

ADULTERY AS A GROUND FOR THE DISSOLUTION OF MARRIAGE: STATUS OF A KANDYAN WOMAN IN SRI LANKA

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ABSTRACT

Sri Lanka is a multi-cultured nation in its nature. As the democratic Socialist Republic, it widely accommodates every person's customs, traditions and practices without causing damage to others; Law also no exception. When courts deal with private law issues it is crucial to determine whether persons of disputes are Kandyan Sinhalese? Muslims? Or Jaffna Tamils? This distinction made different treatments before the law in civil matters. Sri Lankan Law on the dissolution of marriage is primarily focused on establishing matrimonial fault. Kandyan Marriage and Divorce Act (KMDA), is possibly the only piece of legislation that recognizes the irretrievable breakdown of marriage and consensual divorce. However, section 32(b) of the Kandyan Marriage and Divorce Act is drafted in such a manner that is quite discriminatory against women and cannot be perceived as ensuring gender equality. The primary objectives of this paper is addressing the lacunas found in section 32(b) of the KMDA and establishing it as a gender discriminating law and make recommendations to meet gender justice from the perspective of third world feminism. To achieve these goals this paper followed the doctrinal method by discussing, explaining and comparing the secondary sources such as books, legislations, decided cases and international instruments related to women's rights. In this study, Hindu Law and law applicable to Christians in the Indian Legal system have been alluded to compare and contrast the Sri Lankan approach to the rights of women. Ultimately through this paper, it has attempted to make recommendations as to how the domestic legal system should be altered to incorporate International standards such as redeveloping the gender-related law in order with the Convention of Eliminating all Discriminations Against Women (CEDAW), Enforcing single piece of legislation for all citizens of the nation,

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Introducing gender-related study in education curriculum, Empowering women to raise their voice against discrimination, Waking up all the persons from the hidden patriarchy perspectives and myths and making awareness about patriarchy dominations among all women including Kandyan women. Finally, this paper tried to establish section 32(b) of the Kandyan Marriage and Divorce Act as a discriminatory law that continuously oppressing the marital related right of a Kandyan woman.

1. INTRODUCTION

Article 12(1), 12(2), 12(4) and Article 16 of the Sri Lankan Constitution are some of the controversial provisions affecting women in Sri Lanka. Although the constitution of Sri Lanka is known as the supreme Law of the country, some of the provisions embodied in the constitution overlap with each other making it hard to comprehend a clear stance on the rights of women and women empowerment in the country.

For an instance Article 12(1) of the constitution enunciates that all persons are equal before the law and are entitled to equal protection of the Law whilst Article 12 (4) ratifies special provisions being made for the advancement of women, children or disabled persons. Nevertheless as per Article 16 of the constitution, all existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of the constitution which includes all personal laws albeit them having certain provisions that are quite discriminatory against women and their rights.

This paper attempts to identify some of the lacunas in the legal system of Sri Lanka with regard to women and their rights in areas of marriage, divorce and grounds for divorce etc. Sri Lankan Law on dissolution of marriage is primarily focused on establishing matrimonial fault. Kandyan Marriage and Divorce Act, is possibly the only piece of legislation which recognizes irretrievable breakdown of marriage and consensual divorce. However, section 32(b) of the Kandyan Marriage and Divorce Act is drafted in such a manner which is quite discriminatory against women and cannot be perceived as ensuring gender equality.

This paper addresses the lacunas found in the personal laws of the country in the perspective of third world feminism. Also Hindu Law and law applicable to Christians in Indian Legal

system have been alluded to compare and contrast the Sri Lankan approach to rights of women and ultimately through this paper I attempt to make recommendations as to how the domestic legal system should be altered in order to incorporate International standards.

2. BACKGROUND OF THE RESEARCH ISSUE AND THIRD WORLD FEMINISM

During the British colonial period, most of the indigenous customary laws in the country were subject to the process of codification. Kandyan Law was one of such laws and is known to be both a Territorial and a Personal Law. In the year 1952, Kandyan Marriage and Divorce Actⁱ (KMDA) was given effect and came to be applicable to the Sinhala nationals residing in the Kandyan district.

Although superficially the Act seems to grant some privileges to women which men are not subject to, section 32 of the Act takes away any of such special privileges. For an instance section 32(a) enunciates that a Kandyan man can put an end to his marriage by merely proving adultery on the part of his spouse whilst section 32(b) of the Act states **that it is essential for a Kandyan women desiring to obtain a divorce from her spouse to prove not only adultery but also adultery coupled with incest or gross cruelty.**ⁱⁱ Thus section 32 of the Act puts women in a disadvantageous position and seems to be rather discriminatory of women and their matrimonial rights.

It is a quite daunting task to ascertain the reason behind this discrimination. Before the colonial period came in to being, Kandyans could enter in to three different marriages.ⁱⁱⁱ Nevertheless after the enactment of the penal code, bigamy was introduced as an offence^{iv} which is prohibited by law and Kandyans could no longer enjoy the special marital privileges granted to them and can only enter in to a second marriage subsequent to a valid dissolution of the first marriage.

Adultery as a ground for dissolution of marriage is commonly recognized by many jurisdictions. For an instance, according to the General Marriage Ordinance of Sri Lanka, adultery has been legally given sanction as a common ground of divorce for both spouses without any limitation or restriction whatsoever.^v The fact that the Kandyan Marriage and

Divorce Act differentiates between men and women when proving adultery as a ground for divorce has become a rhetoric question to which nobody has an answer. Through my research, it has come to my attention that even the Hansards relating to Kandyan Marriage and Divorce Act fails to disclose a reason as to the existence of such discrimination levelled against women and hence it is my opinion that it is imperative to address these issues in respect of the feminist jurisprudence, in order to mitigate and eliminate women from discrimination with regard to their matrimonial rights.

In the name of customs and culture, the Kandyan woman is discriminated by gender, customary values as well as ethnicity. These aspects of discrimination were clearly recognized by the third world feminism. Third world feminism advocates that women are put in an inferior position than men not only in the name of their gender but also in the name of culture, ethnicity, religion and different standards sanctioned by individual opinions. The following statements on third world feminism clearly depict the discrimination that black women were subject to and white women were exempted from.

“...especially race, but also one’s culture, sex, or class, can deny comfortable or easy access to any legitimized gender category so that the interactions between such social classification produce other, unnamed gender forms within the social hierarchy”^{vi}

“There is something inside us that makes us different from other people. It is not only men and it is not like a white woman”^{vii}

Both these statements are evident of the discrimination levelled against women on many different grounds which are not merely confined to their gender. Chela Sandoval describes these grounds as being causal factors in her article. According to the research conducted by her, she agrees with the ideas of Hegemonic feminists who believe sex or the gender to be the determining factor in relation to discrimination^{viii} but she does not share the Hegemonic feminist ideology that discrimination is merely a result of a common differential concept between men and women.

She has justified her statements and view by introducing four more ideological forms of discrimination which this paper will further elaborate on the following paragraphs.

Equal Rights mode- This ideology is closely associated with ‘liberal feminism’ which emphasizes upon the concept of gender equality through laws and policies.^{ix} The concept believes that considering how people are equally created, there is also a requirement for them to be equally treated. The ideology attempts to ensure the principle of equality through underlying notions of humanity.^x When looking closely at section 32(b) of the Kandyan Marriage and Divorce Act, it can be identified that the section blatantly makes it a requirement for women to prove ‘cruelty by husband’. Taking in to account the fact that torture is already prohibited by the constitution,^{xi} the supreme Law of the nation, the section seems to sanction adultery on the part of the husband as long as such act is devoid of cruelty. The idea emanating from the section clearly goes against notions of basic humanity and mitigates the restrictions placed on men to engage in adultery whilst making it a difficult task for women to obtain a divorce due to the high burden of proof of adultery required by the Law. Further the fact that section 32(b) reiterates that, in order to constitute a ground for divorce, adultery on the part of the husband should be coupled with either cruelty or incest seems to provide ample opportunity for men to engage in adultery as far as such adulterous relationship is not construed as ‘incest’. The overall conception created by the provision undermines the principles of humanity and validates a clear discrimination levelled against the Kandyan woman which contradicts with principles embodied in the Third world woman’s feminism’s equal rights ideology.

Revolutionary mode- This ideology attempts to legitimize the differences between men and women through social transformation.^{xii} The ideology postulates that failing to do so leads to discrimination. The dominant differences which are rationalized by this ideology are social, radical and gender differences, aspects which are also closely linked with ‘Social and Marxist feminisms’.^{xiii} The principal focus of the ideology is to empower women by identifying, prioritizing their differences and ultimately revolutionizing them. However this distinct and fundamental attribute of the revolutionary mode cannot be seen through section 32(b) of the KMDA. The section proceeds to differentiate between the Kandyan man and woman instead of empowering their differences and places the Kandyan woman behind an unjust veil named as ‘traditions’, something perceived as undesirable by the revolutionary mode.

Supremacist mode- supremacist mode expresses the view that, it is indispensable to provide the social order with a higher ethical and moral vision while also accepting the differences in a woman.^{xiv} These notions to a great extent were distinctly visible in cultural and radical

feminism ideologies.^{xv} While comparing this with section 32(b) of the Kandyan Marriage and Divorce Act, since adultery is considered as an immoral act in many jurisdiction including Sri Lanka, it is doubtful whether this section attempts to build a social order that encompasses a higher moral or ethical vision. This is even more accentuated by the fact that the section does not make any attempt to prevent adultery and rather accords protection to Kandyan male adulterers by requiring a high burden of proof to establish guilt on their part.

Seperatist mode- As the name of this mode itself implies, the mode does not deal with equal rights, women empowerment or acceptance of differences as advocated by the other ideologies discussed afore. It is distinct and separate from all other ideologies and upholds only that political resistance is driven towards protecting and nurturing these differences which women are subject to.^{xvi} In this regard, if the differences in terms of race, class and ethnicity which the Kandyan women are faced with are nurtured or protected, it is commendable. Nonetheless, section 32(b) of KMDA neither nurtures nor is protective of these differences but rather places the Kandyan woman in a socially and legally vulnerable position.

In the backdrop of these ideologies, in the subsequent paragraphs, section 32(b) of KMDA will be analyzed in light of Hindu Law and the Indian Marriage and Divorce Act solely applicable to Christians of India.

3. ADULTERY AS GROUND FOR DISSOLUTION OF MARRIAGE: A COMPARATIVE ANALYSIS OF THE INDIAN LEGAL SYSTEM

Similar to Sri Lanka, India also has a plural legal system governing civil matters of the country. In relation to divorce matters, Hindus, Buddhists, and Jaina or Sikh are governed by the Hindu Marriage Act^{xvii} whilst Muslims are governed by the Dissolution of Muslim Marriages Act^{xviii} and Chirstians by the Indian Marriage and Divorce Act.^{xix} Moreover the 1956 Special Marriages Act^{xx} governs inter- community marriages of the country subject to a conditional framework. For reasons which I will be explaining in subsequent paragraphs, I have chosen to analyze the Hindu Marriage Act and the Indian Marriage Act. In the first part of this analysis, Hindu Marriage and Divorce Act will be compared with section 32(b) of KMDA.

The choice for my analysis is due to a rather interesting reason. Through research, it came to my notice that Sinhalese customary Laws have derived inspiration from Hindu Laws and Customs and that such laws and customs have played a major role in the enactment of Sinhalese customary law regime.^{xxi} For an instance, M L S Jayasekera in his work indicates that Hindu Law allows a man to contract a marriage with his 'ewessa' (cousin), a concept which is recognized in KMDA, by not placing cousins within the prohibited degrees of marriage under the Law.^{xxii} Hindu Law is enacted and given effect through the Hindu Marriage and Divorce Act whilst Sinhalese customary laws are codified through the KMDA. Therefore it is my opinion that it is effective to compare and contrast these two pieces of legislations together.

Section 13 of the Hindu Marriage and Divorce Act deals with divorce and the section states as follows 'having voluntary sexual intercourse with any person other than his or her spouse after the solemnization of marriage provides a ground for divorce'.^{xxiii} This section recognizes adultery as a ground for divorce and unlike KMDA, the provision is not discriminatory of women and does not require women to prove adultery on the part of their husbands with a high burden of proof. It is quiet disheartening to see that section 32(b) of KMDA does not attribute any value to its own traditional sources and neglects to give effect to the Equal Rights mode, an integral aspect of the Third world feminism. Further, whereas the Hindu Marriage and Divorce Act disapproves of adultery as amounting to immoral conduct when committed by both men and women equally, section 32(b) of KMDA fails to recognize the Supremacist mode of Third world feminism by sanctioning adultery on the part of men. In the proceeding paragraphs, the fundamental differences of the KMDA will be discussed in light of the Indian Marriage and Divorce Act.

In the Indian legal system, the Marriage and Divorce Act, Parsi Marriage and Divorce Act and Dissolution of Muslim Marriages Act are the principal personal laws affecting the minority communities of the country. Kandyan Sinhalese can also be ascertained to a considerable degree as a minority community Therefore I have chosen to analyze the Marriage and Divorce Act applicable to the Christians of India as representative of a minority community and also for the reason that terms 'cruelty and incest' are better explained by the provisions of this Act allowing for a much distinct and clear comparison with KMDA.

As per section 10(a) of the Marriage and Divorce Act, adultery is considered as a ground leading to divorce and the provision makes no restrictions or exemptions based on gender.^{xxiv} Thus the provision is rather compatible with Equal rights, Separatist and Supremacist modes of third world feminism. In addition to this, Honorable Sir Hendry Rattigan in his writings^{xxv} on the Marriage and Divorce Act has extensively described and defined the term cruelty and incest. These definitions given by him are indispensable when identifying the differences and defaults made by section 32(b) from a feminist perspective.

Cruelty has no clear cut definition or description. But the case law jurisprudence of the United Kingdom has recognized causing bodily injury, causing actual injury to body or mind or raising a reasonable apprehension as to such injury as 'cruelty.'^{xxvi} Equal rights mode discussed afore has already incorporated these definitions in its ideologies and the Supremacist mode advocated by Sandoval takes a psychological perspective in to heed.^{xxvii}

Secondly, in terms of incestuous adultery, Sir Hendry case law Rattigan places much importance on blood and half -blood siblings as well as children as established through case law.^{xxviii} Although these ties are considered as already within the ambit of the prohibited degrees of relationship enunciated by KMDA, the difference lies in the fact that whilst Sir Hendry Rattigan suggests adultery to be an offense^{xxix} (although adultery is no longer considered as an offense in India^{xxx}) KMDA recognizes adultery as merely providing a ground for establishing matrimonial fault leading to dissolution of marriage.

Hence this comparative analysis makes it abundantly clear that, India has consistently maintained gender equality through their legislative provisions relating to adultery, a practice which section 32(b) of KMDA has failed to adopt.

4. RECOMMENDATIONS

Prior to making any suggestions, it must be kept in mind that the chief concern with regard to section 32(b) of KMDA is that the provision is neither gender neutral nor makes an attempt to do so. Further a Kandyan married woman usually encounters a different experience than any

other married woman residing in Sri Lanka, governed by the General Law. Having these two notions in the backdrop, Article 16(1) c of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)^{xxxii} and General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women^{xxxiii} will be evaluated.

Article 16(1)c of CEDAW states that since women share the same rights and responsibilities as those of men during the existence of marriage and at its dissolution, it is the responsibility of state organs to take measures to protect their rights. General recommendation on article 16 of the Convention, further explains this from a socio- economic perspective and places importance on ensuring substantive and formal equality as described below.^{xxxiii}

“The Committee has consistently concluded that the elimination of discrimination against women requires state parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be achieved only when the state parties examine the application and effects of laws and policies and ensure that they provide for equality, in fact, accounting for women’s disadvantage or exclusion....”

According to this, formal equality is driven towards guaranteeing the sameness approach advocating all persons to be treated as equal whilst substantive equality is quite similar to Article 12(4) of our constitution, attributing a special regard for women.

Further the General recommendation on article 16 of the Convention has placed special importance on the constitution and its articles and compels the state parties to avoid enacting and giving effect to traditional laws which are gender discriminatory. It also perceives this kind of laws as being a violation of Article 15(2) of CEDAW.^{xxxiv}

In addition to this, the following enunciation of the General recommendation on article 16 of the Convention^{xxxv} is reiterated by the Sri Lankan constitution.^{xxxvi}

“States parties should guarantee equality between women and men in their constitutions and should eliminate any constitutional exemptions that would serve to protect or preserve discriminatory laws and practices concerning family relations”

As I mentioned afore in the introductory paragraph of this paper, the whole aim of article 12(4) is defeated due to the enactment of Article 16 of the constitution.

The main recommendation provided by General recommendation on article 16 of the Convention attempts to eliminate this lacuna by making personal law as a choice of parties but the recommendation fails to consider the cultural rights of a person. If a particular individual is willing to follow his or her own culture,^{xxxvii} this recommendation may lead to disputes among parties.

The next recommendation is to adopt Marriage Registration ordinance in order to rectify the issues raised by KMDA. This can be achieved by bringing an amendment to section 32(b) of KMDA through proper legislative drafting mechanisms. Making effective use of a woman’s charter will also contribute towards guaranteeing this end.

Men and women governed by the Kandyan law can equally obtain a divorce from their respective spouse by relying on section 32(f) of the Act dealing with the non- fault concept of adultery. The section must be expended by a judge as, that if the wife is able to produce sufficient evidence as to the adultery of her spouse, the Judge in his discretion may at least order the husband to compensate his spouse for emotional pain and suffering that the woman had to undergo due to the conduct of her spouse.

5. CONCLUSION

In conclusion, I would like to traverse the concept of ‘*Noxal Surrender*’ which was in existent during the roman period allowing for the sale of or handing over of individuals treating them as things. The concept was later abolished by the Great King and scholar Justinian and section 32(b) of KMDA can be juxtaposed with a similar barbaric behavior. If a person committing

adultery coupled with or without incest and cruelty is not tolerated by any woman, governed by any legal system, the fact that the Kandyan woman is compelled to tolerate adultery of her spouse as long as such conduct is not associated with cruelty or incest is rather appalling. Therefore it is my opinion that policy makers should pay stringent regard to this section and that they should attempt to mitigate the differences between the genders in order to mete out justice.

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ENDNOTES

ⁱKandyan Marriage and Divorce Act, No 44 (1952)

ⁱⁱ *ibid* Section 32(b)

ⁱⁱⁱ H W Thambiah, Sinhala Laws and Customs, (1968) at pg 123

^{iv} Penal code of Sri Lanka, No 2 (1883) Section 362(B)

^v Marriage Registration Ordinance, No 19 (1907) Section 19(2)

^{vi} Chela Sandoval, "U S Third World Feminism: The Theory and Method of Oppositional Consciousness in the post-modern World" Genders, (University of Texas press) Spring 1991, No 10, p 3

^{vii} *op cit* p 4

^{viii} *op cit* p 11

^{ix} *op cit* p 12

^x *ibid*

^{xi} The Constitution of Democratic Socialist Republic of Sri Lanka (1978) Article 11

^{xii} Chela Sandoval, "U S Third World Feminism: The Theory and Method of Oppositional Consciousness in the post-modern World" Genders, (University of Texas press) Spring 1991, No 10, p 12

^{xiii} *op cit* p 13

^{xiv} Chela Sandoval, "U S Third World Feminism: The Theory and Method of Oppositional Consciousness in the post-modern World" Genders, (University of Texas press) Spring 1991, No 10, p 13

^{xv} *ibid*

^{xvi} *op cit* p 13

^{xvii} Hindu Marriage Act 25 (1995)

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^{xxii} *op sit* pp 89,90

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^{xxviii} Hendry Rattigan, The Law of Divorce Applicable to Christians in India, 2nd Edition, Law book Sellers- Lahore (1938) pp 105.106

^{xxix} *ibid* p 105

^{xxx} <https://www.bbc.com/news/world-asia-india-45404927> accessed on 29th November 2019 at 5.43 p m

^{xxxi} Convention on the Elimination of All Forms of Discrimination against Women (1979)

^{xxxii} General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (2013)

^{xxxiii} *ibid* guideline 8

^{xxxiv} Convention on the Elimination of All Forms of Discrimination against Women (1979) Article 15(2)

^{xxxv} *ibid* guideline 11

^{xxxvi} The Constitution of Democratic Socialist Republic of Sri Lanka (1978) Article 16

^{xxxvii} See International Covenant on Social, Economic and Cultural Rights (1966)



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