

ABORTION: RIGHT OR INTENTIONAL KILLING? A COMPARATIVE ANALYSIS OF ABORTION LAW IN TWO COMMONWEALTH NATIONS: SRI LANKA & NEW ZEALAND

S.Balakumar

Attorney-at-Law
LL.B (Honours) (UK)

Introduction

Abortion is rather a sensitive topic, the legalisation of which is still debated in some countries. Cultural barriers along with ethical and moral grounds across the different countries, make it a rather tedious task to implement a common treaty. Certain countries view the act of abortion as one of 'right', that is, exercising one's discretion as to whether or not to continue with the pregnancy. In other countries on the contrast, abortion is regarded as an act of 'killing', considering the foetus as a human being from the time of conception.

This divided perspective raises questions such as, after how many weeks of conception is the foetus considered as a human being? Is it morally correct to end

the life of an unborn child? Since it is the female who bears a greater degree of responsibility than her male counterpart, should she not be given the discretion to decide whether to continue with the pregnancy? Responding to these in one way or the other would undoubtedly trigger public uproar - anti and/or pro.

In the medical context the abortion is described as the "termination of pregnancy"¹. The definition encompasses two types of abortion: induced and spontaneous abortion.² An induced abortion is one which is induced by the pregnant woman either through surgical method or by consuming prohibited food items (eg: papaya, pineapple) or by engaging in prohibited activities (eg: climbing stair case, lifting heavy items).³ The second type,

¹ British Pregnancy Advisory Service, 'What is abortion?' <<https://www.bpas.org/abortion-care/considering-abortion/what-is-abortion/>> accessed 24 September 2019

² Merriam-Webster, 'Abortion' <<https://www.merriam-webster.com/dictionary/abortion>> accessed 30 September 2019

³ Science Direct, 'Induced Abortion' <<https://www.sciencedirect.com/topics/medicine->

spontaneous abortion terminates the pregnancy without any interference from the expectant mother.⁴ This is more commonly referred to as miscarriage. Unintentionally on the part of the pregnant mother, the pregnancy is terminated prior to 20 weeks.⁵

As surprising as it may sound, pregnancies were terminated in ancient times as well. Research indicates that the act of abortion was in practice in the medieval era. In fact, women in primitive Greece and Rome chose to terminate pregnancy⁶, using the herb known as silphium.⁷ With the passage of time and technological advancement in the medical industry more awareness of the term ‘abortion’ was created and women in the developing countries were educated on the safe and legal modes of terminating a

pregnancy if desired. Nonetheless, this was and regrettably is still not the case in many developing countries.⁸

Though there is currently no single treaty that can be applied to all nations, the matter has been the subject of discussion on various occasions, including the time when the government of Peru was ordered by the United Nations Human Rights Committee to reimburse the complainant for the loss sustained by her for refusing to authorise her abortion (KL v. Peru)⁹. The decision in this case “marked the first time that a UN human rights body held a government accountable for failing to ensure access to legal abortion services.”¹⁰

The argument that access to safe and legal abortion services is a fundamental human right and the denial of which is a violation

and-dentistry/induced-abortion> accessed 30 September 2019

⁴ Science Direct, ‘Spontaneous Abortion’ <<https://www.sciencedirect.com/topics/medicine-and-dentistry/spontaneous-abortion>> accessed 30 September 2019

⁵ Southern Cross, ‘Miscarriage – symptoms and causes’ (May 2018) <<https://www.southerncross.co.nz/group/medical-library/miscarriage-symptoms-and-causes>> accessed 30 September 2019

⁶ BBC, ‘Abortion in ancient history’ <http://www.bbc.co.uk/ethics/abortion/legal/history_1.shtml> accessed 23 September 2019

⁷ History Daily, ‘Things You Didn’t Know About Ancient Birth Control’ (28 June 2018)

<<https://historydaily.org/ancient-birth-control-plant-was-harvested-into-extinction>> accessed 30 September 2019

⁸ Guttmacher Institute, ‘Abortion in Asia’ (March 2018) <<https://www.guttmacher.org/fact-sheet/abortion-asia>> accessed 30 September 2019

⁹ CCPR/C/85/D/1153/2003

¹⁰ UN News, ‘UN announces that Peru will compensate woman in historic human rights abortion case’ (18 January 2016) <<https://news.un.org/en/story/2016/01/520272-un-announces-peru-will-compensate-woman-historic-human-rights-abortion-case>> accessed 26 September 2019, paragraph 3

of this right has been emphasised by the UN on numerous occasions.¹¹ This view is strongly supported by pro-abortion organisation such as reproductive rights which emphasise on the need to safe and legal access to abortion and, that it is at the woman's discretion to decide whether or not she wishes to continue with a pregnancy. The grounds sighted in support of their argument is the 'limitation' that will be placed on the girl / woman if she is compelled to give birth at an unexpected stage in her life, such include inability to complete (or pursue further) education, or not being able to commit to a career of her desire.¹²

In fact, there is sufficient statistics to proof that "legal restrictions on abortion do not result in fewer abortions, instead they compel women to risk their lives and health by seeking out unsafe abortion care."¹³

¹¹ Center for Reproductive Rights, 'A Global View:Mapping Abortion Rights Worldwide' <<https://reproductiverights.org/sites/default/files/documents/World-Abortion-Map-GlobalView.pdf>> accessed 26 September 2019

¹² Ibid

¹³ Center for Reproductive Rights, 'The World's Abortion Laws' <<https://reproductiverights.org/worldabortionlaws>> accessed 26 September 2019, paragraph 7

The report titled 'Abortion Policies and Reproductive Health around the World' published by the United Nations, provides that most countries permit abortion with the view to save the life of the woman.¹⁴ Other grounds that permit abortion include, "to preserve a woman's physical or mental health, foetal impairment, in instances of rape or incest, economic or social reasons or on request by the pregnant woman".¹⁵

Given these imperative and grounds highlighted by international bodies, one is compelled to wonder: what is the substantial rationale that truly restrains the government from legalising abortion in their respective country? Religious or Political?

Sri Lanka

Currently the only legislation in Sri Lanka that makes reference to 'abortion' is the

¹⁴ United Nations, 'Abortion Policies and Reproductive Health around the World' (2014) <<https://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf>> accessed 26 September 2019

¹⁵ United Nations, 'Abortion Policies and Reproductive Health around the World' (2014) <<https://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf>> accessed 26 September 2019

Penal Code 1883. As will be revealed from the wording of the relevant section, the legislation criminalises the intentional causing of miscarriage to a woman and does not specifically mention the term ‘abortion’. Section 303 of the Penal Code provides:

“Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, ...; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”¹⁶

In strictly interpreting this section, the following ambiguities can be highlighted:

(1) Miscarriage is also described as spontaneous abortion, in other words termination of pregnancy due to natural causes without any intervention on that the part of the pregnant woman or a medical

practitioner (as explained above under spontaneous abortion). However, by inserting the word ‘voluntarily’ it can be assumed that the legislators intended to refer to induced abortion. However, strictly speaking, a miscarriage is rarely caused voluntarily. It is a spontaneous occurrence.

(2) In accordance with this section the only ground on which ‘a voluntary miscarriage’ can be permitted is when the life of the woman is endangered. Therefore, the act of causing miscarriage in all other circumstances results in a criminal offence including foetal impairment, mental health of the woman, social or economic reasons.

Thus, the initial query that requires clarification at this stage is: does the current legislation in Sri Lanka encompass the act of abortion in its entirety?

The lack of a relevant legislation and proper guidance and education on abortion are sufficient grounds for women in Sri Lanka to seek access to illegal and unsafe modes to terminate their pregnancies.¹⁷ The cost

¹⁶ Penal Code 1883, s 303.

¹⁷ The Island, ‘A comparison of abortion law in Sri Lanka and the UK’ (2 June 2012)

<http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=53449>
accessed 24 September 2019

factor is also another vital reason for the majority of women to access unhealthy clinics and possibly inexperienced staff that agree to terminate the pregnancy at an affordable cost.¹⁸

Though, there are no apparent steps taken to legalise abortion in the country, the need to implement a legislation and the vitality of it has been emphasised by different actors on several occasions, including by professionals in the country.

In a 2018 Article, the importance and the need to legalise abortion in Sri Lanka was highlighted by the Past President of the Sri Lanka College of Obstetricians & Gynecologists and Past President, Sri Lanka Medical Association.¹⁹ The writer emphasised sufficiently valid grounds for legalising abortion, sighting examples of abortion rate pre and post legalising abortion in some European countries such as France and Italy.²⁰ His argument focused on mental and physical health of the expectant

woman, post abortion care needs and most importantly the consideration of basic human rights.²¹

In another article published in 2015, the author, a Consultant judicial Medical Officer at the District General Hospital highlighted the consequences of and the impact on the live of the woman if compelled to continue with the pregnancy. To quote: “The social impact on women and the new born children in cases involving sexual assault is often horrible. The woman with the child will be condemned by the family and society. The ultimate result would be the shattering of the family. The woman will live as a single mother or end up as a sex worker. In the case of teenage pregnancy, her education will also crash. The new-born may be ill-treated by the mother, left in a toilet pit, thrown into a canal or buried alive.”²²

Notably, the interpreters of the legislation in the country, too, do not appear to have provided clarity to the current and only

¹⁸ Ibid

¹⁹ The Sunday Times, ‘A case for legalising abortion in Sri Lanka’ (4 March 2018) <<http://www.sundaytimes.lk/180304/sunday-times-2/a-case-for-legalising-abortion-in-sri-lanka-284253.html>> accessed 24 September 2019

²⁰ Ibid

²¹ Ibid

²² Dr. K.M. Mahasen, ‘Abortion: Reform the obsolete laws now’ *The Sunday Times* (31 May 2015) <<http://www.sundaytimes.lk/150531/sunday-times-2/abortion-reform-the-obsolete-laws-now-151388.html>> accessed 24 September 2019

legislation that governs ‘abortion’ in the country. Though there are reported case laws where the accused was charged for the breach of section 303, the questions that were raised in the appellate courts either focus on the applicability of certain sections in the Evidence Ordinance or the decision of the jury as will be evident below.

In the case of Sheela Sinharage v The Attorney General²³ it was contented that due to the act of the accused that terminated the second pregnancy of the victim was the underlying ground that caused her death. Though the act of the accused did in fact cause the abortion of the foetus, the accused was charged for the breach of section 305 of the Penal Code amongst other vital sections in the Penal Code. Section 305 of the Penal Code provides: ‘Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine’.²⁴ It should be

noted that the accused was not charged for the breach of section 303, as her act of voluntary miscarriage of the foetus was not done with a view to save the life of the mother.

In another case of Fernando v The Republic of Sri Lanka²⁵, the accused in this case was charged for the breach of section 303. However, the leave to proceed to the Court of Appeal related to the evidence submitted by the victim. The Court of Appeal ruled out the conviction and acquitted the accused due the failure on the part of the prosecution to corroborate the victim’s evidence and the failure on the part of the learned Magistrate to direct the jury accordingly.²⁶

The case of Regina v D. D. W. Waidyasekera²⁷ is not different in context as the above mentioned case laws. The case was filed in the primary court for the breach of section 303. However, the leading questions which the Court of Criminal Appeal focused on, revolved around the evidence that were produced by the accused’s Counsel and

²³ [1985] 1 Sri L.R.

²⁴ Penal Code s 305.

²⁵ (1980) 2 S.L.R.

²⁶ (1980) 2 S.L.R.

²⁷ (1955) 57 NLR 202

whether a constant reminder about the benefit of the reasonable doubt to given to the accused should be directed to the jury by the learned judge.

In an interview conducted in February of this year, the Director of Advocacy at the Family Planning Association of Sri Lanka, hinted to the possibility that our lawmakers are considering to permit the termination of pregnancy in circumstances other than that of saving the life of the mother.²⁸ She believes more awareness and education on this topic may give the necessary push to amend the current law on abortion in Sri Lanka.²⁹

Saira Meyler in her article also emphasised the need to legalise abortion in Sri Lanka. Sighting vital reasons such as high rate of maternal death and increased number of illegal abortions recorded annually.³⁰ In 2016 alone 658 abortions were recorded.³¹ Though there were few efforts to legalise

abortion, none of them were fruitful, to quote:

“There have been several attempts to reform these archaic laws in Sri Lanka, but opposition groups have continuously rejected all proposals. In 1995 an amendment was proposed to allow abortions in cases of rape and foetal impairments. In 2011 the National Action Plan for Human Rights included a goal to decriminalise abortion for rape and major congenital abnormalities, in 2013 the Law Commission proposals called for legalisation in cases of rape and foetal impairments, and more recently in 2017 recommendations were made by the Justice Aluvihare Special Committee to allow abortions in cases of rape and incest, pregnancy in a girl below 16 and with serious foetal impairments.”³² However, such recommendations never progressed beyond the draft stage and were put on hold due to opposition by different actors including religious leaders.”³³

Having discussed the stance of abortion in Sri Lanka and the relevant law that governs

²⁸ International Planned Parenthood Federation, ‘Fighting for safe abortion access in Sri Lanka’ (27 February 2019) <<https://www.ippf.org/blogs/fighting-safe-abortion-access-sri-lanka>> accessed 29 September 2019

²⁹ Ibid

³⁰ Saira Meyler, ‘Abortion – Where is Sri Lanka On The Spectrum?’ (9 February 2018) <[https://groundviews.org/2018/09/02/abortion-](https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/)

[where-is-sri-lanka-on-the-spectrum/](https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/)> accessed 29 September 2019

³¹ Ibid

³² Saira Meyler, ‘Abortion – Where is Sri Lanka On The Spectrum?’ (9 February 2018) <<https://groundviews.org/2018/09/02/abortion-where-is-sri-lanka-on-the-spectrum/>> accessed 29 September 2019, paragraph 7

³³ Ibid

it, let us now analyse the position in another commonwealth country: New Zealand.

New Zealand

Prior to the enactment of the current legislation that governs abortion, the act was considered to be a crime unless performed with the intention to save the life of the mother or if her mental health was endangered,³⁴ somewhat similar to Sri Lanka.

In 1977, following the legalisation of abortion in United Kingdom, New Zealand parliament followed suit and enacted the Contraception, Sterilisation and Abortion Act 1977. The statute permits the performance of abortion provided two doctors consent to and authorise the procedure.³⁵ The grounds on which abortion can be permitted is determined in accordance with section 187A of the Crimes Act 1961:

“(1) For the purposes of sections 183 and 186, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks’ gestation, the person doing the act believes—

(a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl; or

(aa) that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or

(b) that the pregnancy is the result of sexual intercourse between—

(i) a parent and child; or

(ii) a brother and sister, whether of the whole blood or of the half blood; or

(iii) a grandparent and grandchild; or...”

Care of Children Act 2004 also governs abortion in instances of minors under the age of 16. As per section 38 of the Act:

³⁴ Megan Cook, 'Abortion - Illegal but possible: 1840 to 1950s' (5 May 2011) <<http://www.TeAra.govt.nz/en/abortion/page-1>> accessed on 29 September 2019

³⁵ New Zealand Family Planning, 'The Law around abortion' <<https://www.familyplanning.org.nz/advice/abortion/the-law-around-abortion>> accessed 29 September 2019

“(1) If given by a female child (of whatever age), the following have the same effect as if she were of full age:

(a) a consent to the carrying out on her of any medical or surgical procedure for the purpose of terminating her pregnancy by a person professionally qualified to carry it out; and

(b) a refusal to consent to the carrying out on her of any procedure of that kind.”³⁶

Pro- and Anti-Abortion Groups in New Zealand

In comparison to Sri Lanka, there are quite a number of organisations that are against and pro-abortion, including, Family First New Zealand, Family Life International New Zealand, Right to Life New Zealand and Voice for Life. In New Zealand groups that are in favour of abortion are more commonly referred to as pro-choice groups.³⁷ One example is The Abortion Law

Reform Association of New Zealand.³⁸ The focus of pro-choice groups is on the rights of women as opposed to mistaken beliefs that such groups encourage the death of unborn children.³⁹ Access to safe and legal modes of abortion are considered by pro-choice groups of crucial importance, the denial of which has been the ground for number of maternal deaths recorded in the past.⁴⁰

A well-known case law in this context is Right to Life New Zealand Inc v Abortion Supervisory Committee.⁴¹ The case was filed by the Right to Life New Zealand contending the arbitrary use its statutory powers granted to the Abortion Supervisory Committee by the Contraception, Sterilisation, and Abortion Act 1977. The appeal to the Supreme Court was based on the question of the Committee’s authorisation to inquire about individual abortion cases.⁴² After considering the

³⁶ Care of Children Act 2004 s 38

³⁷ Lynley Tulloch, ‘The abortion debate: Her uterus, her decision - just give her compassion and respect’ *Stuff* (3 June 2019) <<https://www.stuff.co.nz/life-style/parenting/113199326/the-abortion-debate-her-uterus-her-decision-just-give-her-compassion-and-respect>> accessed 4 October 2019

³⁸ The Abortion Law Reform Association of New Zealand, ‘About Us’ <<http://alranz.org/about-us/>> accessed 4 October 2019

³⁹ Lynley Tulloch, ‘The abortion debate: Her uterus, her decision - just give her compassion and respect’ *Stuff* (3 June 2019) <<https://www.stuff.co.nz/life-style/parenting/113199326/the-abortion-debate-her-uterus-her-decision-just-give-her-compassion-and-respect>> accessed 4 October 2019

⁴⁰ *Ibid*

⁴¹ [2012] NZSC 68

⁴² [2012] NZSC 68

submission from both counsel, the court ruled in favour of the Committee and held:

*“...we conclude that investigation into individual cases, when reasonably necessary in the view of the Supervisory Committee, is contemplated and permitted under the Act, in addition to generalised inquiries into the operation of the abortion law. The Supervisory Committee is statutorily entrusted with the supervision of the provisions of abortion law, particularly decision-making under ss 32 and 33, and its role in this respect should not be read down.”*⁴³

In *Wall v Livingston*⁴⁴, a paediatrician filed the case against the decision of two consultants who authorised an abortion.⁴⁵ His application was rejected on the basis that since he was not involved in the abortion process, as a consultant, his case is of no avail.⁴⁶ This case is also known for the decision of the court that an unborn

child does not have right to which he or she is entitled to.⁴⁷

Another notable incident is that of Graeme White’s tunnelling case where he was found guilty for having attempted to explode an abortion clinic attached to a hospital in Christchurch by placing “firelighters, matches, candles and kerosene-soaked string”.⁴⁸ The accused was a well-known “anti-abortionist”⁴⁹ who had protested several days in front of the hospital, but without success. Hence, his attempt to burn down the entire clinic.⁵⁰

Since 1977, the above mentioned legislation in New Zealand governing the act of abortion was subject to several criticisms and proposed amendments, including an amendment to the Care of Children Act that should include consent from parents for girls under the age of 16 wanting to terminate their pregnancy.⁵¹ But this proposal was

⁴³ [2012] NZSC 68 p 41-42

⁴⁴ [1982] 1 NZLR 734

⁴⁵ Hugo Farmer, ‘An analysis of New Zealand’s abortion law system and a guide to reform’ [2013] 19 Public Interest Law Journal of New Zealand <<http://www.nzlii.org/nz/journals/NZPubIntLawJl/2013/9.html>> accessed 4 October 2019

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ NZ Herald, ‘Mystery hole revealed 'sinister' plot’ (30 June 2000)

<https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=138379> accessed 28 September 2019

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ The Abortion Law Reform Association of New Zealand, ‘Parental Notification’ <<http://alranz.org/change-the-law/parental-notification/>> accessed 4 October 2019

rejected. However, the more recent proposal include notable changes - the removal of abortion from the Crimes Act 1961 and the discretion to terminate a pregnancy if under 20 weeks without having the authorisation from two consultants.⁵² In the event the pregnancy is beyond the above period, the pregnant woman is still entitled to terminate the pregnancy provided

“..... the health practitioner reasonably believing that an abortion is appropriate in the circumstances. The health practitioner must have regard to the woman’s physical health, mental health, and well-being when considering whether an abortion is appropriate.” (as per section 11 of the proposed Abortion Act) ”⁵³

As may or not have been anticipated, the public expressed mixed views on this proposal. The pro-choice groups defending their stance on the basis of human rights, including the entitlement of women to choose whether or not to continue with a

pregnancy.⁵⁴ The ant-abortionist on the other hand focused on saving a life, regardless of ‘age’ and term which may be attributed.⁵⁵

Protests by public does not appear to be novel, the New Zealand parliament has in spite of all the protests proceeded with the enactment of the bill which has passed the first reading in the Parliament on 8 August and is presently with the select committee for consideration.⁵⁶

Conclusion

In conclusion, abortion is a sensitive, personal and a vital topic that should not be treated lightly. In particular, when considering in the context of health and human rights this topic deserves the attention of the legislators and places them under an obligation (as the representatives of the members of public) to enact a

⁵² Sarah Robson, ‘Abortion law reform: What you need to know’ *Radio New Zealand* (8 August 2019) <<https://www.rnz.co.nz/news/national/396248/abortion-law-reform-what-you-need-to-know>> accessed 29 September 2019

⁵³ Abortion Legislation Bill s 11

⁵⁴ Alice Peacock, ‘Clash of abortion rallies: Pro-choice protesters’ rally meets pro-life rally in Auckland’s

Aotea square’ *NZ Herald* (25 May 2019) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12234329> accessed 4 October 2019

⁵⁵ Ibid

⁵⁶ New Zealand Parliament, ‘Abortion Legislations Bill, <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_89814/abortion-legislation-bill> accessed 4 October 2019

legislation that takes into consideration the above mentioned factors.

Undoubtedly, a proposal to any degree will receive mixed reviews, especially in Asian countries where religious and cultural values play a vital role. However, as mentioned considering the mortality rate

which impacts the overall population and the GDP of the country, legalising abortion could result in positive outcomes in the long run.