. Sarath watched them go over the hill, past the del tree - then they were lost to sight.



Mala could feel the tears stinging her eyes, trickling down her face and Sarath's hands wiping them gently. "You will see me before you know what has happened", he told her. They walked to the picket gate and then up the hill together. The jeep was parked by the del tree. Two officers got down and smiled at Mala. "Don't worry about him", they said to her. "He'll be back really soon!" They revved the engine, and in a trice the jeep was just a blur of dust in the distance.

A banging on the door in the early hours of the morning rudely awoke her. She rubbed

her eyes sleepily, and went to see who it was. Two army officers stood outside. Their faces bore an inscrutable expression. They had carried out this task so many times recently. When she saw them she knew it was bad news. "The plane had crashed into the sea shortly after take off", they told her. "They had managed to rescue some of the bodies. One of them was Sarath's". She just stood there. Dumbstruck. Her eyes saw nothing, her mind a maelstrom of anguish. Sugath and Kanthi had woken up for the noise and were peering at her from behind the bedroom curtain. Their eyes were filled with anxiety and fear. "What is it Ammi? Why have they come"? She fell on to her bed sobbing out grief and agony. The children cried out aloud with her. The words kept coming back. "You will see me really soon". She did. She saw him hardly a day after he had left her; but he was dead, and they had sealed the coffin concealing his tattered, mangled body which lay inside. Cold and lifeless. She felt as if some vile beast was tearing out her insides. The two children, silent and swollen eyed, clung to her, fearing that she might go away too.

When Mala awoke the oppressive darkness stifled her. She realised the little oil lamp beside her bed and gone out. Getting up, she felt her way to where the lamp was, and relit it. Its flame shone bravely, defying the ominous blackness of the night.

Anthia Senarathne

WOMEN, VIOLENCE AND THE LAW

SAVITHRI WIJESEKERA

There is no doubt that over the last two and a half decades male violence against Women and Children has become an issue of increasing public concern.

Today violence in women's personal lives is recognised and in various ways is being challenged. Feminists have been active in seeking changes in the policing of violence against women and have fought and achieved much law reform in this area. However, despite the gains made by the women's movement over the last two and half decades violence against women still exists on massive scale. Although women have increased access to education have many more options relation to employment opportunities, and as a result of legislative development reforms of redress in some areas when they experience discrimination, overall women as a group still do not have economic or political power.

Attempting to define violence is difficult. Definitions of violence by professional experts such as lawyers, police, psychiatrists often either fail to recognise or trivialise behaviour that many women experience as violent. Women themselves are much broader in their definitions, they take into account a wide range of behaviours, including the fear of the threat of violence and the way this forces or constrains them to moderate their behaviour and act in cer-

tain ways. Violence has its many forms including physical, sexual, psychological, social and economic. Moving away from traditional meanings of violence such as physical force or cause injury or damage to a person or property also includes aspects that do not involve physical or interpersonal violence or direct violence.

In Sri Lanka the subject of violence against women is treated with much frivolity. Seen as the weaker sex in society women have a long fight for rights that most men take for granted. Although we in Sri Lanka boast a high literacy rate among women the fact remains that many women are not economically independent. Hence they



Domestic violence clearly is the most common form of violence against woman. Violence against wives is a right men exercised with impunity for centuries. This prerogative of men has been articulated in the precepts of religion, philosophy and law throughout the world. There seemed to have been a belief and in some instances continue to be still prevalent that physical violence against wives was deemed necessary for the "well being" of women.

turn to marriage as a means of support and survival. Ironically several women unwillingly enter into abusive relationships. Until recently it was assumed that in Sri Lanka alcoholism was the main factor that spurred men to abuse their wives. However a survey conducted by WIN states that only 18% of Sri Lankan women who were victims of violence cited this as the main cause of their abuse. The primary causes for domestic violence are financial crisis, the failure to complete house-

hold chores, extended family situations, assumed neglect and sex related issues.

Domestic violence is not included in the penal code of Sri Lanka as a criminal offence. Quoting Dr. Radhika Coomaraswamy on domestic violence "The basic assumption is that what happens in the home is a private affair and the law should only intervene if it becomes a public nuisance- such as when a woman screams hysterically through the night when her husband is beating her up, depriving her neighbours of sleep". Therefore domestic violence still remains a "hidden issue" where abused women consider it a "private shame" due to the lack of social empathy and support in addition to the patriarchal norms which allow male domination over a woman's own sexuality, women hesitate to obtain redress. Marital rape is still not considered a criminal offence unless the wife is judicially separated from the husband at the time of rape. Married woman has no protection against the violence of her husband. She is a prey to battery mental and physical abuse without a ray of hope of redress. Women victims of domestic violence are often reluctant to seek legal assistance. This is mainly due to social and cultural norms that frown upon breakup of marriage and very often women perceive that the underlying cause of violence lies with trauma.

According to a research conducted by Women in Need with 200 women from a mixed eth-

nic low income urban community 60% of these women were victims of domestic violence 42% were beaten up while they were pregnant and 38% of these abused women left their marital home due to the violence against them. According to this study gender stereotyping of women and men within their families and in society itself could be linked to the cause of domestic violence.

Rape is an offence which is considered not only as a crime against a person but against society itself. Rape is defined under the penal code of Sri Lanka as sexual intercourse between a man and woman without her consent and against her will under the following circumstances.

- a) Without her consent even where such a woman is his wife and is judicially separated from the man.
- b) With her consent, when it has been obtained under threat or by intimidation or while she was in unlawful detention.
- c) With consent, when it has been obtained at a time when she was of unsound mind or was in a state of intoxication.
- d) With her consent when it has been obtained under false pretences.
- e) With or without her consent where she is under 16 years of age ; unless the woman is his wife who is over 12 years and is not judicially separated from the man.

Evidence of resistance such as physical injuries is no longer essential to prove that rape has been committed. Punishment for rape is 'rigorous imprisonment for a term not less than 7 years and not exceeding 20 years with a fine. For custodial rape, rape of a pregnant woman, a mentally or physically disabled woman, of a woman under 18 years of age or gang rape, the imprisonment can be from 10 to 20 years with a fine. Incest is recognised as a criminal offence punishable with rigorous imprisonment of a term not less than 15 years.

The enforcement of the law in relation to gender violence rests with the police authorities. It is not surprising that police personnel tend to view acts of violence against women as unimportant. However a positive factor has emerged during the recent past with the establishment of women's and children's units in some of the major police stations in the country.

The right to life the right to be free from violence and cruelty, the right to equality within the family are some of the fundamental rights that should be enjoyed by women. In this context gender based violence is a violation of human rights. The need for the realisation of women's rights as human rights should be a recognised fact by everyone. Women themselves should be committed in creating public awareness in the existing discriminatory laws and the gendered roles in society which deny women the right to freedom from violence.

Muslim Law in Sri Lanka : Critical areas of Concern

Sri Lanka became a signatory to the Convention against Elimination of All Forms of Discrimination against Women (CEDAW) in 1981. The CEDAW which has been described as 'the definitive international legal instrument requiring respect for and observance of the human rights of women', imposes an obligation on States Parties to take all appropriate measures to eliminate discrimination against women. The government also pledged to work towards eliminating all forms of gender inequality, in the Women's Charter of 1993. The Charter reiterates the principles of the CEDAW, while 'recognizing and addressing the spe-

of Muslim Women according to age old, highly patriarchal constructions of society and the family. If the CEDAW and the Women's Charter is to have any meaning for women living under Muslim Law, what is now required is a comprehensive review and revision of these laws, in the light of standards laid down in these 2 documents.

Critical areas of Concern

Muslim Law in Sri Lanka is embodied in the Muslim Marriage and Divorce Act No. 13 of 1951.

But the Act is not intended to be an

long to a different sect, he/she will be governed by the law of that sect. Thus in cases involving hanafis, the courts have applied hanafi law.

The Muslim law in Sri Lanka is administered in special courts known as Quazi Courts. Appeal from the decision of quazi lies to the Board of Quazis situated in Colombo and thereafter to the court of Appeal and the Supreme Court.

This article will highlight some critical areas of the Muslim Law, which must be considered in implementing the CEDAW and the Charter.



cific needs and situations of women in Sri Lanka'. But the Personal Laws in Sri Lanka, i.e the Kandyan Law, the Thesevalami and the Muslim Law contain elements which are discriminatory towards women and which cannot be reconciled with principles of justice and equity. Muslim Law particularly continues to define the role and responsibility

exhaustive and comprehensive enactment. Wherever the Act is silent recourse must be to the Muslim Law of the sect to which the parties belong. The majority of Muslims in Sri Lanka belong to the shafi sect (that is the popular belief) and indeed the substantive provisions of the Act embody principles of shafi law. Where a person claims to be-

Polygamy

Muslim law recognises the right of a man to marry up to four wives. A Muslim woman however, can only take one husband at a time. Thus the practise of polygamy in Muslim law is inherently unequal. Apart from this inherent discriminatory character, the Sri Lankan legal provisions do not even embody the limitations on polygamy as laid down in the Quran.

The Act of 1951 merely requires that a husband wishing to marry a 2nd, 3rd or 4th time, give notice of his intention to do so the Quazi. Unless notice is given the marriage cannot be registered. [Sec. 24 (1) - (4)]. There is no need for him to obtain the consent of his wife/wives or inform her/them of the impending marriage. The statutory provisions are seen by Muslim women as a licence to enter into polygamous

unions, without the limitations envisaged by the Quran.

The Quranic injunction relating to polygamy is that a man may take a 2nd, 3rd, or 4th wife, if he can treat them equally in every respect. On the basis of this principle some contemporary codes require a court to assess the husband's capacity to treat the wives equally, and the necessity of taking a subsequent wife. Tunisia completely prohibited polygamy in the 1950's, on the basis that it is not possible to treat 2 or more wives equally under modern conditions.

Consent of Bride

Traditionally the marriage of a Muslim girl in Sri Lanka is arranged by the male members of the family, and she is expected to consent to the arrangement without demur. The MMDA Act enacts that a marriage of a woman belonging to the shafi sect is not valid unless the wali on her behalf communicates her consent to the marriage [Sec. 25 (1) (a) (ii)]. The Act does not however, provide for a mechanism to ensure that her consent is in fact obtained.

A shafi bride does not sign the declaration which is made prior to the registration of the marriage, except when her wali is someone other than her father. Nor is there provision requiring her to sign the marriage register. Thus there is no record of the fact that she has consented to the marriage and it is quite possible and even probable that marriages are registered against the wishes of the bride.

Consent of Wali

Although case law in Sri Lanka has recognised that under hanafi law, a female who has reached the age of puberty can enter into marriage without the intervention of a wali

or marriage guardian, under Sec. 25 (1) (a) of the MMDA Act a shafi woman cannot contract a valid marriage without the consent of her wali. He is generally the father and in his absence a paternal ascendant or collateral. The rule applies irrespective of the age of the bride and even an adult independent shafi Muslim woman needs the consent of her guardian before she can enter into wedlock. The wali's consent may be dispensed with only if it can be established that it is being withheld unreasonably. [Sec. 25 (1) (b)].

The concept of a marriage guardian for all ages is an anachronism, and inconsistent with a right to choose a spouse and enter into marriage with free and full consent.

The grounds and the procedure for obtaining a divorce

As far as the grounds of divorce are concerned, the Muslim law in Sri Lanka is more liberal than the general law and recognize divorce on the mutual consent of both parties - mubarat. In the absence of mutual consent, the husband has a greater right of divorce than the wife.

A husband can unilaterally repudiate the marital tie by the pronouncement of talaq, without giving any reason for so doing. The Act lays down a procedure for the pronouncement of talaq whereby divorce becomes effective only 3 months after the pronouncement of talaq. In the interim period the Quasi is under a duty to try to effect a reconciliation between the parties. [Sec. 27 & Rules 1-9 of the 2nd Schedule]. In practice these provisions are not stringently followed. In fact, it appears that triple talaq is widely practised and recognised as valid by Quazi Courts.

A Muslim wife can obtain a divorce on the ground of an act or omission amounting to fault or ill treatment on the part of the husband - fasah. [Sec. 28 (1)]. She can also obtain a divorce on any other ground recognised by Muslim law under sec. 28 (2) of the MMDA Act. Under this section, the courts have recognised that a wife may obtain a divorce with the consent of her husband by forfeiting her dowry or some other property - khula. In order to obtain a fasah divorce, the wife's evidence of fault must be corroborated by 2 witnesses. In order to obtain a khula divorce there must be evidence of breakdown of marriage and consent of the husband. In both fasah and khula, efforts at reconciliation by the Quazi is imperative for the validity of the divorce. Thus it is much more difficult for a woman under Muslim law to obtain a divorce than it is for a man.

Maintenance after divorce

On divorce, a woman is entitled to maintenance during the period of iddat, i.e. for a limited period of 3 months and if she is pregnant at the time, till the child is born. [Sec. 47 (1) (d)]. During iddat, she is entitled to support in the same scale as during the subsistence of the marriage. On divorce, she has also a claim to the mahr and kaikuli, provided it has not been already claimed.

Given new trends in other countries, which recognise that a divorced woman is entitled to an equitable share of the marital property, i.e. all the property acquired during the marriage irrespective of the fact that the husband is the sole wage earner and that a woman has to be compensated for her unpaid labour as mother and home maker, divorce settlements under Muslim law may

not adequately compensate a woman on divorce. The Islamic law concept of matak or compensation on divorce, is not part of the law in Sri Lanka. In other countries matak has proved to be a useful mechanism, which ensures that women receive a just and equitable settlement on divorce.

Minimum age of marriage

Muslim law does not specify a minimum age of marriage, and the concept of wilayat al jabr or marriage guardianship gives the guardian the right to give a minor child in marriage. This right is subject to two limitations. A minor girl given in marriage has the option of repudiating the marital tie, when she attains the age of puberty, if she can prove that the marriage is not in her interest and a minor girl given in marriage cannot be delivered to her husband until she attains the age of puberty. (Although this is cited as an important limitation on the right of jabr, the earliest age for the attainment of puberty is 9 years!. In the absence of evidence minority terminates at the age 15.)

Under hanafi law, a girl can enter into marriage on her own when she attains puberty.

The Act of 1951 in an attempt to discourage child marriages provided that a marriage of a Muslim girl below the age of 12 will not be registered unless it is authorized by the Quazi, after an inquiry. However, registration is not compulsory under the law and child marriages can well be solemnized in disregard of this provision.

The health and socio-economic implications for women of early age at marriage is well documented. The younger the mother, the higher

the incidence of child loss and complications at delivery. Young mothers also risk low birth weight babies with chromosomal disorders like Downs Syndrome. Early marriage also mean that she loses her opportunities to obtain higher levels of education and to acquire skills for income generating purposes.

The incidence of child marriages in Sri Lanka are quite low, and the average age of marriage among Muslim women is around 19 years of age. However, in a study of a typically Muslim village, Priyani Soyza records that the age of marriage ranged from 12-26. She also states that maternal and child mortality, complications of pregnancy and child birth are highest in the predominantly Muslim Districts of Batticaloa, Ampara and Mannar.

Registration

The Act provides for a procedure for the registration of Muslim marriages on the conclusion of the Nikah ceremony. A duty of causing the marriage to be registered is imposed on the bridegroom, the wali and the person who conducts the nikah ceremony. Failure to cause the marriage to be registered is an offense punishable by law. [Sec. 17]. However, non registration does not render the marriage invalid, so long as it is solemnized according to customary rites. [Sec. 16]

As is the case under the General Law, registration is not a compulsory legal requirement for the validity of a Muslim marriage. The acceptance of unregistered marriages creates problems of proof and prevents the maintenance of accurate records. Furthermore registration has other important implications for women and children. It

is a point at which the State can control and prevent discriminatory practices by enforcing requirements of minimum age of marriage, consent, etc. Registration will also ensure women's right to maintenance, inheritance and other rights following marriage.

The recognition of customary marriages are justified in countries where literacy is low and people are unaware of the need to register, or where people don't have access to registrars or the means to do so. Whether such marriages need to be recognised in Sri Lanka is a debatable point.

Composition of Quazi Courts

The office of Quazi in Sri Lanka is statutorily limited to "male Muslims of good character and position and of suitable attainment". [Sec. 12 (1)]. The section embodies the shafi rule that "a judge or a quazi must be a Moslem, adult, sane, free, male of irreproachable character, sound of hearing, sight and speech, educated and enjoying a certain degree of authority in matters of law".

The Quran and the Sunna are however silent on the subject, and Muslim women's rights activists maintain that there is no prohibition in the sharia against women holding office as quazis or judges. The Muslim Women's Research and Action Forum made a strong plea for the amendment of sec. 12 (1) before the Muslim Law Reform Committee of 1990. The Committee felt that the 'question of whether any law of the shafi mazhab can be altered or modified is a matter for competent jurists' and recommended that a fatwa be obtained from a body of jurists in Sri Lanka or abroad.

Property

A Muslim woman is a femme sole, capable of acquiring, holding and entering into legal transactions in respect of her own property, independent of her husband. Ameer Ali states that "(s)he acts, if sui juris, in all matters which relate to herself and to her own property, in her own individual right, without the intervention of husband or father. She appoints her own attorney, and delegates to him all the powers she herself possesses. She enters into valid contracts with her husband and her male relations, on a footing of equality...

Her ante-nuptial settlement is her own by absolute right, and she can deal with it according to her own will and pleasure. To become entitled to its enjoyment, she requires no intermediaries, trustees or next of kin".

Although, a Muslim woman's independent status in relation to her property has been accepted, in principle, in Sri Lanka for over 150 years, two important property transactions concluded on the marriage of a Muslim woman cannot be reconciled with it. Both mahr and kaikuli, which are gifts for the benefit of the wife are transferred to the husband who is charged with the duty of controlling and managing such property, until it is demanded from him by the wife.

Kaikuli is defined as follows in the Act :-

'Any sum of money paid, or other movable property given, or any sum of money or any movable property promised to be paid or given to a bridegroom for the use of the bride, before or at the time of the marriage by a relative of the bride or by any other person'

Similarly, mahr remains in the hands of the husband and under his control and management, until it is demanded by the wife'. However, since Islamic law recognises a woman's property rights, there is no need to create the device of a trust.

Inheritance

A Muslim can dispose of his property according to his/her own will and pleasure under the provisions of the Wills Ordinance No. 21 of 1844. In the case of a Muslim who dies intestate, his/her property devolves according to the Muslim law of intestate succession governing the sect to which the party belongs. The Islamic law of succession is quite complicated. Sufficient to say that women do not inherit equally with men. Under shafi law, women inherit of what men inherit, and daughters get half of what sons get.

Conclusion

What space is there for the reform of Muslim Law in Sri Lanka?. The communalisation of the Sri Lankan polity and the rise of ethnic or more correctly religious consciousness among Muslims mean that Muslim identity in Sri Lanka will hinge more and more on their Personal Law. Take for example a recent case in point. In September 1995, the minimum age of marriage under the General Law and Kandyan Law was raised to 18 years, for both males and females. No corresponding change was made in the Muslim Law due to strong resistance by the Muslim Lobby. Muslim Law does not specify a minimum age of marriage, and child marriages are possible under the law. The prospects for future reform does not therefore look promising.

Chulani Kodikara

House with many Doors

**I have returned once more to
The house of my childhood
wished me by my father
I divided with my mother
between myself and two brothers
like a chocolate-slab
we'd share in childhood**

**I wander through
Its many doors
with friends who remember
Its previous lives
with my daughter watch the white ants
Emerge from its walls
watch her stamp out their houses
built on years of solitude, saying
"A queen ant lives a hundred years"
and wonder how much longer
It would still hold me
before I break
Another fetter**

Lakmali Gunawardena

Sexual abuse

"A man who is alleged to have committed gross sexual abuse on a seven year old child has been released on bail while the child's mother has been remanded for allegedly throwing hot water on the suspect in outrage.

In this shocking case with its strange twist of justice, the Dehiwela police had first produced the suspect in court on an allegation that he committed an act of gross sexual abuse on the child who is his wife's sister's daughter.

The suspect had allegedly taken the girl in his van and got her to commit oral sex. Later the suspect had tried to rape the girl but failed, the girl's mother told police.

The girl's mother said that when she saw what the suspect had tried to do to her child, she had gone into a frenzy and thrown hot water on him.

The police then arrived, arrested the suspect and produced in court under the Penal Code's section 365 (b) which is generally interpreted as a non-bailable offence and punishable with a jail term of upto twenty years with a heavy fine.

The Dehiwela Police asked that the suspect be remanded till Tuesday as inquiries were not complete and as this offence was non-bailable. But the magistrate released the suspect on bail despite objections by the police and the lawyer who appeared for the mother.

The nightmare did not end there. The next day, the mother received a number of threatening calls, saying the suspect would destroy them. She then went to the Dehiwela police to complain about the threats but a horrible shock awaited her there.

Instead of getting relief protection from the threats, the mother was arrested for throwing hot water on the suspect.

Worse was to follow. She was produced before a Magistrate for committing an offence of grievous hurt under the Penal Code section 316 which is a bailable offence.

But the police moved that the mother be remanded for 14 days. So she was, leaving the child in the custody of her sister who is the wife of the alleged child abuser since the child's father has gone abroad for employment. The Sunday Times learns one of the reasons given by the magistrate to remand the mother of the child victim was that it was done for her own protection.

Prof. Savithri Goonasekera who headed a committee which drafted amendments to the Penal Code to punish the abusers of innocent children said that every rapist should be sent to jail with no discretion given to judges to suspend the sentence. Some Judges were of the view that they should have unfettered judicial discretion to decide on the sentence."— *The Sunday Times - 15th November 1998*

(Read editorial Justice)

The following is a summary of the Sexual Harassment Guidelines Judgement passed by the Supreme Court of India on August 13, 1997 prepared by Sakshi (New Delhi):



Sexual Harrassment Guidelines

In view of the increase of cases reported on sexual harassment of women, the Supreme Court of India, on a writ filed by women's NGO's has laid down guidelines to obviate such harassment at places of work, and at other institutions including universities, hospitals and other professional bodies. In the absence of any legislation, the court has held that these guidelines shall be legally binding and enforceable. With respect to employment, the guidelines are applicable to the government, public and private sector, and cover women drawing a salary or an honorarium or working as volunteers. The court has directed all employers and other responsible persons in workplace and other institutions to ensure the prevention of sexual harassment of women and to provide procedures for resolution, settlement and prosecution of acts sexual harassment. Most significant, the Supreme Court has brought sexual harassment within the purview of human rights violation.

Definition : Sexual harassment is unwelcome sexually determined behaviour, direct or by implication, and includes : Physial contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornography, any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Acts of sexual harrassment can be humiliating, can create a hostile work environment and may constitute a health and safety problem for women. Employers and responsible persons need to ensure that a woman objecting to harassment is not disadvantaged in respect to her employment and promotion.

Prevention : In order to prevent the occurrence of sexual harassment, the Court has directed employers and persons incharge of the workplace to take the follwing steps -

- (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- (b) The rules / regulations of Government and Public Sector bodies relating to conduct and discipline should include rules / regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- (c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that is no hostile environment towards women at work places and no employee women should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Complaints

Employers are expected to set up within their organisation an appropriate complaints mechanism. The Court had recommended provision for a complaints committee, a special counsellor and other support services for handling complaints. With respect to the committee, the following guidelines have been laid down.

The committee is to be headed by a woman. At least half of the committee members should be women. To prevent undue pressure from within the organisation, the committee should include a third party representative from an NGO or any other body conversant with the issue of sexual harassment. The complaint should be handled confidentially and within a time bound framework. The committee is required to submit an annual report to the concerned Government Department regarding compliance with the aforesaid guidelines.

Disciplinary Action :

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Other Provisions :

In addition to preventive and remedial measures, the Court has also stressed the need for awareness - raising in the workplace :

Employers should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate forums. Sexual harassment should be affirmatively discussed in employer - employee meetings. The guidelines stressing the rights of women workers must be prominently notified. Criminal Law In addition to the above the court has also addressed sexual harassment and criminal law remedies.

- a) Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, the employer should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

These guidelines are binding and enforceable in law until such time as the Government passes appropriate legislation.

Asian NGOs' Statement on the International Criminal Court

April 27, 1998

Noting that the waging of armed conflict and the commission of genocide, crimes against humanity serious war crimes throughout the world has continued in our times, at a tragic and horrific cost to human life;

Noting that national legal systems have historically failed to prosecute the perpetrators of international crimes, and that in Asia, victims of such abuses have no further recourse to a regional human rights forum;

Noting that the United Nations General Assembly, in Resolution 51/207, has called for a diplomatic conference of plenipotentiaries, which will convene in Rome from 15 June to 17 July 1998 to finalize and adopt a treaty to establish the International Criminal Court (ICC);

Noting the strong international support for the establishment of an international criminal court, as expressed by both governments and non-governmental organisations in, inter alia, the statement of the Southern African Development Community (11-14 September 1997), the Atlanta (USA) Declaration on the International Criminal Court (13 November 1997), the Dakar (Senegal) Governmental Declaration on the Establishment of the ICC (6 February 1998), the Declaration of the NGO International Forum in Dakar (Senegal) (4 February 1998), the European Parliament Resolution on the International Criminal Court (12 March 1998);

A number of non-governmental organisations in the Asia-Pacific hereby;

Support the early establishment of an effective and impartial International Criminal Court, recognising the importance of such a Court to end impunity for egregious violations of international law, to enhance the enforcement of human rights, to encourage national courts to adhere to the standards of international law, to provide justice for victims, and to deter the commission of future international crimes;

Support the principle of complementarity for the International Criminal Court, understanding that national courts have the primary responsibility [of] bringing perpetrators to justice and that the Court should exercise jurisdiction only when it has determined that national judicial systems have been ineffective or unavailable;

Support the Court's inherent jurisdiction over the three "core" crimes of genocide, crimes against humanity and serious war crimes based on the existing universal jurisdiction over these crimes as currently recognised under international law and reject the requirement of further consent by states to the Court's jurisdiction;

Support the creation of an independent prosecutor, allowing her / him to initiate investigations based on information from any source, including individuals and non-government organisations;

Support the Court's authority to make binding requests for cooperation and enforcement upon states parties, recognising that in order to ensure full and fair prosecution, state compliance with the Court's decisions, after an opportunity for challenge should be a legal obligation;

Call for the definition of crimes to reflect the progressive development of international law by including violations committed in internal armed conflict and crimes of sexual and gender violence within the definitions of war crimes and crimes against humanity, and removing the requirement of armed conflict from the definition of crimes against humanity;

Recognise the right of victims and their representatives to reparations (including restitution, compensation, and rehabilitation) under international law and urge the International Criminal Court to establish mechanisms for providing reparations;

Urge governments in Asia to play more active and supportive role in the establishment of an International Criminal Court, by fostering public awareness of the ICC, and sending delegations to the Rome Conference and including human rights experts in such delegations;

Oppose giving states the right to make reservations to the Court's statute, since reservations would undermine the moral authority and legal force of the statute and weaken the legal obligations of the state parties.



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Ghastly Flaw in the Law

The Law's an ass, there is no doubt,
From every roof-top let us shout.
The mother of age seven child
Who found her child had been defiled
By an uncle who took in his van
The innocent to rape did plan,
But failing, forced to oral sex-
All decent human beings to vex-

In frenzy threw some water hot
Upon the suspect on the spot
Was charged and remanded to jail,
The suspect being enlarged on bail.

The victim's father is abroad
And she perforce a hapless ward
Of Aunt, the very suspect's wife,
By a strange quirk of cruel life.
If such occurs within the law,
Revise with speed the ghastly flaw.

Mervyn Casie Chetty

Courtesy Sunday Times 29 . 11 . 98