

**GENDERIZING LIFE, CHOICE, AND RIGHTS: ASKING THE
WOMAN QUESTION IN THE ABORTION DEBATE**

*Achalie Kumarage**

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Achalie Kumarage

Women's choices and rights, to health and equality in particular, do not sufficiently figure into the abortion debate or command the attention that they rightfully deserve. Key aspects undermining their prominence could be identified as religious fundamentalism and propagated morality. This paper is based on the recent abortion debate in Sri Lanka, which arose as a result of an impending bill to legalize abortion in specified circumstances. Abortion is neglected or overlooked in many jurisdictions, and Sri Lanka is no exception. This paper develops a critical analysis of the abortion debate in the plural religious and legal system of Sri Lanka. Comparative perspectives are drawn from jurisdictions which faced similar dilemmas in reforming their laws on abortion. The analysis employs the feminist method of practical reasoning to look beyond the surface of religious and moral generalizations and obscure gender biases, revealing more crucial considerations of women's health, autonomy, and dignity that do not figure sufficiently in this debate. This paper unpacks gender biases pertaining to reproduction and abortion, couched within religious and moral universality in the pluri-religious cultural setting of Sri Lanka, by adopting the feminist legal method of "asking the woman question."

INTRODUCTION

ABORTION is a contested subject in any legal system of the world. Though the issue has been debated for centuries, nations have yet to arrive at a common ground.¹ Religious communities are divided on legalizing or banning abortion as a practice.² Women have been the primary victims regarding this unsettled issue, unable to voice their choices or bodily rights, and have been denied access to safe termination of pregnancy even when pregnancy threatens their lives. While abortion

¹ See Alan Blinder, *Louisiana Moves to Ban Abortions After a Heartbeat Is Detected*, N.Y. TIMES, May 29, 2019; Siddhivinayak S. Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 REPROD. HEALTH MATTERS, 114, 114-19 (2004); Rachel Rebouché, *Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1-42 (2011).

² Religious communities, for the purpose of this paper, refer to religious fundamentalist groups, including priests and secular groups who advocate fundamentalist religious views pertaining to life and termination of life. Religious fundamentalism is more fully described with reference to criteria in Part II, *infra*; see Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 289-323 (1997).

uncomfortably looms on the margins of positive law, unable to find its place in the legal system, women's voices on the issue have been submerged in the mainstream debate on abortion. This is particularly profound in the plural legal systems in Asia, where influential religious communities dominate secular lawmaking, its reform, and the lawmakers themselves.³

Premised on the abortion debate in Sri Lanka, the primary contention of this paper is that women's choices and rights, specifically the rights to health and equality, do not figure in the abortion debate, being undermined by religious fundamentalism and a propagated morality. The second most common cause of direct maternal deaths in Sri Lanka is septic abortions.⁴ The Ministry of Health estimates that it remains at 12%, performed primarily as an illegal procedure by poorly qualified persons under septic conditions.⁵ This fact blatantly contrasts with the commendable track record on maternal health and maternal mortality that Sri Lanka is maintaining as a developing country.⁶ Abortion thus factors in as the Cinderella of the maternal health sector of Sri Lanka. It is criminalized except to save the life of the mother, and the decriminalization movement is conveniently ignored or overlooked to maintain a status quo backed by religious fundamentalists and conservative cohorts. Abandoning proposed reforms to conditionally relax the law on abortion in Sri Lanka in January 2017⁷ was the most recent effort.⁸

This paper develops as a critical analysis of the abortion debate in the plural religious and legal system of Sri Lanka. By employing the feminist method of practical reasoning, the analysis looks beyond the surface of the religious and moral generalization and obscure gender biases.

³ India is considering a Uniform Civil Code to replace its religious laws which include discriminatory provisions against women on marriage, divorce and inheritance; see TNN, *Uniform Civil Code Not Desirable at this Stage: Law Panel*, TIMES OF INDIA, Sept. 1, 2018.

⁴ FAMILY HEALTH BUREAU OF SRI LANKA, AN ANNUAL REPORT ON FAMILY HEALTH IN SRI LANKA (2011), 30; WOMEN AND MEDIA COLLECTIVE, COUNTRY PROFILE ON UNIVERSAL ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH: SRI LANKA, 7 (2015).

⁵ C. Arambepola & C.L. Rajapakshe, *Hospital Based Study on Unintended Pregnancies in Sri Lanka*, COLOMBO: UNITED NATIONS POPULATION FUND (2014).

⁶ Sri Lanka's maternal mortality ratio is 30 per 100,000 live births whereas the United States' is 14, United Kingdom's 9, Canada's 7 and Norway's 5 per 100,000 live births. See UNICEF, TRENDS IN MATERNAL MORTALITY: 1990 AND 2015, 5-12 (2017).

⁷ Kamanthi Wickramasinghe, *Cabinet to Legalize Abortions Under Crucial Circumstances*, DAILY MIRROR (Colombo, Sri Lanka), Jan. 23, 2017.

⁸ Chrishanthi Christopher, *Abortion Bill put on Hold Amid Opposition from Religious Leaders*, SUNDAY TIMES (Colombo, Sri Lanka) Sep. 3, 2017; Piyumi Fonseka, *Changing Abortion Law: Catholic Church Says No*, DAILY MIRROR (Colombo, Sri Lanka), Aug. 26, 2017.

Unpacking the gender biases pertaining to reproduction and abortion that are couched within religious and moral universality in the pluri-religious cultural setting of Sri Lanka requires “asking the woman question,” a feminist legal method designed to identify and elucidate gender implications in ordinary practices which otherwise seem objective or neutral.⁹

I. CONTEXTUALIZING ABORTION IN THE SOCIO-LEGAL FABRIC

A. *The Global Setting*

Feminist methods of practical reasoning encourage contextualized methods of reasoning.¹⁰ An insight into the global context on abortion, therefore, can create a greater understanding of the injustice that exists in the Sri Lankan context. Abortion remains a contentious topic everywhere in the world. However, the global context makes it evident that the case study of Sri Lanka is an example that fails to reflect the global trend of relaxing restrictions on abortion laws.

“Globally, 40% of women of childbearing age (15 to 44) live in countries with highly restrictive laws (those that prohibit abortion altogether, or allow the procedure only to save a woman’s life, or protect her physical or mental health).”¹¹ Between 2010 and 2014, 45% of abortions worldwide were unsafe, while “97% of these unsafe abortions occurred in developing countries in Africa, Asia and Latin America.”¹²

⁹ The “woman question” and “feminist practical reasoning” have been utilized in the manner illustrated by Katharine Bartlett. See Katharine T. Bartlett, *Feminist Legal Methods*, in *FEMINIST LEGAL THEORY FOUNDS.* 550, 550-66 (D. Kelly Weisberg ed., 1993).

¹⁰ *Id.* at 556.

¹¹ SUSHEELA SINGH ET AL., *ABORTION WORLDWIDE: A DECADE OF UNEVEN PROGRESS* 4 (2009).

¹² For the first time, in 2017, a new study by WHO and the Guttmacher Institute includes two sub-classifications within the unsafe abortion category as less safe or least safe. From 2010-2014, approximately 31% of abortions were “less safe,” while about 14% were “least safe.” The study states that the distinction provides for a nuanced understanding of the different circumstances of abortions when women are unable to access safe abortions. About 55% of all abortions from 2010 to 2014 were conducted safely, which means they were performed by a trained health worker using a WHO-recommended method appropriate to the pregnancy duration. “Less safe” abortions mean they were either performed by a trained provider using an unsafe or outdated method such as “sharp curettage,” or by an untrained person albeit using a safe method like misoprostol, a drug that can be used for many medical purposes, including to induce an abortion. The study discusses administering this drug in section 1.3. “Least safe” abortions are provided by untrained persons using dangerous methods, such as introduction of foreign objects and use of herbal concoctions. “Least safe” abortions can lead to complications such as incomplete abortion (failure to remove all of the pregnancy tissue from the uterus), hemorrhage,

Internationally, laws on abortion are diverse, but religious influence as a cause for this diversity, is universal. The countries of the world could be organized into six categories based on the nature of their abortion laws. Per a study conducted in 2008,¹³ out of 197 countries, thirty-two criminally ban abortion on any grounds. Thirty-six countries permit induced abortion when the woman's life is threatened. Sri Lanka is in the latter category, and its law cannot be interpreted to permit abortion on any other ground. The premise of this paper draws legitimacy from the global context: only 34% of countries have succumbed to pro-life mores in depriving women access to safe abortions, whereas a majority (66%) facilitate abortion for the health and wellbeing of women.

B. Contextualizing the Abortion Debate in Sri Lanka

Abortion has been criminalized by the penal laws of Sri Lanka for the past forty-four years. Sections 303 through 307 of the Penal Code of Sri Lanka stipulate provisions relating to causing miscarriage by the mother, or another, i.e. a trained provider or any other person.¹⁴ The punishment inflicted varies from three years' imprisonment if committed by the woman or by another with the consent of the woman, to twenty years, with or without a fine, when committed without the consent of the woman or when the death of the mother is caused as a result. Section 303 makes an exception to criminal liability when abortion is performed only in "good faith" for "the purpose of saving the life of the woman."

The government of Sri Lanka was pressured to stall the process to introduce controversial abortion reforms in September 2017.¹⁵ The abortion debate in Sri Lanka has been prolonged for over forty years and has explicitly emerged on the public stage twice: once when the reforms were proposed by a study in 1973, and once after legislative proposals in 1995. The Penal Code Amendment of 1995 for abortion was withdrawn on the promise of introducing health legislation to address the problem,¹⁶ which never materialized.¹⁷ The reforms in 2017 came to a standstill when

vaginal, cervical and uterine injury, and infections. See World Health Organization and Guttmacher Institute, *Worldwide, An Estimated 25 Million Unsafe Abortions Occur Each Year*, WORLD HEALTH ORGANIZATION, 28 Sept. 2017.

¹³ See SINGH ET AL., *supra* note 11, at 9-10.

¹⁴ Penal Code of Sri Lanka, Ordinance No. 2 of 1883.

¹⁵ Fonseka, *supra* note 8.

¹⁶ Hansard of the Parliament of Sri Lanka, Sept. 19-20, 1995; Sunila Abeysekera, *Abortion in Sri Lanka in the Context of Women's Human Rights*, 5 REPROD. HEALTH MATTERS 87, 91 (1997).

¹⁷ In 2013, the Law Commission of Sri Lanka submitted Proposals on Medical Termination of Pregnancy to the Ministry of Justice, Sri Lanka. See Law Commission of Sri Lanka, *Medical Termination of Pregnancy - Proposals of The Law Commission of Sri Lanka*, Feb. 2013.

the government was on the verge of commissioning a draft of the proposed Bill to be passed at the Parliament.¹⁸

Although the drafted reforms by the special committee seeking Cabinet approval to legalize termination of pregnancy were not made public, sources claim that the proposals decriminalized abortion to allow for medical termination of pregnancies in specific circumstances under strict regulations. The specified circumstances were sexual abuse and incest, pregnancy occurring in a girl below the age of sixteen (a victim of statutory sexual assault), and serious fetal impairments before the fetus is twelve weeks old.¹⁹ All sources reported on this matter attribute the intended law reforms process reaching an inevitable standstill to vehement opposition by religious groups.²⁰ A few attribute the issue of abortion to causes other than predominant religious influence, including lack of reproductive education, non-usage of contraceptive methods, and inaccurate or nonexistent family planning among married couples.²¹ These analyses overlook that contraceptives “can never eliminate the need for abortion services owing to their relatively high failure rates with typical use, as well as the fact that they are unlikely to be used when sexual intercourse is forced.”²²

The opposition by religious groups, in particular the Catholic Church, is prominent, unambiguous, and widespread in the current abortion debate in Sri Lanka. Activism seemed to have grown even more since 1995, when the reforms were last withdrawn after an extensive parliamentary debate which concluded that the then-proposed abortion reforms reflected some “intractable” moral problems, and contradictions “between those traditions that regard all life as being sacrosanct and those voices that believed in the independence and autonomy of women and of women’s right to determine their own future.”²³ In 1995, withdrawing the abortion reforms, the then-Minister of Justice declared that, the government has “tried to accommodate different points of view, different religious convictions and different cultural and moral traditions.”²⁴

¹⁸ Christopher, *supra* note 8. The reforms to the Penal Code No. 2 of 1883 and consequential amendment to the procedure in the Code of Criminal Procedure Act No. 15 of 1979 were commissioned by the Ministry of Justice, Sri Lanka on December 7, 2016. Office of the Minister of Justice, Cabinet Memorandum dated Dec. 7, 2016, MOJ/L(1)/308/2016.

¹⁹ Methmalie Dissanayake, *Abortion Laws Long Overdue for Overhaul*, CEYLON TODAY (Sri Lanka), Sept. 3, 2017; Nadira Gunatilleke, *Abortion Bill to be Brought to Parliament Soon*, DAILY NEWS (Sri Lanka), Aug. 22, 2017.

²⁰ Christopher, *supra* note 8.

²¹ Dinesha Samararatne, *Abortion Debate in Sri Lanka: Mismatched and Misplaced?*, GROUNDVIEWS (2017).

²² Ramya Kumar, *Abortion in Sri Lanka: The Double Standard*, 3 AM. J. PUB. HEALTH 400, 400-04 (2013).

²³ Hansard of the Parliament of Sri Lanka, *supra* note 16.

²⁴ *Id.*

As Sunila Abeysekera analyzes the abortion debate of 1995, “[t]he coming together of conservative religious and political opinions against women’s right to control their sexuality and reproduction, as reflected in this debate, is of grave concern for women in Sri Lanka.”²⁵ The same reality is manifest in the current abortion debate. As Tiruchelvam opined in 1995, Sri Lanka’s need for “new and profound changes in contemporary mores and values relating to gender equality, must be reflected in the law.”²⁶ However, the pressure exerted by religious fundamentalism has prevented the law from evolving.

C. Does Sri Lanka Need Abortion Reforms?

Contrary to the generalized picture of morality and safeguarding life painted by the Catholic Church, statistics reveal a gruesome reality of about seven hundred illegal abortions performed daily in Sri Lanka.²⁷ Hapless women deprived of safe access to abortion seem to be increasingly resorting to discreet procedures to terminate pregnancy.

As revealed at the outset of this paper, while there is no formal mechanism to gather data on these illegal procedures, the Ministry of Health of Sri Lanka reveals that nearly 12% of maternal deaths in Sri Lanka are due to septic abortions.²⁸ A majority of abortions are unsafe as they are performed illegally, under septic conditions, and by poorly qualified persons.²⁹ While the country maintains the lowest maternal mortality rate in the region, which was thirty-two maternal deaths per one thousand live births in 2013, about 10 to 12% of maternal deaths are reportedly due to unsafe abortions.³⁰ Pointing out that abortion was the second leading cause of maternal death in 2006, 2008, and 2014,³¹ Human Rights Defenders and women’s groups in Sri Lanka claim that the “continued criminalization of abortion is a crisis for women’s rights, women’s wellbeing and health in Sri Lanka. It is a serious obstacle to women’s ability to make empowered and autonomous decisions as equal citizens to choose the termination of an unwanted pregnancy under any circumstances.”³²

²⁵ Abeysekera, *supra* note 16, at 91.

²⁶ *Id.* at 89.

²⁷ EVANGELINE DE SILVA, WOMEN AND MEDIA COLLECTIVE, COUNTRY PROFILE ON UNIVERSAL ACCESS TO SEXUAL AND REPRODUCTIVE RIGHTS: SRI LANKA 7 (2015).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Meera Srinivasan, *Revisiting the Debate on Abortion Law*, THE HINDU, Oct. 7, 2017.

³¹ KAPILA JAYARATNE, Family Health Bureau, NATIONAL MATERNAL MORTALITY REVIEWS 20 (2016).

³² *Opinion, Decriminalize Abortion in Sri Lanka: Statement by Human Rights Defenders and Women’s Groups*, SRI LANKA MIRROR, Sept. 11, 2017.

Apart from the illegal abortions that happen daily, reported abortion cases in the police log and prosecution establish the issue more candidly. While forty-six cases of abortion were reported to the police in 2012, by 2013 it increased to sixty-eight cases.³³ Compared to the number of cases reported in 2012, this was an increase of 48%. The judiciary continues to hear cases pertaining to abortion prosecutions and appeals, often filed by doctors who carried out the procedures at the request of women. In one instance, in *Sheela Sinharage v. Attorney General*³⁴ a suit was filed against a medical practitioner for the death of a woman as a result of septic abortion.

Furthermore, the increasing use of two particular drugs for inducing abortion, mifepristone and misoprostol,³⁵ demonstrates that their legal prohibition has not met the intended end of preventing abortion. The drugs, particularly misoprostol, are claimed to be highly effective in the management of incomplete abortion and miscarriage, and in the prevention and treatment of postpartum hemorrhage where oxytocin is not available or cannot be safely used.³⁶ Although mifepristone and misoprostol are not registered drugs permitted in Sri Lanka, the two in combination are used for medical abortion.³⁷

There are two problems with this ban. First, despite their unregistered status, “the drugs are available across the country and used widely in obstetric practice.”³⁸ Second, the unregistered status of the drug is problematic because abortion is legal in life-saving circumstances. In fact, misoprostol has been included in the WHO Essential Medicines List (EML) since 2005, and was included for labor induction where appropriate facilities are available, and in combination with mifepristone for medical abortion “where permitted under national law and where culturally acceptable.”³⁹ This raises questions about essential medicines, right to health, and cultural relativism, more fully discussed in Part 2.

Hospitals in the country provide post-abortion care. Anecdotes from practitioners show that there is reluctance to seek support, especially on

³³ WORLD ORG. AGAINST TORTURE & GLOB. JUST. CTR., SUBMISSION TO THE COMMITTEE AGAINST TORTURE IN RELATION TO ITS EXAMINATION OF THE SRI LANKA’S FIFTH STATE PARTY REPORT 3 (2016).

³⁴ *Sheela Sinharage v. Attorney General*, 2 S.C. 84 (Sri Lanka, 1984).

³⁵ Marc Roberts states that the drug is smuggled into Sri Lanka from India and Pakistan where it is registered and easily available at affordable prices. In Sri Lanka they are indirectly available at exorbitant prices, especially in peripheral areas of the country where the law enforcement is weak. See Marc J. Roberts, WORLD BANK PUBL’NS, *Pharmaceutical Reform: A Guide to Improving Performance and Equity* 217 (2011).

³⁶ WORLD HEALTH ORG., *Model List of Essential Medicines* 46 (20th ed. 2017).

³⁷ Ramya Kumar, *Misoprostol and the Politics of Abortion in Sri Lanka*, 20 REPROD. HEALTH MATTERS 166, 166-74 (2012).

³⁸ *Id.* at 166; Roberts, *supra* note 35, at 217.

³⁹ WORLD HEALTH ORG., *supra* note 36, at 46.

the part of rural impoverished women, out of the fear that they will be reported to the police by the hospitals for committing abortion.⁴⁰ This is tied to the way gender stereotyping and societal attitudes towards abortion penalize women.

The facts collectively press for relaxing the laws on abortion, and outweigh the opposition by religious leaders. Nevertheless, the Ministry of Health proposes dealing with the seemingly increasing demand for abortion through minimizing unwanted or unplanned pregnancies.⁴¹ This alternate plan of the Ministry of Health appears blatantly inadequate. In the given context, a promise by the State to a right to healthcare and nutrition during pregnancy remains restricted to a piece of paper. The Women's Charter of Sri Lanka (1993), in its policy status,⁴² remains a paper tiger⁴³ as it does not carry the force of a law. Article 13 of this policy document encompasses equal access to health care information and "highest available standards of health care, quality services in connection with pregnancy, confinement and post-natal period"⁴⁴

The Report of Sri Lanka to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2015 asserts that "[t]he State continues to address the need for safe and therapeutic abortion services for women by providing an alternative of quality post-abortion care and promoting the greater uptake of modern contraceptive methods among women."⁴⁵ Unable to suppress the compelling need for legalized abortion, the report states that "[t]he Law Commission has formulated a comprehensive draft Bill recommending the liberalization of the current strict approach contained in the Penal Code. The proposal has been formulated in consultation with medical professionals and recommends that termination of pregnancies be permitted in limited circumstances such as rape or where the fetus is established to have congenital abnormalities." Reasoning out the delay for the reforms to materialize, the Country Report

⁴⁰ Kumar, *supra* note 37, at 168.

⁴¹ Arambepola, *supra* note 5.

⁴² Abeysekera, *supra* note 16. The Women's Charter of Sri Lanka is not a legally binding document and cannot be enforced in a court of law. See SHYAMALA GOMEZ & MARIO GOMEZ, FROM RIGHTS AND SHAME TO REMEDIES AND CHANGE 54 (Canadian International Development Agency's SHAKTI Gender Equity Project 1999).

⁴³ The Women's Charter of Sri Lanka is a key component in the legal framework affecting women. However, being a policy document, it is merely normative and ineffectual. See GOMEZ & GOMEZ, *supra* note 42.

⁴⁴ Women's Charter of Sri Lanka (approved by the Government of Sri Lanka on Mar. 3 1993), Section 13.

⁴⁵ The Woman and Media Collective, Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), submitted for the 66th Session of the CEDAW Committee Geneva, Switzerland Feb. 13 – Mar. 3, 2017 (Jan. 2017).

to the CEDAW Committee quotes that “a policy decision on the proposals is awaited” to go ahead with the draft proposals.⁴⁶

The CEDAW Committee, in its concluding observations to Sri Lanka, recalled its General Recommendation No. 24 (1999) on Women and Health, with attention to Sustainable Development Goal 3. It specifically targets 3.1 and 3.7 “on the reduction of global maternal mortality ratios and ensuring universal access to sexual and reproductive health services,” recommending⁴⁷ that Sri Lanka:

- a) Amend its legislation to legalize abortion not only in cases in which the life of the pregnant woman is threatened, but also in all cases of rape, incest and severe fetal impairment, and to decriminalize abortion in all other cases;
- b) Remove barriers to women’s access to safe abortion services, such as the requirement of a judicial inquiry as to whether there should be a medical termination of the pregnancy and the need for a medical certificate authorizing an abortion.⁴⁸

Given the recommendations expressed by the CEDAW Committee, Sri Lanka appears to be violating its international obligations. In other words, succumbing to pressure by religious fundamentalists not only threatens the living conditions of Sri Lanka’s female citizens but potentially challenges the state’s credibility in fulfilling its pledge of state obligations in the international forum.

It is perplexing why the law on abortion remains unchanged when Sri Lanka shows a continuous commitment to maintain high standards of healthcare. The free national health system of Sri Lanka has worked to

⁴⁶ Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention, Eighth Periodic Report of States Parties Due in 2015 Sri Lanka, Committee on the Elimination of Discrimination against Women, at 23, CEDAW/C/LKA/8 (May 29, 2015).

⁴⁷ Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Sri Lanka, March 3, 2017, 35 CEDAW/C/LKA/CO/8 (Mar. 9, 2017).

⁴⁸ *Id.* at 11; The judgment in *LMR v. Argentina*, UNHRC (2007) may have had an impact on this recommendation. The judgment of the case seriously considered how the victim was denied justice due to an unlawful judicial intervention which prolonged the case and thereby denied the opportunity for safe abortion for a victim of sexual abuse. *Human Rights Comm., Commc’n No. 1608/2007*, L.M.R. v. Argentina, 9.4, U.N. Doc. CCPR/C/101/D/1608/2007 (Apr. 28, 2011). Although abortion was legal in her case due to her disability, pregnancy was prolonged by unlawful judicial intervention and religious activism. *Id.* at 2.6-2.7. Parties were compelled to seek an illegal procedure after which the victim underwent post-traumatic stress disorder and incurred monetary and other costs for the whole family. *Id.* at 9.4.

reduce the maternal mortality ratio to 30 per 100,000 live births, which is claimed as the lowest in South Asia.⁴⁹ The proportion of births attended by skilled health professionals, and the proportion of women who delivered at a health facility, are exceptionally high, at 99%.⁵⁰ “Sri Lanka’s Human Development Index (HDI) value for 2013 was 0.750, positioning it at 73 out of 187 countries.”⁵¹ “This rate is above the average of 0.735 for countries in the high human development group and above the average of 0.588 for countries in South Asia.”⁵² Interestingly, these development indexes do not grasp the contextual experiences of women who are deprived of safe access to abortion when a pregnancy threatens their health and wellbeing. This is where raising the woman question will bring to light the obscure gender injustices analyzed below.

II. WOMAN, HER HEALTH, AND HER CHOICE IN THE ABORTION DEBATE

The primary thesis of this paper is that a woman’s choice and right to health have not figured in the abortion debate of Sri Lanka, and that this omission stems from two main causes: religious fundamentalism and gender stereotyping that undermines women’s rights. The thesis is further analyzed against the backdrop of tension between democracy, secularism, and the role of religion in Part 3. These arguments are thoroughly interlinked and individually contribute to a compelling case for abortion law reforms. Part 2, in each of its core arguments, explores the “woman question”⁵³ to examine how women’s bodies, roles, choices, and lives are all affected by various segments of this debate.

⁴⁹ WORLD HEALTH ORG., COUNTRY OFFICE FOR SRI LANKA, WHO Sri Lanka Annual Report 2016.

⁵⁰ For the proportion of births attended by skilled health professionals, see Maternal mortality in 1990-2015- Sri Lanka (WHO, UNICEF, UNFPA, World Bank Group, and United Nations Population Division Maternal Mortality Estimation Inter-Agency Group). For the proportion of women who delivered at a health facility, see Sri Lanka Demographic and Health Survey 2016 111, 117 (September 2017, Department of Census and Statistics Ministry of National Policies and Economic Affairs Health Sector Development Project Ministry of Health, Nutrition and Indigenous Medicine).

⁵¹ Asian-Pacific Resource & Research Centre for Women (ARROW), *Country Profile on Universal Access to Sexual and Reproductive Health: Sri Lanka (Sinhala)*, 2015, arrow.org.my/publication/country-profile-on-universal-access-to-sexual-and-reproductive-health-sri-lanka-sinhala.

⁵² UNDP, *Country Profile on Universal Access to Sexual and Reproductive Health: Sri Lanka*. Most notably, solely focusing on life expectancy at birth under the indicator for health, HDI does not reflect maternal mortality, maternal health or wellbeing contributing to its calculation.

⁵³ Bartlett, *supra* note 9, at 550-66.

A. Religious Fundamentalism in the Abortion Debate

The diversity of abortion laws around the world results from differences arising according to the influence of religious, moral, and cultural norms.⁵⁴ Common in the global context, “seminal impediments that persist outmoded laws [are...] opposition from powerful religious authorities, the activities of antichoice groups influenced by precedence of such authorities and reluctance to publicly address sensitive issues of sexuality and reproduction.”⁵⁵ Anywhere in the world where the need to relax abortion laws surfaces, religious influence or activism by conservatives backed by religious cohorts is evident.⁵⁶ Similarly, these are clearly visible traits in Sri Lanka’s abortion debate, and they lead to persistent, outmoded laws that essentially deprive women of a right to health in the form of access to safe abortion.

The current withdrawal of abortion law reforms was preceded by failed efforts of the state to gain support of religious groups. The Ministry of Justice of Sri Lanka confirmed that the proposed reforms were on hold because the President instructed that the Bill be drafted in consultation with religious leaders.⁵⁷ Failed attempts by the State to convince religious leaders and pursue the process included a briefing held by doctors to teach the medical aspects of the proposed abortion reforms to the religious leaders, which was attended by no female doctors.⁵⁸ The Catholic Church opposed abortion under any circumstance,⁵⁹ while other religious groups backed the Church, opining that abortion cannot be condoned despite any remaining necessity and the escalating closed-door abortions.⁶⁰

It is noteworthy that the Catholic community in Sri Lanka is the dominant force preventing reforms to relax legal restraints on access to abortion. Catholics form only 6.2% of the population, while Christians (Protestants) account for 1.4%. Buddhism is professed by 70.1% of the population, Hinduism 12.6%, and Islam 9.7%.⁶¹ It is perplexing how the

⁵⁴ SINGH ET AL., *supra* note 11, at 5.

⁵⁵ *Id.*

⁵⁶ Examples are the pending abortion law reforms in Ireland and the debate on *Roe v. Wade* which has resurfaced in the USA; see Henry McDonald, Emma Graham-Harrison, & Lisa O’Carroll, *Ireland Moves Forward with Abortion Law Reform After Historic Vote*, THE GUARDIAN, May 27, 2018; *The New Push to Overturn Roe v. Wade: A Dozen States Have Introduced “Heartbeat” Bills that Would Ban Early Abortion*, THE ECONOMIST, Apr. 13, 2019; Anthony Zurcher, *What U.S. Ruling May Mean for Roe v. Wade*, BBC NEWS, Feb. 8 2019.

⁵⁷ Christopher, *supra* note 8.

⁵⁸ Lahiru Pothmulla, *Abortion: Medical Doctors Brief Religious Leaders*, DAILY MIRROR (Sri Lanka), Sept. 15, 2017.

⁵⁹ Fonseka, *supra* note 8.

⁶⁰ Ruwan Laknath Jayakody, *The Abortion Debate Heats Up*, THE NATION, Sept. 24, 2017.

⁶¹ Department of Census and Statistics Sri Lanka, *Annual Census Report*, 147 (2012).

Catholic Church single-handedly commands support and dictates legislative policy when the population remains so religiously diverse. Besides, in a democratic order as opposed to a theocracy, there is no mandatory ground rule that the law should reflect religion beyond the needs and demands of the society.⁶²

Religious fundamentalist movements, in any country, involve increasing activism in the political arena to enact their religious visions into the law, be it Buddhism, Hinduism, Christianity, or any other religion.⁶³ They operate to influence the secular state. Religious fundamentalism, for the purpose of this paper, is defined as a movement within a religion that is understood to be “oppressive of women.”⁶⁴ It is distinguished from religious conservatism in that the latter is more passive in accepting the political and legal structures of the society.⁶⁵

It is not the purpose of this paper to scrutinize religious doctrine or scripture. Religious fundamentalist movements do not even completely abide by religious scripture or teachings, having evolved as a cultural phenomenon.⁶⁶ Courtney Howland, writing on religious fundamentalism and women’s rights, posits that fundamentalism comes from a wide variety of religions and races, and many of them emphasize their cultural origins and attachments.⁶⁷ These cultural origins are largely oppressive toward women. The larger fundamentalist movement is devoted to “maintaining and enlarging the requirement of women’s submission.”⁶⁸ Howland’s criteria for fundamentalism consist of the following:

Believes that the group and society need to be rescued from the secular state; rejects Enlightenment norms, particularly individual rights and secularism; is committed to the authority of the ancient scripture; holds a total worldview such that religious beliefs are inseparable from politics, law and culture; relies on idealized past; is selective in drawing from the past for religious traditions and orthodox practice; centers that idealized past in a patriarchal framework mandating separate gender spheres and a “pristine morality;” rejects outsiders and the concept of pluralism; and is committed

⁶² Hart argues that enforcement of morality by law is a mistake because it results in the neglect of certain important decisions and that paternalistic enforcement of morality is inconsistent with the positive legal order. See HLA HART, *LAW, LIBERTY AND MORALITY* 25-32 (1963).

⁶³ Howland, *supra* note 2, at 294-323.

⁶⁴ *Id.* at 275.

⁶⁵ John Hawley & Wayne Pudfoot, *INTRODUCTION IN FUNDAMENTALISM AND GENDER*, 12 (OUP 1994).

⁶⁶ *Id.*

⁶⁷ Howland, *supra* note 2, at 275.

⁶⁸ *Id.* at 288.

to activism and fighting for changed social, political and legal order.⁶⁹

There are three common threads running through these criteria: first, mandating separate gender spheres rooted in orthodox practice and culture and religious traditions emanating from ancient patriarchal frameworks; second, conflating religion and culture with law and politics; and third, rejecting individual rights and secularism. This paper analyzes the case based on these three factors identified from Howland's criteria. The discussion will flow into the other sections of Part 2, recognizing their intricate shared common features.

As a prologue to the analysis, it is apt to consider the statements issued by religious leaders in relation to the abortion debate. Notably, the primary opposition for the reforms came from the Catholic Church in Sri Lanka, while other religions joined the chorus. Issuing a communiqué, the Catholic Church of Sri Lanka said that no one has the right to tamper with human life, even if it is in a circumstance that might fall under an exception to abortion laws discussed above, such as rape or where the fetus is established to have congenital abnormalities.⁷⁰ Since then, several expressions emerged from the Catholic clergy to the effect that no abortion is permitted under any circumstances. The justifications included that the Church believes "the precious life of a human being starts at the very moment of conception," "no one [has] the right to tamper with human life in any way,"⁷¹ "children are born according to God's will and no one is born outside his will;" and "even those who are differently-abled keep their parents together and play a role in ensuring well-being of their families."⁷² It was further claimed that there are ample places and services in the country willing to care for children whom the rape victims may not want to raise.⁷³

Meanwhile, as the Church criticizes abortion, it fails to face its own bitter history of prejudice against women. The Church has influenced laws such as the Roman Dutch Law, heavily influenced by religion, which imposed the sole responsibility of illegitimate children to their mothers and exonerated the fathers from any responsibility. Until 1998, when the Sri Lankan judiciary gave precedence to the best interest of the child standard, unwanted children remained the mother's responsibility.⁷⁴ Sri Lankan law on custody strictly adhered to the Roman-Dutch Law

⁶⁹ *Id.* at 277-78.

⁷⁰ Christopher, *supra* note 8.

⁷¹ Fonseka, *supra* note 8.

⁷² Pothmulla, *supra* note 58.

⁷³ *Id.*

⁷⁴ In the Sri Lankan judgment of *Jeyarajan v. Jeyarajan*, the court upheld that the best interests of the child standard, stipulated by Article 3 of the Convention of the Rights of the Child, should be of paramount importance in awarding custody and can override the father's preferential right to the child. *See Jeyarajan v. Jeyarajan*, 1 Sri Lanka Law Reports 113 (1998).

principle emanating from Catholicism that “a mother makes no bastard;” women were compelled to assume sole responsibility of an illegitimate child.⁷⁵ The Church approaches abortion in the same way it approached illegitimacy: with prejudice regarding the woman’s role.

Drawing legitimacy for their position from the 1.3 billion Catholic people all over the world, the Catholic community claimed that their stance is “the moral and ethical stand of the Church guided by the teachings of the Lord Jesus Christ.”⁷⁶ However, the vast majority of Catholics in the world have safe access to abortion. Only thirty-two countries, out of 197, completely prohibit abortion,⁷⁷ and not all majority Roman Catholic countries impose a blanket legal prohibition on abortion.

At this juncture, it is apt to consider the opinions of other religions contributing to the debate. Buddhist clergy believe that “one must look at victims of incest and rape, especially those who are minors who are still girls, about their mental state, and the situation of babies severely disabled at birth, with empathy and sympathy.”⁷⁸ In Sri Lankan society, when a minor conceives out of wedlock, she often suffers humiliation and insults. However, submitting to the opinion of the Catholic Church, Buddhist clergy claimed that “the Government must in such instances provide for the mother to raise the child in secrecy, for the mother and child to be protected and safeguarded whilst living out in the open, or for the child to be put up for adoption.”⁷⁹ As with abortion, this is a manifestation of a religious community’s gender bias: the mother is presumed to be the primary custodian of an illegitimate child.

Presenting a more liberal stance to the debate, the Sri Lankan Islamic clergy opined that, in Islam, there is no choice to terminate a fetus, except in three instances under strict supervision: “[w]hen the mother’s life is in danger, within 40 days if a girl was subject to sexual abuse and she did not want the baby and within 120 days if the fetus is diagnosed with extreme deformed conditions.”⁸⁰ However, the mullahs said that “laws pertaining to the killing of a soul should be strong,” because “people would abuse the abortion practice” if they were not.⁸¹

⁷⁵ Savitri Goonesekere, *THE SRI LANKA LAW ON PARENT AND CHILD* (1987).

⁷⁶ Augustine Fernando, *How Should We Consider Abortion?*, *THE ISLAND* (Sri Lanka), Sept. 7, 2017.

⁷⁷ SINGH ET AL., *supra* note 11, at 4.

⁷⁸ Jayakody, *supra* note 60.

⁷⁹ *Id.*

⁸⁰ Pothmulla, *supra* note 58.

⁸¹ *Id.* Contrary to the liberal position adopted by Islamic parties in the abortion debate, in the recent Muslim Marriage and Divorce Law reform efforts in Sri Lanka, the Islamic perception of women resonates with orthodox perceptions of women in other religions. Proposals based on a Shari’ah perspective, submitted by All Ceylon Jama’iyathul Ulama (“the apex body of Islamic scholars in Sri Lanka”), express that “[t]he male is different from female in many ways . . . in intellectual terms, for men are known for their strength of understanding and their memory as compared to women. Women are weaker than

The Chairperson of the Human Rights Commission of Sri Lanka, in the backdrop of abortion debate in Sri Lanka, highlighted that the laws on abortion have existed for decades but are centered on religious beliefs. She claimed that public policy on health matters should not be dictated by religious lobbyists.⁸² She further stated that, although the Commission respects the religious views and freedom of speech of everybody, the “public policy on health ought to be made on the basis of strong medical and secular grounds and not on religious beliefs.”⁸³ Leveraging religious freedom, her premise was that “those who have such religious beliefs can make personal choices even if abortion is permitted on certain grounds.”⁸⁴ This liberal perspective, and those who believe it in Sri Lanka, has been ignored by fundamentalist religious powers.

The recent Halappanavar case from Ireland can be analogized to Sri Lanka’s current abortion debate,⁸⁵ since in both countries religion has interfered with the reproductive rights of citizens of different religions. In that case, the mother, Savita Halappanavar, requested an abortion due to acute physical pain after it was confirmed that the fetus had died.⁸⁶ Ireland has a blanket prohibition on abortion.⁸⁷ The hospital refused to perform the abortion, pointing to the prohibition and to their Catholic beliefs.⁸⁸ Ms. Halappanavar questioned why the hospital could impose the law on her, when she is Hindu and not Catholic.⁸⁹ The reports on the case claim that she would have lived had abortion been performed in time.⁹⁰ In that light, a study in Sri Lanka revealed that, of 356 clients selected from two abortion clinics in the city of Colombo, nearly 80% were Buddhists and

men in memory and forget more than men do. This is well known, for most of the reputable scholars in this world are men” See Report of the Committee Appointed to Consider Amendments to the Muslim Marriage and Divorce Act Vol II, C1 - ‘Proposals for the Muslim Marriage and Divorce Act- Shari’ah Perspective’ representation by All Ceylon Jama’iyathul Ulama, December 2017, at 25.

⁸² Disna Mudalige, *Abortion Laws Should Not Be Looked at by Religious Lobbyists: Dr. Deepika Udagama*, DAILY NEWS (Sri Lanka), Oct. 05, 2017.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Shane Harrison, *Woman Dies After Abortion Request “Refused” at Galway Hospital*, BBC NEWS, Nov. 14, 2012.

⁸⁶ Megan Specia, *How Savita Halappanavar’s Death Spurred Ireland’s Abortion Rights Campaign*, N.Y. TIMES, May 27, 2018.

⁸⁷ After months of hearings, a special parliamentary committee voted to recommend repealing the controversial “eighth amendment” to the Irish Constitution which protects “the right to life of the unborn.” See *Dáil committee votes for abortion law change in Ireland*, BBC NEWS, Dec. 13, 2017.

⁸⁸ Ben Quinn, *Scandal in Ireland as Woman Dies in Galway “After Being Denied Abortion,”* THE GUARDIAN, Nov. 14, 2012.

⁸⁹ Harrison, *supra* note 85.

⁹⁰ Paul Cullen & Kitty Holland, *Husband’s Action over Death of Savita Halappanavar Settled*, IRISH TIMES, Mar. 9, 2016.

about 10% were Catholics.⁹¹ One could question the State in Sri Lanka's case for failing to accord access to safe abortion as falling under the right to health, when those who seek abortion are of a faith other than Catholicism.

The premise of the Human Rights Commission of Sri Lanka is that those who have such religious beliefs can make personal choices even if abortion law is amended to permit abortion on specified grounds. This view is more in harmony with the religious and cultural diversity of Sri Lanka. Furthermore, introduction of the reforms leads to no derogation of any person's choice or freedom of religion. The Sri Lankan Constitution continues to enshrine freedom of religion and conscience,⁹² and freedom to manifest one's religion or belief in worship, observance, practice, and teaching,⁹³ as fundamental rights. Therefore, abortion reforms do not undermine freedom of religion or conscience, and it is ironic how the fundamentalists use such rhetoric of religious freedom to deprive women of an essential right to health.

B. Gender Stereotypes and Human Rights

Gender stereotypes, in this paper, are teased out with substantial reference to women's right to health and right to equality. While acknowledging that women's health is more than reproductive health, it cannot be overlooked that women bear an unfair burden in reproductive health for biological reasons.⁹⁴ Citing a World Bank study on investment in health,⁹⁵ Cook reveals that maternity tops the five main causes of disease burdens in young women in developing countries.⁹⁶ Moreover, "[v]iolations of women's sexual and reproductive health rights are often deeply ingrained in societal values pertaining to women's sexuality."⁹⁷ Access to safe abortion is essentially tied to a right to health.

Women have been handed a subordinate role in the abortion debate: "[p]atriarchal concepts of women's roles within the family mean that women are often valued according to their ability to reproduce."⁹⁸ This leads to the subordination of women in the family and to external

⁹¹ Deok Jin Ban et al., *Induced Abortion in Sri Lanka: Who Goes to Providers for Pregnancy Termination?*, J. OF BIOSOCIAL SCI. 303-15 (2002).

⁹² THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978.

⁹³ *Id.* art. 10 § 14(1)(a).

⁹⁴ REBECCA COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS* (OUP 2003), 15.

⁹⁵ WORLD BANK, *WORLD DEVELOPMENT REPORT 1993: Investing in Health* 223 (Oxford Univ. Press 1993)

⁹⁶ COOK ET AL., *supra* note 94, at 15.

⁹⁷ *Id.*; U.N. Office of the High Comm'r on Human Rights, *Women's Rights are Human Rights*, U.N. Doc. HR/PUB/14/2, at 51 (2014).

⁹⁸ *Id.*

controlling of their bodies, not only by family but also by social institutions such as the church.

In exploring the area, this paper considers two aspects of the subordination of Sri Lankan women: first, it discusses the society's separate gender spheres rooted in orthodox practice and culture, and the religious traditions emanating from ancient patriarchal framework; secondly, it moves into a discussion rooted in women's rights, morality, and secularism. Under the first prong, the paper analogizes to Howland's core argument of "the challenge of religious fundamentalism."⁹⁹ In her work, Howland argues that the text of the UN Charter makes clear that entitlement to human rights, i.e. systematic non-discrimination based on all prohibited distinctions including sex, should not be permissible for any religious justification.¹⁰⁰ In the context of abortion, this paper argues that legislation for abortion as a right must not be dictated by religious fundamentalism. The argument is founded upon two sub-arguments: first, abortion as a human rights imperative; and second, legislation as governance in secularism as opposed to religious fundamentalism. This section will examine the former, while the latter will be addressed in Part 3.

Traditionally differentiated gender roles for men and women have almost always led to subordination and disempowerment of women. The gender role of the Sri Lankan woman is a contour of religion, culture, and ethnicity.¹⁰¹ Governed by a plural legal system, her role as a citizen is shaped by the general law—including the Constitution, criminal, and general civil law—as well as personal or religious laws, which may factor in depending on her ethnicity or religion.¹⁰² Legal pluralism is relevant to this debate because it has impacted the status of women in Sri Lankan society; however, it cannot be sustained that legal pluralism has too strong

⁹⁹ Howland, *supra* note 2, at 274-82.

¹⁰⁰ *Id.* at 346-49.

¹⁰¹ Radhika Coomaraswamy, *To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39-57 (Rebecca J. Cook ed., 1994).

¹⁰² For instance, the Matrimonial Rights and Inheritance Ordinance (Jaffna) of 1911, No. 1, § 3 (Sri Lanka), stipulates that whenever a woman to whom the *Thesawalamai* applies marries a man to whom it does not apply, she shall not be governed by the *Thesawalamai* during the subsistence of their marriage. However, if a woman to whom the *Thesawalamai* does apply marries a man to whom it does not, during the subsistence of their marriage, she shall be subject to the *Thesawalamai*. *Thesawalamai* is a special law that is applicable to Tamils in Sri Lanka who consider the Northern Province (Jaffna) as their permanent home. The Muslim Marriage and Divorce Act No. 13 of 1951, ch. 134, § 474723)), stipulates that the marriage of a female child who is below twelve years of age is possible with the permission of the *Quazi*, who adjudicate matters in *Quazi* courts. In Sri Lanka, *Quazi* courts mainly hear matters related to marriage and inheritance.

a bearing on the topic of abortion, since this area is entirely governed by the general law of the country.

It is important to consider how the Sri Lankan woman is perceived in the abortion debate. In 2017, the proposed reforms were withheld before they reached the stage of parliamentary debate. Although there are no substantial facts for such a discussion in relation to the current abortion debate, the parliamentary debates on the abortion reforms of 1995 can provide the necessary data. For the purposes of this analysis, my focus will be not on the fact that the stereotypes might be reflections of “particular individuals’ needs, wishes, abilities, and circumstances,” but rather the fact that, as argued by Cook and Cusack, they are generalized to all women.¹⁰³

The traditional gender roles asserted by religious fundamentalists were visible in the gendered comments by Sri Lankan legislators in 1995, when the abortion reforms were debated for two days in the Parliament. The 1995 Bill was submitted to the Parliament by the Ministry of Justice with the intent to decriminalize abortion, as in other jurisdictions in many parts of the world.¹⁰⁴ He stated that he “[did] not see any reason why Sri Lanka should be out of step with that general development.”¹⁰⁵ Several Members of Parliament (MPs) articulated that “new and profound changes in contemporary mores and values relating to gender equality . . . must be reflected in the law,” with “growing sensitivity to reproductive rights [and] concern with the health risks to which women are subjected to due to unsafe abortions”¹⁰⁶

While the religious objection by the Catholic MPs were particularly strong amidst all other objections, some MPs’ objections to abortion reforms seemed rooted in misogynistic perceptions of women.¹⁰⁷ Some openly demonstrated attitudes ranging from seeing women as promiscuous or apt to “run wild’ given the opportunity,” to seeing them as “conniving or vulnerable.” Some MPs painted women as “sly and deceitful,” inclined to make up rape stories. An amendment of the Evidence Ordinance to make corroboration necessary to prevent false accusations targeting men was even suggested.¹⁰⁸ Women were projected as a weaker section of the society in need of protection. However, this argument was tainted with misogyny, as explained in the intersectionality argument raised above.¹⁰⁹ One MP stated that Sri Lankans “have a culture. We have something called a decent upbringing. When something like this happens in our villages we call them indecent women, indecent girls. You

¹⁰³ REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 11 (Bert B. Lockwood, Jr. ed., 2011).

¹⁰⁴ See Law Commission of Sri Lanka, *supra* note 17, at 2.

¹⁰⁵ Abeysekera, *supra* note 16, at 91 (quoting Minister of Justice Peiris).

¹⁰⁶ *Id.* at 89.

¹⁰⁷ *Id.* at 88.

¹⁰⁸ *Id.*

¹⁰⁹ Abeysekera, *supra* note 16, at 88.

must not give protection to that indecency. That is against our traditions and our culture. All our religions are opposed to this.”¹¹⁰ These statements reflect religious fundamentalist structures and attitudes emanating from a culture that regards women’s sexuality as potentially evil and destructive of men.¹¹¹

This fundamentalism reinforces gender biases. Traditional beliefs encompass separate ideological spheres for men and women. The reason for this separation is said to be the patriarchally structured societies within which the major religions emerged and developed. Fundamentalist religious traditions are imbued with patriarchy and treat men and women differently.¹¹² A common goal shared by fundamentalist movements is to “[effect] political, legal and social changes that are highly detrimental to women’s rights.”¹¹³ Drawing on these beliefs, some MPs contextualized abortion rights as an empowerment of women that could lead to disputes at home, threatening the women’s “rightful” place at home under the custody of her husband. They opined that abortion rights could challenge male decision-making power within the family, leading to conflict between the spouses, a weaker institution of the family, and promiscuity, especially among the young.¹¹⁴ This is reminiscent of the fundamentalist opposition raised against the Equal Rights Amendment to the U.S. Constitution, which centered on arguments that the Amendment would prevent women from serving their proper submissive roles as wives and mothers.¹¹⁵

What this Parliamentary debate failed to take into account was not just the gendered discrimination but also the intersection caused by religious and class differences. As pointed out by Sunila Abeysekera, a Sri Lankan author and activist, in 1995, abortion should be debated within a “more humane and realistic framework.”¹¹⁶ The class biases in the debate disproportionately affect “poor women who suffer the consequences of unsafe abortions.” As in other restrictive contexts, clandestine abortion

¹¹⁰ *Id.*

¹¹¹ An analogy can be drawn between the assessment of these statements and Bendroth’s claims of how women were urged to retreat to their “ordained” roles as submissive helpers following World War II. See MARGRET L. BENDROTH, *FUNDAMENTALISM AND GENDER: 1875 TO THE PRESENT* 3-4 (Yale University Press 1993).

¹¹² Mary Becker, *The Politics of Women’s Wrongs and the Bill of Rights: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 458-79 (1992).

¹¹³ Howland, *supra* note 2, at 279.

¹¹⁴ Abeysekera, *supra* note 16, at 83.

¹¹⁵ Nancy Ammerman, *North American Protestant Fundamentalism, Fundamentalism Project: Fundamentalism and the State*, in *FUNDAMENTALISMS OBSERVED*, 150-51 (Martin Marty & R. Scott Appleby eds., 1991).

¹¹⁶ Abeysekera, *supra* note 16, at 89.

services are easily accessible in Sri Lanka through the private sector.¹¹⁷ These services, their quality and cost, remain unregulated as they are available and provided secretly.¹¹⁸ Poor women of Sri Lanka who cannot afford to pay a premium for safety are thus exposed to potential harm. Therefore, when the government succumbs to religious pressure, a disproportionate burden falls on poor segments of the society who are disempowered in the political process.¹¹⁹

At the end of the debate in 1995, potential reforms were withdrawn by the Minister of Justice on the grounds that emulating uncritically legal development in other countries would be impossible because since Sri Lanka must account for its own cultural realities:

It is difficult to conceive of absolute norms or principles which cut across cultural distinctions. It sometimes becomes necessary to recognize different standards and values applicable to different sections of the community. That is a part and parcel of life in Sri Lanka It is not possible to emulate uncritically legal development in other countries. We have to take into account the cultural realities in our own countries.¹²⁰

Eventually, patriarchy and religious beliefs trumped rights, and, more vitally, the legislative power of the democratic order in Sri Lanka. How these arguments implicate cultural relativism, and how different cultural settings may accord arbitrary power to those in power to use legal norms to legitimate what they believe is right, is discussed later in Part 2.

C. Gender Stereotyping and Women's Rights

The world has come a long way since 1995, the time when “women’s rights are human rights” was an international topic of discussion.¹²¹ Human rights are universal, inherent, inalienable and indivisible.¹²² This discussion will primarily focus on the moral aspects of human rights. In

¹¹⁷ Thalagala N. Process, *Determinants and Impact of Unsafe Abortions in Sri Lanka*. Colombo, Sri Lanka: Family Planning Association of Sri Lanka (2010); Ban et al., *supra* note 91, at 303-15.

¹¹⁸ *Id.*

¹¹⁹ Kumar, *supra* note 37, at 168.

¹²⁰ Hansard of the Parliament of Sri Lanka, Sept. 19-20, 1995, as quoted in Abeysekera, *supra* note 16, at 89.

¹²¹ The point took center stage at the United Nations Fourth World Conference on Women in Beijing, China (1995), following the address by Hillary Clinton at the plenary sessions, as the First Lady of United States of America. See UN Women, Fourth World Conference on Women Action for Equality, Development and Peace in Beijing, China, “Statement by United States of America, HE Mrs. Hillary Rodham Clinton,” Sept. 4-15, 1995.

¹²² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble.

this analysis, it is important to bear in mind that the discussion accords two distinct meanings to legal morality and religious morality.¹²³

Human rights, as such, are not founded in traditional religions. Nonetheless, theology is one basis for a theory of human rights stemming from a higher law.¹²⁴ An egalitarian model for rights posited by the law-making authority, such as that propounded by liberalism, can achieve formal equality for women.¹²⁵ However, such a model—with no differentiation based on natural differences between men and women—may not be an ideal model to discuss abortion rights.¹²⁶ Frameworks such as radical feminism or different voice theory, which do account for natural gender differences, are better suited to such a discussion. Women's bodily autonomy and gender differences in the physical sense are closely critiqued under radical feminism, which is more fully discussed below.

As part of the international community, it is incumbent upon Sri Lanka to protect rights stipulated under the human rights trinity: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁷ As there is no enshrined right to life or right to health in the Sri Lankan constitution, this paper is based on international instruments to which Sri Lanka is a signatory.¹²⁸ Asserting a human rights imperative, the UN states that women have sexual and reproductive rights, that violations of those rights are frequent, and that such violations take forms including denying access to services that only women require.¹²⁹ Sri Lanka's denial of abortion rights to women is one such example.

The existing human rights framework was developed to reflect a Catholic morality in response to emergent nation-states' normative calls

¹²³ This is because unlike in religion, the law provides a framework to theorize morality particularly in the areas such as abortion, sexuality and the place of religion in public life. See Justice Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1 (1969); Robert George, IN DEFENSE OF NATURAL LAW (Clarendon Press 1999).

¹²⁴ Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 HUM. RTS. Q. 201, 202 (1998).

¹²⁵ Hilary Charlesworth & Christine Chinkin, *Feminist Theories and International Law*, in THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 38-39 (Manchester Univ. Press 2000).

¹²⁶ *Id.*

¹²⁷ U.N. General Assembly Treaty Series vol. 993, 3, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

¹²⁸ Right to equality and non-discrimination based on criteria including sex is enshrined in Article 12 of the Constitution of Sri Lanka. THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978, art. 12.

¹²⁹ U.N. Human Rights Office of the High Commissioner, Women's Rights Are Human Rights, at 51, U.N. Doc. HR/PUB/14/2 (2014).

for church-state separation.¹³⁰ Cook defines this activism as an attempt to “secure the supremacy of fundamentalist religions and their hierarchies.”¹³¹ A new feminism based on natural differences between men and women redefines women’s rights in this hierarchy and resembles the different voice theory. Natural differences are emphasized, and while male dominance is challenged, “[n]atural gender roles are defended, particularly through devotion to motherhood and opposition to abortion.”¹³² Lemaitre suggests that a right to conscientious objection, including a right to restrict abortion, has been absorbed into this theological interpretation of human rights. Through this absorption, a legal right to disobey immoral laws can replicate a religious agenda for human rights.¹³³

Asserting women’s rights on a more substantive level, a radical feminist framework is better suited to pursuing rights compatible with the experiences of women.¹³⁴ Radical feminist reasoning is based on a view of women as a distinctive class, and its conception of human rights emanates from the characteristics of the group itself. Because it is grounded in the lived experiences of women, this framework is a stronger basis for achieving bodily autonomy for women, including the right to terminate a pregnancy. Additionally, when women’s bodily integrity and personhood is viewed informally, this informality dominates issues pertaining to women, even when strong legal frameworks protecting women’s rights are in place. This is exemplified by reproductive rights in South Africa, where, despite laws considered to be some of the best in the world, informality takes precedence, and many illegal abortions occur behind closed doors—quite contrary to the expected positive outcomes of the progressive laws.¹³⁵

Even supposedly innate rights are not immune from normative judgments, nor is their applicability universally agreed upon. For example, both pro-choice and pro-life advocates maintain that theirs is a legitimate end. Further, changed understanding of the scope of the “right” involved can change one’s views on various related issues: the degree of protection available, the necessary extent of derogations or exceptions, the relative weight to be accorded to various competing rights and the potential

¹³⁰ Julieta Lemaitre, *Catholic Constitutionalism on Sex, Women and the Beginning of Life*, in *ABORTION IN TRANSNATIONAL PERSPECTIVE—CASES AND CONTROVERSIES*, 239, 240 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., U. Pa. Press 2014).

¹³¹ Rebecca J. Cook, *Modern Day Inquisitions*, 65 U. MIAMI L. REV. 767, 767 (2011).

¹³² Lemaitre, *supra* note 130, at 243.

¹³³ *Id.* at 250.

¹³⁴ Patricia Cain, *Feminism and the Limits of Equality*, in *FEMINIST LEGAL THEORY FOUNDATIONS*, 237, 237 (D. Kelly Weisberg ed., Temple Univ. 1993).

¹³⁵ Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women’s Health*, 63 ALA. L. REV. 1, 1-42 (2011).

hierarchical relationships of those rights, and whether rights can “trump” competing claims based in cultural expectations.¹³⁶ For instance, in many jurisdictions, abortion is (often uncontroversially) permitted before the fetus reaches twenty to twenty-four weeks.¹³⁷ Thus, the point at which the right to terminate pregnancy ends appears dependent upon competing understandings of the age at which the fetus falls within the scope of, for example, the right to life.

Analysis of the debate around abortion would be incomplete without consideration of the cultural relativism of human rights. The abortion debate in Sri Lanka is permeated by cultural and religious assertions. Cultural relativism, as a concept, is loosely grounded in moral relativism, and is used to justify departures from international human rights standards on cultural grounds.¹³⁸ As claimed by Shestack, cultural relativism has been given “trappings of philosophic credentials even in UN circles.”¹³⁹ The approach emphasizes the culture, rather than religious or moral orders. However, it is noteworthy that relativism can shroud coercive and abusive practices that themselves may be encouraged by religious or moral understandings. Although suffering and abuse are understood differently in various cultures, this cannot be used to disregard the fact that some cultures contain unreasonable, immoral, and evil elements.¹⁴⁰

III. FUNDAMENTALISM VERSUS SECULARISM: DEMOCRACY AND THE PLACE OF WOMEN

This section uses a rights perspective focused on health and equality to analyze how women’s choices and rights are viewed in the secular system against the backdrop of the abortion debate. While dealing with fundamentalism, morality, and human rights, this section also discusses tensions between national sovereignty and religious influence, and the impact of the religious and moral order on deprivations of rights to healthcare and equality.

Religious fundamentalist movements have merged with the functions of the secular state, undermining the rule of law. As Howland’s criteria reflect, fundamentalists presume an entitlement to instruct the state on governance. I argue that such entitlement is illegitimate for two reasons:

¹³⁶ Shestack, *supra* note 124, at 203.

¹³⁷ See Medical Termination of Pregnancy (Amendment) Act, 1971, No. 34, Acts of Parliament, 2002 (India); see also Medical Termination of Pregnancy (Amendment) Act, 1971, No. 34, Acts of Parliament, 2003 (India).

¹³⁸ Shestack, *supra* note 124, at 228.

¹³⁹ *Id.*

¹⁴⁰ See *Id.* at 228-32 (arguing that the wife is required to submit to the authority of the husband, limiting the woman’s independence and autonomy and ensuring women’s subordinate position to men, a position that is perpetuated by the obedience rule, depriving women of their right to equality and liberty, as well as her right to economic independence, as it is seen as reducing her commitment to the patriarchy).

first, the incompatibility of religion and secularism, and second, the proper and independent role of sovereign power in the democratic order.

Sri Lanka claims to be a “Free, Sovereign, Independent and Democratic Socialist Republic”¹⁴¹ and claims no affiliation to any religion or fundamentalist group in governance. However, Article 16 of the Constitution provides that any written or unwritten law enacted prior to the Constitution will remain valid, even when inconsistent with the fundamental rights stipulated in Chapter III of the Constitution.¹⁴² Although religious laws in Sri Lanka’s plural legal system do not directly govern abortion rights, gender stereotypes, and beliefs in women’s incapacity are evident within the laws.¹⁴³

Certain lines of scholarly thought support the underpinnings of the argument that religion should not play a role in Sri Lanka’s legal approach to regulating abortion. For example, Ralf Michaels argues that religious laws are not considered positive law—or even a part of the secular system—for three reasons: 1) they comfortably fit within a transnational legal order, but not within the law comparable across jurisdictions or the globalized legal order; 2) they are marginalized for their religious nature; and 3) they are allegedly underdeveloped—incompatible with foundations of secular law such as human rights and fundamental rights in various nations’ constitutions.¹⁴⁴ Meanwhile, Lemaitre states that a separation of church and state can be justified on two grounds: strict positivism (i.e., that humans “cannot achieve knowledge of transcendental truths about morality”) and an insistence that “the natural law of human rights activists is not the same as Catholic natural law.”¹⁴⁵

Allowing religious fundamentalism to dictate the national legislative agenda is a derogation of the sovereign power of the people. Howland in her work argues that a state violates the UN Charter when it “creates under state law a zone of autonomy for religion to impose . . . religious laws upon women.”¹⁴⁶ The history of abortion in Sri Lanka suggests the Sri Lankan legislature is abdicating its legislative power to religious fundamentalist movements, and thus may even be, per Howland’s view,

¹⁴¹ THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978, art. 1.

¹⁴² “All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.” THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978, art. 16 § 1.

¹⁴³ See L.J.M. Cooray, AN INTRODUCTION TO THE LEGAL SYSTEM OF SRI LANKA (2nd ed. 2003) (discussing Sri Lanka’s plural legal system, which includes religious laws such as Muslim Law, governing matters such as marriage, divorce, and property of all people professing Islam, as well as Hindu and Buddhist Laws that are mainly applicable to religious communities and property); see also H. W. Tambiah, PRINCIPLES OF CEYLON LAW (1st ed. 1972).

¹⁴⁴ *Id.*

¹⁴⁵ Lemaitre, *supra* note 130, at 252.

¹⁴⁶ Howland, *supra* note 2, at 274.

violating the UN Charter. In Sri Lanka, sovereignty is vested “in the People and is inalienable.”¹⁴⁷ Sovereignty consists of the powers of government, fundamental rights and the right to vote. The sovereignty of the People is vested in the different organs of the State, and only one of these organs is vested with the power to legislate: “legislative power may only be exercised by the Parliament” (consisting of elected representatives) or “by the People via referendum.” Article 75 of the Constitution confers the power on the Parliament to make laws, including those having retrospective effect. By principle, norm, and law Parliament may not abdicate or in any manner alienate its legislative power, except in two instances specified in Article 76 of the Constitution. As religious fundamentalism is not one of the specified exemptions, in the area of abortion rights, the Parliament—and, by extension, the State—has unconstitutionally abdicated its legislative power.

Thus, the legislature withholding or withdrawing proposed legislation due to pressure inflicted by fundamentalist movements is an abdication of legislative power. Further, it is a derogation of the sovereign power vested in the People and exercised through the legislative branch. It is noteworthy that this abdication of legislative power did not arise as a result of any citizen objecting to the Bill by effecting pre-enactment judicial review, the only process through which a citizen can challenge a bill submitted for voting and approval at the Parliament.¹⁴⁸

Therefore, the incumbent abortion debate of Sri Lanka not only raises issues concerning a mere gendered social phenomenon, but additionally implicates more serious issues of legislative power and popular sovereignty, particularly the sovereignty of female citizens of the country.

CONCLUSION

Raising the woman question in Sri Lanka’s abortion debate exposes many obscure injustices that underlie the state’s promises to uphold equality and human rights. Abortion is an area that requires accounting for the unique experiences of reproduction that only women experience, and thereby engenders the social connotations of women’s lives and their standing in society.

As long as women are subject to negative gender biases, prejudiced by religious fundamentalists, and subordinated by the patriarchal order, it will be difficult for appropriate abortion laws to materialize. While other countries in the region, even those below Sri Lanka in world health rankings (such as India), contemplate expanding abortion-related services

¹⁴⁷ THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978, art. 3.

¹⁴⁸ THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Aug. 31, 1978, art. 78 § 18.

such as quality post-abortion counseling,¹⁴⁹ Sri Lanka is struggling to take its first step to facilitate access to safe abortion as a human right.

By utilizing feminist practical reasoning, this paper demonstrates that abortion law in Sri Lanka has tended to reflect existing structures of power, without making space for the needs of affected communities. Based on legal, cultural, and religious pluralism, the analysis argued that no single community is legitimately privileged to speak for all others, and perspectives should be drawn not merely from the dominant culture but from those actually impacted. These broadened perspectives would ideally reduce the gendered prejudices that prevent progressive law reform.

In term of reforms, introducing separate maternal health laws dealing with abortion will be woefully inadequate without amending Sri Lanka's Penal Code. Furthermore, any form of law reform is unrealistic until abortion is debated through reason devoid of the gender-based prejudices propagated by religious fundamentalism.

If there is "willingness to engage law through reason" alone,¹⁵⁰ the Sri Lankan people could arrive at an agreement on abortion law reform. These abortion reforms could then draw legitimacy from human rights, such as rights to health and equality and from the democratic order in which the rule of law precedes fundamentalism. Raising the woman question in Sri Lanka's abortion debate demonstrates that abortion is not merely a women's problem, but a problem caused by religious fundamentalism and patriarchal norms which undermine the serious need for change and contribute to the life-threatening consequences of the status quo.

¹⁴⁹ Saumya Rai and Sajid Sheikh, *India's Abortion Laws Need to Change and in the Pro-Choice Direction*, THE WIRE INDIA (May 11, 2017), <https://thewire.in/gender/abortion-pregnancy-law-india>.

¹⁵⁰ See Lemaitre, *supra* note 130, at 256 (discussing examples of German courts and their use of mediators).
