A comparison of the law relating to abortion in Sri Lanka and the UK

I, Victoria Curran LLB Law (Hons) studying at the University of Glasgow, Scotland, have had the privilege of spending two weeks as an intern at Godfrey Cooray Associates in Negombo. During my time here, I have been given the opportunity to put my legal studies into practice, working in both the office and attending at various courts. My time as an intern at the firm has allowed me to compare many aspects of Sri Lankan law and the legal system with that of the UK. My main interest is criminal law and procedure, and during my internship I was given the opportunity to research the Sri Lankan system, with particular focus on the, arguably taboo, issue of abortion.

A recent report by the Asian Safe Abortion Partnership estimates, since there are no official figures, that the implied abortion ratio in Sri Lanka is 741 abortions per 1000 live births and there are induced abortion levels of 150,000 to 175,000 per year. In comparison, a report by the Department of Health showed that in 2010 there were more than 200,000 abortions carried out in the UK. The slight difference in the number of abortions carried out in Sri Lanka and the UK is highly significant, considering that the population of the UK is approximately 62 million, compared to only almost 21 million in Sri Lanka. This shows that abortion is extremely common in Sri Lanka, much more than in the UK, despite it continuing to be a criminal offence with only a single limited legal defence.

The criminal offence of abortion has existed unchanged in Sri Lanka since it was introduced to the Penal Code by the British in 1883. Section 303 provides that ‘whoever voluntarily causes a woman with a child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine’. An explanation in the Code provides that this offence may be committed by a woman who causes the miscarriage herself. The term ‘quick with child’ is defined as the time at which there is perception of foetal movement, usually about four or five months into the pregnancy.

The more severe punishment of imprisonment for a term up to seven years where the abortion is conducted at the later stages of pregnancy highlights the importance attached to a foetus in the more advanced stages of development. However, ‘quickening’ is a very subjective symptom felt by the pregnant woman, and will occur at slightly different stages in each pregnancy.

In the UK, abortion continues to be a criminal offence, under common law in Scotland and in English legislation. The Offences against the Person Act 1861 applies in England and section 58 provides that it is a criminal offence where a woman herself, or a third party, procures a miscarriage. It is also an offence in England under section 59 for anyone to supply or procure any substance or instrument with the knowledge that it will be used to procure an abortion. Additionally, the Infant Life Preservation Act 1929 makes it an offence to destroy the life of a ‘child capable of being born’, the statutory presumption is that this will be the case where the child is 28 weeks or more.
An abortion may only take place legally in Sri Lanka where the miscarriage is caused in good faith for the purpose of saving the life of the pregnant woman. The burden of proof in cases of abortion is on the prosecution to show beyond reasonable doubt that it was not carried out in good faith for the purpose of saving the life of the pregnant woman. However, indictment and conviction for the offence of aborting a pregnancy are rare in Sri Lanka. Further, despite the strict provisions, women from higher income households who seek an abortion find little or no difficulty in doing so. A recent United Nations publication on abortion in Sri Lanka states that such women often consult a psychiatrist for severe mental depression combined with suicidal tendencies, and the psychiatrist may advise an abortion in order to save the life of the mother, thus allowing the termination of pregnancy in a private or government hospital by a qualified medical practitioner.

In Scotland, abortion is a criminal offence under common law however the defence of necessity has always been available to women or third parties who procured an abortion. This defence was available only where the abortion was carried out with no ‘evil intent’ and was necessary to preserve the life or health of the mother.

The Abortion Act 1967 dramatically reformed the law in relation to abortion and provided a number of defences, which apply in both Scotland and England. Section 1(1) of the 1967 Act provides that an abortion will not be a criminal offence where the continuation of the pregnancy would involve a risk of injury to the physical or mental health of the woman or any existing children of her family. This defence is only available until the 24th week of pregnancy. After this time, a defence to abortion will only be available: where the termination of pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; where there is a risk to the life of the pregnant woman; or where there is a substantial risk that the child, if born, would be seriously handicapped. In any of these cases, the woman must obtain the consent of two registered medical practitioners acting in good faith. These available defences are broadly defined to allow for a wide interpretation and application. It is argued by many that it is therefore very easy to obtain permission from two medical professionals, thus termination of pregnancy is arguably available ‘on demand’ in the UK.

There are a number of problems highlighted with reference to the strict approach taken in Sri Lanka, in which an abortion may only take place to save the life of the pregnant woman. It does not allow for consideration of other issues, such as where the unborn child has or is likely to suffer from a severe disability, or where pregnancy is the result of rape or incest. A major problem is the dilemma faced by medical professionals when consulted by pregnant women in such situations, in the knowledge that carrying out a termination would incur criminal liability.

The changing social environment in Sri Lanka and increase in the rights and position of woman in society has had an impact on the issue of abortion. Goonesinghe argues that more women are now choosing to find employment and obtain a good education, and as a result these increased social interactions tend to result in an increased number of unwanted pregnancies outside of marriage. Further, evidence has shown that the use of contraception in Sri Lanka is limited and approximately 40% of women rely on traditional methods, which are
widely known to be unreliable. Such women are therefore the prime users of the dangerous and illegal abortion services in Sri Lanka, essentially using such terminations as a method of contraception.

The strict law on abortion and the fact that many cannot afford the high costs charged by some centres (Rs. 3000 or more) has the consequence that many abortions are performed under sub-standard conditions by unqualified persons, which frequently result in serious complications, such as septicaemia, haemorrhage, HIV/AIDS or sometimes even the death of the woman. Data from the Ministry of Health has shown that 7-16% of all admissions of females to government hospitals are probably due to complications of induced abortion. Moreover, a study carried out by Gunasekara and Wijesinghe showed that induced abortions and the complications arising from these accounts for almost 6% of all maternal deaths in Sri Lanka.

Abortion is a highly debated issue in every society, and there are many arguments both in favour of and against allowing women to have their pregnancy terminated. One of the main reasons for prohibiting abortion is based on the right to life attributed to the unborn child. Religion and culture in Sri Lanka therefore view abortion as the murder of a child; the taking of an innocent right to life. Section 303 upholds the importance of this right, until the point in which the mother’s life is in danger. It then provides that the life of the mother is of higher importance than that of the unborn child, and permits abortion to be carried out in this situation. However, in a number of other countries, such as the UK, USA, Canada and South Africa, the courts have refused to extend rights under the law to an unborn foetus. This approach focuses on the principle of bodily integrity and attributes rights only to the pregnant woman, who then has the right to choose whether to terminate her pregnancy or not.

There are some clear cases in which the arguments in favour of allowing abortion are very convincing. Where a victim of rape or incest becomes pregnant as a result, the situation for both the individual woman herself and for any medical professional consulted is highly difficult. The woman inevitably faces social stigma from the rape itself, and if she cannot have the pregnancy terminated, will suffer further humiliation in society throughout the life of the child. These women have no choice but to resort to illegal and dangerous terminations.

It is arguable that the strict prohibition on abortion is necessary in Sri Lanka as many people, due to their culture and religion, conscientiously object to abortion in principle. Any change in the law to relax the position may appear to force medical professionals to carry out an abortion against their will and personal beliefs. However, in the UK, the Abortion Act 1967 section 4 provides that no person shall be obliged to participate in treatment under the legislation to which he has a conscientious objection. Therefore, a similar provision in Sri Lankan legislation would ensure that a clinician is not obliged to perform a termination of pregnancy where his religion, culture or personal opinion prohibits him from doing so.

A number of commentators fear that changing the law would open the floodgates to misuse of the facility and unnecessary practices. However, others such as Goonesinghe, state that the strict law on abortion is an ‘anachronism frozen in the 19th Century’ through its failure to take account of the changing role of women in Sri Lankan society. Opinions in favour of changes
to the current law on abortion have been expressed by the Government in Sri Lanka, with the Minister of Justice stating in 1995 that ‘Decriminalisation of abortion is a feature of evolving legal systems in many parts of the world and I do not see any reason why Sri Lanka should be out of step with that general development’. Despite this, no such changes have been made.

Abeysekara has argued that the restrictions on abortion have shielded the place of battery, marital rape and the exploitation of domestic labour for woman, and preserved the institutions whereby women are deprived of identity, autonomy, control and self definition. Given the social stigma of pregnancy and birth outside of marriage in Sri Lanka due to the strong cultural and religious influences, many women who find themselves in such a position feel that they have a choice only between abortion and suicide. The main issue therefore appears to be prevention of such unplanned pregnancies in the first place, and suggestions have been made that better education and advice on sexual health, family planning and contraception is required to reduce the incidence of unwanted pregnancies, therefore reducing the need for abortion altogether.

I would like to take this opportunity to express my sincere gratitude to Mr Godfrey Cooray, the Associates and staff at the firm for my interesting and unforgettable internship here in Negombo. I have thoroughly enjoyed my time working at the firm and attending at various courts, but the experience would not have been the same without the friendly hospitality, helpful assistance and support of staff in the firm. This internship has given me a unique insight into the Sri Lankan legal system, allowing me to draw comparisons with aspects of law in the UK, and I am sincerely grateful for the opportunity to have worked at Godfrey Cooray Associates in Negombo.