

THE IMPACT OF THE U.N. DECADE FOR WOMEN ON THE LEGAL STATUS OF SRI LANKAN WOMEN

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When Ella Wheeler Wilcox, the American poet described the "Women of Ceylon" in 1913, she remarked upon their liberated status in the early twentieth century, with extravagant tributes. "The 'new woman' is not known in Ceylon", she wrote, "as there seems to be little oppression of women in that romantic and beautiful spot, and her privileges seem to be quite equal to those of her brothers". These comments, reflecting her impression of the brief contacts she made with the wealthy elite of that time, are in harmony with the impressions of the first British administrators to establish contact with the 'natives of Ceylon' in the Kandyan Provinces, a century before that. Recent researches on the status of women by contrast focus on the marginalisation of women in the new settlement schemes, and the oppression they suffer in the particular communities studied.

The bleak scene that emerges from these studies does not accord with the general assessment of some sociologists that the majority of women do not function within the framework of the rigidly patriarchal societies typical of many Asian and African Countries. It is also not endorsed in a political and legal structure and a welfare system which adopts a considerably liberal and egalitarian view of women's rights. It is perhaps because there has been a general sense of complacency, in regard to the status of women, that among a highly literate population, the concept of the U.N. Decade for women has not captured the imagination of Sri Lankans, so as to stimulate significant changes in the social and legal framework. Legal changes in the decade have not revealed a concerted effort to endorse the values of the women's decade.

Review of Changes in the Legal Status of Women 1970-1985

In ascertaining the impact of the decade in Sri Lanka, it is relevant

to refer back to the year 1970, rather than 1975. This is because some of the minimal changes that have taken place in Sri Lanka, reflect or continue trends established in the five years prior to 1975, when the U.N. Decade was inaugurated. Ad hoc reforms were introduced in this period which had a bearing on women's rights incidentally or directly, and these were a manifestation of the commitment to liberal values in general, rather than the result of a conscious commitment to the women's rights issue. This is apparent both in the type of legal changes introduced, as well as in the attitude to women's rights reflected in the first autochthonous or home-grown Republican Constitution of Sri Lanka enacted in 1972.

Reforms were introduced in this period that liberalised the law on illegitimacy. Yet these reforms did not alter the basic structural limitations of the law on family support, or depart from the fundamental premise that the primary obligation to support a wife and legitimate children, fell upon the 'head of the household', the husband/father. This same concept was reflected in changes in the Rent Law, which conferred upon a woman the right to continue as tenant of rent controlled premises, after the death of the husband who was a protected tenant. Previous court decisions had recognized the deserted wife's right to continue to live in the matrimonial home, even if it was rent controlled premises of which the husband was tenant.

Significant changes in court procedure and practice were introduced in this period. The reforms in regard to matrimonial legal suits, reflected in a rather contradictory manner, a different approach to the obligations of support, dispensing with the relevance of gender differences in assessing claims for alimony, and support of children after divorce. Provisions that discriminated against women in regard to settlement of pro-

perty after divorce, and actions for damages against the co-respondent in a divorce action based on adultery, were also repealed. Besides this law, for the first time removed the prohibition on married women acting as guardians in litigation involving minors. It clarified by specific statutory provisions that women were eligible for jury service.

The accidental nature of these reforms and the lack of a definite policy on women's issues during this period is demonstrated by the fact that legislative provisions were also enacted which ran counter to the liberal stance adopted in the reforms discussed above. The Land Reform Law, (1972), dispensed with the concept of her distinct property rights in agricultural property. In adopting the policy of imposing a ceiling on land ownership, the statute defined the property interests of husband and wife as one unit. Thus the policy of imposing a ceiling on Land ownership and encouraging distribution of land, resulted in a woman being automatically deprived of her land if the total ceiling was retained by the husband.

The absence of a distinct awareness of the issue of women's rights as a special priority is revealed in the Republican Constitution of 1972. The concept of gender equality was specifically articulated as a fundamental right only in regard to access to public sector employment. Besides even this provision was qualified by another which enabled the reservation of quotas for men and women in particular spheres of employment. It is perhaps this provision which inspired the introduction of quotas in regard to appointments to the public services, even though this particular change was only shortlived.

The Republican Constitution of 1978 which replaced the Constitution of 1972, reveals quite clearly the impact of the international values in regard to women's rights, and the commitments associated with the U.N. Decade for women. For the first time, the Constitution contained a definite reference to gender equality in the section on fundamental rights. The

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fundamental right of equality before the law and equal protection was expressed in terms of a general guarantee against discrimination on the ground of sex, and specifically in regard to access to facilities. There is for the first time a reference to a commitment to gender equality, in the Directive Principles of State Policy. Despite the guarantees in the Constitution, only proposed legislation, rather than past laws can be challenged in the courts under the Constitution, on the basis of a violation of fundamental rights. Even new legislation that is not meant to be discriminatory sometimes contains provisions that discriminate against women because these incidental provisions pass unnoticed, in a context where there is no system of monitoring statutory changes for their implications in regard to women's rights. Administrative and executive action that violates the guarantees on fundamental rights however can be challenged in the courts. Yet, despite the fact that fundamental rights litigation is not uncommon in Sri Lanka, there have been no instances of such litigation involving women's rights issues. Due to the absence of an effective system of legal aid, the costs of litigation in the superior courts, and both victim and interest group apathy in regard to utilising the existing legal remedies, the Constitutional guarantees do not as yet appear to afford meaningful protection against discrimination.

There have been casual or 'cosmetic' changes in the law which benefit women, often as a continuation of the changes introduced between 1970-1977. Since the issue of women's rights has not been monitored, there are often significant inconsistencies and contradictions in the legal provisions. Almost nothing has been really done to reform or change those laws that discriminate against women, and the discriminatory values they reflect. Yet continuing the legal tradition of the past, legislation during this period has hardly ever deliberately discriminated against women.

The provisions in the Administration of Justice laws referred to earlier, have been repealed because the Civil Procedure Code of the colonial period has been re-instated in regard to court procedure and practice. Nevertheless, the changes introduced in regard to alimony, support and marriage settlements in matrimonial actions, which moved away from the earlier discriminatory stance against women, have been retained by amendments introduced into the old Civil Procedure Code. With the automatic re-instatement of the Civil Procedure Code, however, a prohibition on married women acting as guardians in litigation involving minors has been accidentally re-introduced. Considering that there has been an effort to retain the liberal stance in regard to women's rights in the earlier law, it is possible to assume that this constraint was not imposed deliberately. It appears to have entered the law by accident, demonstrating again, the disadvantages and inadequacies inherent in a policy of 'ad hoc' or 'ragbag' legal reform.

An effort was made in 1978 to introduce a system of family courts, with counselling services and the stress on non-adversary court procedures. This change is recognized in many countries as operating to the advantage of women in the area of matrimonial and custody disputes. However, due to the absence of the infrastructure of services to make this experiment effective, distinct Family courts have been abolished and the usual trial courts in civil litigation, the District courts, conferred with the jurisdiction to act as Family Courts. Though the legal provisions governing Family Courts have been retained, the transference of jurisdiction to District Courts has meant that both judges and lawyers adopt the approach and attitudes of that court, and the Family court concept is only paid lip service. The consensus of opinion in the legal profession is that these courts serve no purpose, and it is likely that they will be abolished altogether. Judicial decisions in custody litigation in both trial and appeal

courts have generally been out of harmony with women's rights, in endorsing the importance of the preferential rights of the father to custody, and even departing from an earlier focus on the welfare of the child.

An important change in the Inland Revenue Act now permits the income and wealth of husband and wife to be assessed separately. Yet the same Act perpetuates and endorses the superior position of the father in the family unit, in provisions which permit a minor child's income and wealth to be assessed as the fathers. The concept of a woman's economic independence endorsed in the provisions on alimony maintenance and support after divorce, has not been endorsed in other legislative reforms. Thus the Land Settlements Amendment Ordinance of 1981 perpetuates a table of inheritance in regard to land grants that was originally inspired in colonial times by English law, and which is quite out of harmony with the generally egalitarian attitude to women in the inheritance laws of the country.

The discriminatory attitude in regard to land settlements is mirrored in recent developments in the courts regarding the property rights of a particular ethnic group: Tamil women governed by Tesawalamai customary law. Thus the concept of the husband's marital power has been so strengthened by the appeal courts as to impose upon a married woman disabilities in regard to management of property and the right to contract that have long been rejected in the General law of the land. The fact that the courts have formulated new rules, but derived inspiration from outdated doctrines of Roman Dutch law, on analogies with customary law that are not even supported by sources on that subject, indicate their insensitivity to the issue of women's rights and the international values associated with it. This judicial view has had a far reaching impact, because it has created the impression among lawyers that Tamil women governed by Tesawalamai cannot transact business without the consent of their husbands. Thus some

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banks in Sri Lanka have been given legal advice to the effect that they should obtain the husband's consent in regard to commercial transaction with women constituents..

The conservatism reflected in regard to the rights of Tamil governed by Tesawalamai, is also reflected in judicial developments in regard to Muslim personal law. Sri Lankan law has always accepted the 'choice concept' and conceded that Muslims can be governed by the General law of the land. General law principles on family matters apply to Muslims, even when these may conflict with the traditional values of Islamic law. The trend has been maintained by the courts in regard to custody, but there has been emphasis on reference to Islamic law principles in regard to support of minor children. This development, if it is pursued further, may lead to a situation where a puristic approach is adopted to the application of Islamic Law in Sri Lanka.

The concept of equal pay for equal work was until recently not accepted in the laws regulating manual work. The laws on estate wages now recognize this concept, a change motivated by developments in the plantation sector rather than sensitivity to women's issues. The discriminatory stance to wages has paradoxically been endorsed in legislation of this period on payment of special allowances.

The values inherent in protective legislation appear to have been reviewed in this period. The Mines and Mineral Law (1973) which prohibits women working in Mines has not been brought into operation, while the statutory prohibition on women working at night has been removed. The latter change was prefaced by a Women's Bureau of Sri Lanka study, and is perhaps the sole legislative change rationalised by reference to the concept of equal rights for women. Ironically, given the bleak conditions in the new industrial complexes in the country, and the ineffectiveness in the enforcement of even the minimally worker protection oriented labour laws, this change fosters exploitation of women

in industry, and creates a dubious source of gainful employment. A minimal effort has been made to control the abuses inherent in the recruitment of women for work in West Asian countries, by introducing legislative controls in regard to contracts of employment through registration of recruitment agencies. A women's rights consciousness appears to have inspired new legislation which gives a woman public servant too the right to participate in a pension scheme that will benefit her family in the event of her death. Yet the same statute rejects in incidental provisions, the concept of gender equality. Recent focus on increasing maternity benefits can be traced to the importance attached by Government to maternal health nutrition rather than a concern with treating women's participation as an important aspect of social and economic development. Amendments to the Maternity Benefits Ordinance widen the scope of allowances and leave that can be obtained by some categories of workers, but reject the concept of gender equality in retaining a controversial provision that enables a man to claim the benefit on behalf of the woman. Amendments to the Shop Act do not enable women in private business or offices to claim under the Maternity Benefits Ordinance, but expand the scope of maternity leave available to women in the private office and business sector, without actually altering the period of leave. Though cabinet has accepted the policy of increasing the period of maternity leave to three months long ago, legislative changes governing private sector employment have not yet been introduced, nor administrative circulars issued in the public sector, granting this facility. The existing leave laws are themselves narrowly interpreted, so that a working woman is even denied the right to leave from work for the 42 days permitted by statute.

A legal Aid Law was introduced in 1978, but it has not been effective in delivering legal services generally, or to women in particular.

Legal Policy and Law Reform in the Future

The lack of responsiveness of the legal system, to the issue of women's rights which has been the focus of some concern in the country in the last decade is a striking feature of the Sri Lankan scene in regard to women's rights. Though the Constitution of 1978 has adopted a positive stance, this review clearly indicates that the issue has not been an area of serious concern in the law, nor stimulated a consistent effort to introduce legal reforms.

The women's issue has not received high priority in legislation, which has when enacted been of an 'ad hoc' nature, often revealing obvious anomalies and contradictions. The concept of women's rights has also not been sympathetically viewed by professional lawyers who help to make law in the courts, or by the judiciary. It has in the main passed unnoticed or been ignored, creating a situation where positively anti feminist judicial decisions can be pronounced without controversy or concern. When developments in other areas are contrasted with the apathy in the area of legal change, one may validly speculate that law itself is still not viewed as a tool for effecting social change.

Legislators in Sri Lanka are often concerned with making laws which can at best operate as policy statements, laws being enacted even without the basic infrastructure to enable effective enforcement. There is then a cynicism both among law makers and the people in regard to the relevance of regulatory controls. Lawyers and judges on the other hand, have been so trained as to see the law as a system of rules, rather than an instrument of social change, and they tend to interpret it without special sensitivity to social issues or with the awareness that laws must evolve and keep abreast of social change. These facets may account in part, for the apathy in the attitude of the legal system, and those who administer it, to the women's issue throughout

the decade. Thus, if the law is to be used to strengthen the position of women, emphasis must be placed on a campaign of legal literacy on women's issues at all levels. Such a programme must reach out, not merely to women the beneficiaries of future change, but the general public in the urban and rural sector, and the elite groups of legislators, professional lawyers and administrators. Programmes of legal literacy will hopefully create an environment conducive to appreciating that laws are not just policy statements, but must, to be meaningful, be combined with an infrastructure of supportive institutions, services and public awareness. State support should be obtained for projecting the focus on women's issues at the level of law making and administration in all relevant areas, for legal changes cannot be effected without such support. But the experience of the decade also shows that interest groups should co-ordinate their resources in this regard, and engage in concerted efforts to sensitise the public. Legal educationists should project this focus in programmes that will reach law students, lawyers, judges and public servants.

Studies undertaken during the decade indicate that the legal system is imbued with discriminatory principles in significant areas of law. Once priority is given to legal literacy, the focus must inevitably shift to changes in the substantive law and its enforcement. Past experience shows that discriminatory laws cannot be challenged under the Constitution, and incidental discriminatory provisions are enacted into new laws, often by accident. Just as environmental impact assessment is now required for construction and building, there must be a compulsory procedure for monitoring new laws for discriminatory provisions. There should be ongoing research and recommendations for reform in regard to specific areas of existing law that discriminate against women. It is also necessary to develop a strategy for

offering legal services to women, so that they can utilize those areas of the legal system that protect them from discrimination. It may be possible to establish one institution to undertake all these functions. If this is unrealistic, given current resources, the services of existing institutions should be utilized. Thus units in the Ministry of Justice, or the Law Reform Commission, or the Universities, or the Women's Bureau should be set up to undertake research and monitoring. Legal services can be offered by non-government interest groups, pooling resources in this regard and establishing a device analogous to citizen's bureaus which protect civic rights.

When identifying priority areas in introducing legal change, it is necessary to refer to Family Law, and Work and Labour. The latter area includes laws on pre-school education and maternity leave which have relevance for working mothers, and working conditions in industrial complexes. The Criminal Law and its impact on women, must be studied, as well as delays in litigation, law enforcement and legal aid. The latter aspects affect all citizens but are specially relevant for women, to enforce the protection the law may seek to confer upon them. Some research has been done on the need for changes in the substantive law in the areas referred to above, but the law enforcement and legal aid aspects have not been covered.

One of the major needs in introducing reforms in the area of Family law, is to formulate a uniform code of laws that will postulate the same values in regard to important aspects. The Constitution itself has not resolved the contradiction between recognizing equal protection before the law, and religious and cultural tradition in a context where equality before the law can be denied. Sri Lanka has a long tradition of introducing uniform laws, and it is im-

portant that this creative feature is appreciated in the future.

Lack of interest in the Women's rights issue, in a significant sense, during the decade, may be due in part to the fact that publicity for the serious and fundamental human problem of gender equality has been combined with a focus on some aspects of the women's liberation movement in the West that have failed to stimulate empathy. Reviewing the decade and looking to the future, it has become important to assess whether it is meaningful to adopt a puristic approach and stress, in the Sri Lankan campaign for gender equality, all those facets considered by western feminism as an inherent aspect of any movement for women's rights. Third World countries often focus on their cultural milieu in developing their economies, their art and literature. And yet, when it comes to women's issues, feminist movements in third world countries are deeply committed to breaking with the past, undervaluing the maternal role of the woman and the concept of her family responsibility, condemning concern with the cultural milieu as conservatism that fosters fundamentalism, chauvinism, patriarchy and male dominance. Since a woman must pursue her destiny within the community in which she lives, sharing her world with men and children, it seems counterproductive to foster a model of her liberation that ignores the need to interact with them. If the concept of equal partnership between men and women in the family is postulated as a universally valid premise, it becomes irrelevant to decry the roles that a woman plays in the home, and associate domesticity with oppression and subjugation. Role differentiation will not then be necessarily associated with inequality and it will be possible to convince men and women in Sri Lanka that in seeking equality for women, feminists are not attempting to make a woman "a female man".