

# COMPENDIUM ON LAW, GENDER BASED VIOLENCE AND REPRODUCTIVE RIGHTS

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# **COMPENDIUM ON LAW, GENDER BASED VIOLENCE AND REPRODUCTIVE RIGHTS**

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2017

# MESSAGE FROM THE HUMAN RIGHTS COMMISSION OF SRI LANKA

Sexual and gender based violence and ability to exercise reproductive rights continue to be issues that need to be addressed in Sri Lanka. Although formal equality is enshrined in the Constitution, discriminatory laws and policies that are in contravention of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) continue to exist. This coupled with the lack of political will hampers the empowerment of women and restricts their ability to fully exercise their rights and access entitlements. The CEDAW Committee in the Concluding Observations on Sri Lanka issued in 2011 and 2017, has given considerable importance to these issues and called upon the government to harmonize domestic legislation in line with the Convention, repeal or amend discriminatory laws, establish national machinery for the advancement of women, such as the National Commission on Women, and adopt temporary special measures to expedite the achievement of substantive equality.

In Sri Lanka women have, as in other parts of the world sought to use the emancipatory nature of the law to combat discrimination against women, promote their rights and improve their status. In particular, within the South Asian region, campaigns and movements for change through law reform have to a great extent focused on issues that have been traditionally relegated to the private sphere, such as violence against women and family law. While law has been viewed, and at times has functioned, as a vehicle for social change, we must also be mindful of existing unequal power relations and structural inequalities that impact upon the implementation and exercise of the law, which can often result in denying remedies to those most affected.

Although there continue to be reports of widespread gender based violence (GBV) in Sri Lanka, social stigma continues to curtail reporting, and remedies and support mechanisms are still limited. Often programmes that seek to address GBV are not wholly successful since they do not address the root causes, i.e. patriarchy, discrimination and the resulting inequality and disempowerment of women.

Globally, we have witnessed social mores shifting towards conservatism and increasing anti-rights rhetoric, especially on gender, resulting in attempts to control women's sexuality, reproductive capacity, financial autonomy and even freedom of movement. This makes women, especially those who are already marginalized, such as differently abled, conflict-affected and those living in poverty, vulnerable to violence, and restricts their ability to exercise their reproductive rights.

In this context, the Compendium on the application of laws to address cases relating to reproductive rights and GBV is extremely useful. It adopts a holistic approach that recognises and addresses the inter-linkages between violence and reproductive rights and the role of the law in prevention, protection and enabling access to remedies. Given that many service providers and duty bearers may not be well-informed on the extent of laws and remedies that are available with regard to gender based violence and reproductive rights, the Compendium is a powerful educational and awareness raising tool. For activists it could function as a reference document as it is both comprehensive and accessible.

The Human Rights Commission of Sri Lanka welcomes the publication of the Compendium on Law, Gender Based Violence and Reproductive Rights and is appreciative of the opportunity to partner with Prof. Savitri Goonesekere and the United Nations Population Fund (UNFPA) on this initiative.

**Human Rights Commission of Sri Lanka**

# MESSAGE FROM UNFPA REPRESENTATIVE IN SRI LANKA

The United Nations Population Fund (UNFPA) Sri Lanka Office is pleased to be part of the joint effort with the Human Rights Commission of Sri Lanka and Professor Savitri Goonesekere to publish this compendium on the application of laws to address cases of reproductive rights and gender-based violence.

Although nearly 70 years have passed since the adoption of the Universal Declaration of Human Rights, rights of women and girls are still violated across the world. It is of a particular concern that women and girls are often subjected to violence and their reproductive rights are not fulfilled. As there are a wide range of issues causing this situation, there is a need for a multi-sectoral approach to address both gender-based violence (GBV) and violation of reproductive rights. One of the first important steps should be to rights of women and girls are protected in the national legal system. This compendium aims at providing detailed information and analysis from this perspective. It highlights the linkages between GBV and reproductive health and rights, and identifies gaps in the national legal framework in comparison with what is stipulated in the international human rights treaties. We strongly believe this compendium will serve as a valuable source of information that will influence law, policy, and programming in cases related to GBV and reproductive health and rights.

The importance of reproductive rights is often overlooked in law enforcement, reform, and policy formulation although they are fundamental to wellbeing and dignity of women and girls. When women and girls do not enjoy bodily integrity and dignity, their potential cannot be fulfilled. In order for Sri Lanka to achieve the Sustainable Development Goals by 2030 and ensure no one is left behind, addressing issues related to GBV and reproductive health and rights has to be a national priority.

As Representative of UNFPA in Sri Lanka, I am proud to be part of Sri Lanka's journey towards a more sustainable, equitable and inclusive society in line with the 2030 Agenda for Sustainable Development. We stand ready to provide continued assistance to the Government of Sri Lanka and all key stakeholders to provide effective technical support and policy advice in advancing the rights of all Sri Lankans.

**Ms. Ritsu Nacken**  
**UNFPA Representative in Sri Lanka**

# FOREWORD

This Compendium on law, Gender Based Violence and Reproductive Rights seeks to put together the sources and provide information on the Constitutional Provisions, legislation, regulations, jurisprudence (major cases) that apply in this important area of public concern. It also introduces the aspects of International law and policy that should guide and influence responses to gender based violence and reproductive rights. The Compendium clarifies the main principles on criminal and civil procedures applicable in litigation in the courts, and has a section on mechanisms for human rights protection. A separate section on gaps in law, policy and procedures and recommendations for a holistic response has been included.

Sri Lanka has a significant number of laws, institutions and policies that can provide and initiate effective responses to gender based violence. These responses have not in general focused on the connection between the two areas of gender based violence, and reproductive rights and health, which are both important for the wellbeing of families and the people of the country. There is often duplication of responses on gender based violence or lack of awareness of laws and procedures leading to problems of implementation of even those initiatives that are in place. The interface with the important area of reproductive rights is also not clear to persons involved in law enforcement or law reform and policy formulation. It is hoped that the Compendium will fulfill a need by providing an accessible source of information that can impact on law, policy and programming on gender based violence and reproductive health.

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# 1. INTRODUCTION

This is a Compendium or guideline on the application of laws to address cases relating to Reproductive Rights (RR) and Gender Based Violence (GBV). It compiles laws and regulations on the subject, which can be used or impact in various situations where there is a link between Reproductive Rights and Gender Based Violence.

## a) Reproductive Health For the People

All countries in the world have over a period of time, commencing with the adoption of the United Nations Charter, recognized that it is the obligation of member states to realize high standards of sexual and reproductive health for their people. Internationally accepted policy documents like the Beijing Platform for Action (BPFA) (1995) and the Millennium Development Goals, MDGs (2000) as modified by the World Summit (2005) clarify the goals and standards that all countries should aspire to achieve. These policy documents reflect the ideas incorporated in the Programme of Action adopted at the International Conference on Population and Development (ICPD) in Cairo in 1994. 179 governments including Sri Lanka agreed at ICPD that everyone must be able to achieve the best in access to reproductive health care.

In September 2015 the United Nations General Assembly adopted a new agenda for Sustainable Development described as a “plan of action for people, planet and prosperity.” (A/RES/70/1 Preamble). Gender Equality and human rights are recognised as key to achieving economic, social and environmental progress in the 2030 agenda of sustainable development.

The agenda sets goals and targets to encourage global action in the next 15 years. The institutional arrangements that have been developed provide for systematic and regular progress reviews and reporting, involving states, civil society, the private sector and UN agencies.

The goals and targets in this agenda focus on responding to inequalities and working to achieve peaceful and inclusive environments in countries, eliminating disparities which are recognised as hindering sustainable development.

Seventeen goals have been adopted, and while gender equality is a distinct Goal (5) several others in the areas of poverty (Goal 1), health, education and employment (Goals 3, 4, 8) reinforce the goal of achieving gender equality and impacting to improve women’s lives. Goal 10 on “reducing inequality” and Goal 16 on “promoting peaceful and inclusive societies and institutions with access to justice for all,” can be also interpreted to reinforce Goal 5 on gender equality, including in relation to transitional justice and eliminating gender based discrimination that infringes the human rights of women. National Constitutions, multilateral treaties and principles of customary International law are therefore relevant to the implementation of the SDGs.

The linkages between achieving gender equality and other goals and targets is recognised in specific language in the Declaration accompanying the new SDG agenda. This also uses the familiar and yet neglected concept of “gender mainstreaming.” (Paragraph 20)

The elimination of violence against women and girls is referred to, in the Declaration, including through the engagement and contribution of men and boys (paragraph 20). These ideas are not new, and reflect the conceptual thinking in past international and national initiatives. However their reiteration in the SDGs

is a recognition of gaps and failures of the past in achieving gender equality and impacting to eliminate gender based discrimination and violence against women.

It is of special interest to the area of GBV and its connections to reproductive rights and health, that this development agenda specifically mentions promoting physical and mental health and wellbeing, and reflects commitment to achieving “universal access to sexual and reproductive health care services including family planning information and education” (Paragraph 26).

These areas have been emphasised by the Human Rights Committee and the CEDAW Committee in their responses to implementation of treaty obligations under the respective Conventions by states, including Sri Lanka. The Specific Goal on Health (Goal 3) and Gender Equality (Goal 5) reinforce each other. 2030 is the target date for the achievement of the goals on reproductive health (Target 3.7) which requires “achieving universal access to sexual and reproductive health care services, and the integration of reproductive health in to national strategies and programmes”. Health financing and capacity building for service delivery is recognised (Target 3.c). Target 5.2 on achieving Gender Equality specifically refer to elimination of all forms of violence against women and girls in the public and private spheres, trafficking and sexual and other forms of exploitation of women. Specific reference is made in Target 5.3 to eliminating harmful practices such as child, early and forced marriages and female genital mutilation. Importantly, Target 5.6 refers to achieving “universal access to reproductive health and reproductive rights” as reflected in the ICPD Programme of Action and Beijing Platform For Action and their relevant review conferences.

These are important changes in the approach to development that go far beyond the MDGs. They reflect and reinforce international human rights norms and can contribute to holistic coordinated, legal reforms, policies, resource allocation and programmes that harmonise human rights and development approaches.

The SDG agenda and philosophy must now be used in all interventions on gender equality, reproductive health and violence against women in Sri Lanka. Too often ad hoc and duplicated initiatives fail to impact on these issues in the long term.

Sri Lanka is a country that has attached special importance to giving its people access to highest standards of health, including reproductive health. When we look back at the introduction of free health policies and State support for implementing them from the 1940s, we see that the country had already moved towards some of the approaches now recognized by all countries in the world as critically important to the wellbeing of peoples. A published report, “ICPD 15 years On: A Review of Progress, Sri Lanka” (2009) documents clearly that all Sri Lankan governments and civil society organizations have recognized the importance of laws, policies programmes and public financing in this area. The 2030 Sustainable Development Agenda can be used as bench marks to promote political will, policy planning and resource allocation financing and capacity building in this important area.

## **b) Reproductive Rights and Reproductive Health**

The ICPD Conference in 1994 followed the Vienna World Conference on Human Rights (1993), both global conferences recognized that achieving reproductive and sexual health for the people are fundamental and basic human rights of the people. Consequently later global policy documents like the Beijing Platform for Action (1995) and the Millennium Development Goals (2000) recognize that realizing high standards of reproductive and sexual health must be approached on the basis of human rights, including the right

to health care, equality and non-discrimination, protection of bodily integrity and freedom from torture and inhuman degrading treatment. A rights approach can be distinguished from social welfare, because the latter is given or taken back at the discretion of governments. When Reproductive and Sexual Health is a right of people, they can claim them as part of their human rights.

Sri Lanka has ratified and accepted treaty commitments under many international human rights instruments such as the Convention on Civil and Political Rights (1966), the Convention on Economic Social and Cultural Rights (1966), the Convention on Elimination of Racial Discrimination (1965), the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) (1981), the Convention on the Rights of the Child (1989) and the Convention on Torture (1984). More recently Sri Lanka has ratified the Migrant Workers Convention (1990), the Convention on the Rights of Persons with Disabilities, and the Convention on Protection of All Persons from Enforced Disappearances (2006) The dates of accession are given in the annex with references S.10. We shall see later that Parliaments of Sri Lanka have, over time introduced local legislation indicating their commitment to fulfill the country's obligations as a party to these international treaties.

Consequently Sri Lanka has accepted that standards on reproductive and sexual health that are linked to human rights of the people become reproductive and sexual rights of the people of our country. [See Annex].

### **c) Gender Based Violence**

The term Gender Based Violence (GBV) is a topic that has become familiar to the public because it has received a great deal of attention in Sri Lanka in the media. Government agencies such as the Ministry of Women's Affairs and Child Development and the Ministry of Health, law enforcement agencies such as the Police, and many civil society organizations have programmes to address Gender Based Violence. And yet there is some lack of clarity in regard to the meaning of this phrase.

Sri Lanka ratified the CEDAW Convention in 1981, and successive governments have reported to the CEDAW Committee for progress reviews of the country in fulfilling the obligations undertaken to implement this international treaty. (See Annex). A document that interprets a State's obligations under CEDAW, regarding women's rights to protection from violence, equality and non-discrimination on the basis of their sex is described as General Recommendation No 19, adopted by the CEDAW Committee in 1992. This instrument defines GBV as violence that is directed against a woman because she is a woman, or that affects women disproportionately. (Art. 6). It draws attention to the link between the act of violence or behavior, and the female sex of the victim. By using the word 'gender' as opposed to 'violence against women' what is emphasized is that the violence is not perpetrated against a woman only because she is female by sex, but because of other factors that influence attitudes, values and practices regarding women in a particular society. The term GBV therefore draws attention to the fact that though men may also be victims of violence in society, women are subject to forms of violence that are exclusively or disproportionately directed at them. Similarly the response to violence against women and its impact on them may be different because they are women. These realities make it important for lawyers and judges and law enforcement authorities responsible for administration of justice in the country to understand the concept of Gender Based Violence, in approaching their work and professional duties. (See Annex for some literature on GBV relevant to Sri Lanka).

#### **d) Reproductive Rights and Gender Based Violence**

It should be clear from the above explanations that reproductive rights of women can be violated and impacted by different forms of gender based violence, and the way in which we respond to such situations. These infringements will impact on the reproductive health of women directly, and indirectly through the impact on men and children in the family and community. The close connection between GBV and children's wellbeing highlights the impact of this on our future generations. The concept of taking into account impact on rights between generations (inter generational rights) has been recognized in the Eppawela Case which dealt with impact on the environment. (See Annex). These same concepts become relevant in the area of health including reproductive and sexual health.

## 2. NATIONAL LAWS AND REGULATIONS ON REPRODUCTIVE RIGHTS AND GENDER BASED VIOLENCE

This subject may be approached from the perspective of particular situations in which GBV impacts on Reproductive Rights, and the general sources of national law and regulation in this country. It is proposed to describe briefly, the sources of law, and later consider in each section, their application in relation to specific categories of situations considered in this Compendium, where GBV can impact on Reproductive Rights.

### A. General Sources of Law on Gender Based Violence and Reproductive Rights

#### a) Legislation and Regulations

Sri Lanka's law in this area consists of principles of substantive law (the substance of legal principles governing particular categories of GBV and Reproductive Rights) and procedural law (the law and practice of administration of justice through the courts). These laws are found in Acts of Parliament, and the legislative bodies of Sri Lanka after independence (1948). The laws passed by legislative bodies established before independence in the British Colonial period of our history are described as Ordinances or Codes. Acts of Parliament passed under the Constitution of 1972 are described as Laws. Those passed by Parliament under the Constitution of 1978, which is the basic law of our Country today, are described as "Acts of Parliament." Statutory Authorities, and Ministers have the right to adopt regulations and circulars under powers given to them under Acts or Laws. These are also legal sources of law.

#### b) Laws that apply though not stated in Legislation or Regulations

Principles of English Common law, Roman Dutch Law, and Muslim, Kandyan Sinhala and Tesawalamai Tamil personal law applicable to these groups, in the areas of marriage, divorce, property and succession in particular can also have a bearing on Reproductive Rights and Gender Based Violence.

#### c) The Constitution

The Constitution of 1978 also incorporates principles that are relevant for Reproductive Rights and GBV set out in the Chapters on Fundamental Rights and Directive Principles of State Policy. Both can be used by the Courts and lawyers to interpret the content of the law on Reproductive Rights and GBV in various situations, in court procedures and making decisions in courts or administratively in relation to the application of legal principles. The Constitution is also a basic law to be followed by law enforcement agencies like the police. [See Annex and section on Constitution]

#### d) International Laws

As mentioned above, Sri Lanka has ratified or become a State Party to several international treaties. The Vienna Convention on Treaties (1969) indicates that States who are parties to international treaties must implement provisions of treaties. This principle is expressed in a Latin phrase "pacta sunt servanda" – treaties create legally binding obligations. When Parliament has enacted laws to fulfill treaties, they have recognized this principle. [See Annex and section on International law and Legislation introducing treaty standards].

Principles of good practice for Courts of law, outlined in Judicial Colloquiums of Commonwealth Judges (e.g. The Bangalore Principles) indicate that judges have a duty to apply international treaty law in their interpretation of laws, unless such application conflicts with local laws. There are many cases in the Supreme Court interpreting Fundamental Rights which have used principles of treaties ratified by Sri Lanka in their decisions. For instance the Torture Convention has been referred to in interpreting the Fundamental Right to Freedom for torture in Article II of the Constitution. A consistent judicial practice in this regard in Courts can be useful in responding to the protection of Reproductive Rights and preventing their infringement in GBV. [See Annex and section on International law].

## **B. EXISTING LAWS APPLICABLE ON REPRODUCTIVE RIGHTS AND GBV**

### **I) SUBSTANTIVE LAW**

Reproductive Rights may be infringed by GBV in the family and community. Some laws that apply in relation to violence in the community can be relevant to violence in the family, but this is not necessarily so. The differences will be mentioned in the account given below.

Reproductive rights described earlier can be impacted by different types of GBV. Applicable laws will be categorized according to the types of violence.

#### **(i) Fatal Injuries : Criminal Law and other Laws**

Female Homicide or Femicide.

This violence can occur in the family (as domestic violence) or in the community. There are many cases of femicide in law reports and the media. They usually reflect power relationships in the family, and are embedded in social attitudes that legitimize physical violence against women because of a perception that they are weak. Chapter XVI of the Penal Code, the basic criminal law of our country has always recognized murder and culpable homicide as a grave criminal offence perpetrated against the right of every man and woman to bodily integrity or personal security. Murder and Culpable Homicide Not Amounting to Murder are both described as “offences affecting the human body and affecting life.” (Penal Code S. 293 and Exceptions 1 to 5, S. 294, S. 296, S. 297). General Defences to such offences such as provocation and intoxication can often be traced to GBV, and can involve infringement of rights relating to reproductive and sexual health. These offences and the defences are defined in a gender neutral way without addressing the specific context for GBV. (S. 293 and Exceptions to S. 294 discussed in next section).

Recent jurisprudence in the Supreme Court (see annex) enables causing death under torture in situations of State detention or custody to be considered as a violation of the fundamental right to freedom from torture recognized in Art. 11 of the Constitution. [See Annex, and section on Constitution]. This conduct may therefore be considered torture under the Torture Act (1994) S. 12.

### **Suicide**

Suicide by women can be caused because of emotional or psychological abuse, and can be considered a form of GBV. Attempted suicide was considered a criminal offence until the law was changed by an amendment of 1998 (see Non-Fatal Injuries). It is therefore not considered a crime in our law. Suicide is treated as self-inflicted fatal injuries, and no one is held responsible for this act. English Common law

and Roman Dutch Law in the area of criminal justice or civil wrongs (tort/delict) focused on deterrence of physical harm, on the ground that psychological harm has a dimension that could not be proved. This value system is also embedded in the approach to suicide.

## **(ii) Non-Fatal Physical Injuries : Criminal Law and Other Laws**

This refers to non-fatal injuries caused in the community or as part of domestic violence in the family, and also impacts on reproductive rights of women and girls. This conduct attracts criminal penalties and sanctions set out in the Penal Code Chapter XVI as offences against the human body or life. These offences too are defined in a gender neutral manner, as offences of causing non-fatal bodily injuries through – Assault (S. 342), Use of Criminal Force (S. 341), Hurt (S. 310) and Grievous Hurt (S. 311).

Assault refers to creating a fear of using force, as distinct from using force on a person's body. The offence of Hurt is defined very broadly. The offence is described as “causing bodily pain, disease or infirmity to any person.” The more serious offence of ‘grievous hurt’ was redefined in 1995 to include wider categories of injuries. (S. 311 repealed and redefined by Penal Code Amendment 1995). Non-fatal injuries caused to pregnant women and girls that impact on reproductive rights are not defined specifically as criminal offences against women in the Penal Code, though this is an acute form of GBV. However the Penal Code has an offence called cruelty to children which can be used to prosecute Non-Fatal physical violence perpetrated against girl children. (S. 308A added by Penal Code Amendment 1995). Injuries to the sexual organs of adult women can be prosecuted not as a separate offence of cruelty under the Penal Code, but under the gender neutral offences of assault using criminal force or causing grievous hurt or hurt. We shall see later that non-fatal physical injuries against women and girls also attract the provisions of the Domestic Violence Act (2005). This Act does not punish this conduct as a criminal offence, but defines offences under Chapter XVI of the Penal Code as domestic Violence, and gives certain types of relief and remedy. [See Annex and discussion on Domestic Violence Act].

It will be seen later that injuries to the sexual organs which involve an infringement to reproductive rights can attract the remedies given under the Constitution Art 11 for violation of the right to freedom from torture. This case law on Art 11 can also be used to prosecute State officials including law enforcement officers for the crime of torture under the Torture Act of 1994, which also applies in times of war or conflict. (S. 3). The concept of torture under this Act however is defined in a very limited way as for specific purposes and confined to the conduct of public officials or in an official capacity in defined situations. Private Non-State Actors are not covered by this Act [S.12]. However acting under a superior's order is not a defence, recognizing the concept of ‘command’ responsibility for torture. [See section on Constitution and (S.3)].

Violence that can cause a woman to attempt suicide is not defined as a specific crime of GBV. Non-fatal physical injuries in the forms of corporal punishment as a measure of discipline may be inflicted by family members on women and girls. Corporal punishment is perpetrated more severely against boys than girls in the community, especially in schools or places of employment. Whether it occurs in the family or community, corporal punishment will attract the penalties specified for Assault, Use of Criminal Force, Hurt or Grievous Hurt in the Penal Code. The Code recognizes a defence of “reasonable chastisement” to allegations of use of Criminal Force, following nineteenth century English criminal law. (Penal Code S 341 illustration (i)). However the scope of this defence is limited, as indicated in cases of prosecutions for these



offences and Constitutional case law on Art 11 (torture). [See Annex, section on Constitution]. The Muslim personal law on marriage recognizes the husband's right to inflict "moderate chastisement." However since Muslims are governed by the criminal law of the land and the Criminal justice system, marriage laws cannot be used as a defence. (See Annex).

### **Non-Fatal Physical Injuries GBV and Law of Marriage**

This type of violence which infringes reproductive rights of women can also be a ground for divorce under the General Law of Marriage based on the General Marriage Ordinance (1907) applicable to all Sri Lankans except Muslims and Kandyan Sinhalese. Cruelty by causing non-fatal physical injuries is not a ground for divorce, but can be used as evidence to obtain a divorce on the ground of "constructive malicious desertion." This phrase refers to evidence that a person engaged in cruel conduct so as to indicate a desire to force the spouse to leave the matrimonial home. Cruelty is not a direct ground for divorce, but can be a ground for a legal or judicial separation under order of a court. The legal principles on cruelty and divorce are not found in legislation or acts of parliament, but in principles on divorce developed by the courts. (See Annex).

By contrast, both Kandyan law and Muslim law statutes passed by Parliament recognize that cruelty is a ground of divorce. Sinhala people of the Central Provinces are governed by an Act of Parliament that regulates the Kandyan laws of marriage and divorce, and Muslims by another statute. Proving cruelty in the General Law is not as easy as in these personal laws, as the idea of divorce for cruelty is not recognized as in Muslim law and Kandyan law, in an Act of Parliament or legislation dealing with the subject. Cruelty has to be separately linked to the divorce ground of "malicious desertion" by the male spouse which is the ground for divorce stated in the legislation. [See Annex]. The diversity in marriage laws and the approach to intra family violence has not been addressed in reforms for over a century, and since the colonial period.

Dowry violence is not treated as a distinct offence in the Sri Lanka Penal Code unlike in other countries of South Asia. Similarly, acid throwing is not a specific crime of GBV though there are reports of such violence perpetrated against women. This violence must be prosecuted according to the offences on bodily harm defined earlier in a gender neutral manner, in the Penal Code.

### **GBV Violence in Educational Institutions**

A separate Act of Parliament called the Ragging in Universities and Educational Institutions Act (1998) considers non-fatal physical injuries caused through acts of bullying in these institutions a criminal offence. Male students in Sri Lanka also suffer this type of violence, but female students are "ragged" or "bullied" by both senior male and female students. The reality of this type of bullying is captured in even the literature of a well-known writer like E R Sarathchandra in his book 'Curfew and Full Moon,' as an intrinsic dimension of university life. The Act of Parliament (1998), seeks to create an attitude of zero tolerance for this type of violence when perpetrated against men or women. Though the impact of women students can be different and therefore ragging can also become GBV, the Act adopts a gender neutral approach to ragging. [See Annex]. The University of Colombo has a Code of Sexual Harassment (2001-2002) which has been adopted by the council of the University as a by-law, and provides a procedure to address complaints of sexual harassment.



## **Emotional and Psychological Abuse, Physical Violence and GBV**

The Penal Code of Sri Lanka unlike the Penal Code of India on which it has been modelled, has not been amended to incorporate an offence of emotional and psychological abuse of adult women independently or as a dimension of physical violence. Yet such abuse can impact on reproductive and sexual health. The Penal Code has some gender neutral offences like Criminal Intimidation and Insult (S. 483) which can be used to prosecute what are in fact offences involving emotional psychological violence. Amendments to the Penal Code in 2006 for the first time include psychological abuse as a factor that can be considered an “injury” for the purposes of awarding compensation for various crimes of physical and sexual violence. Changes in approach are reflected in more recent legislation. The Ragging Act 1998 includes causing psychological injury or mental pain or fear to a student or a member of Staff in the definition of ragging. We shall see that psychological abuse is also included in the definition of Domestic Violence in the Act of 2005. However we shall see that this dimension can, but is not considered significant in the criminal justice system at the stage of sentencing as seen in evidenced based research on sentencing and compensation in cases of sexual abuse and violence. It is considered incidentally relevant in proving the offence of sexual harassment in the Penal Code, and in compensation for the offence. [See Annex and section on sexual harassment].

## **Physical Gender Based Violence and Psychological Abuse in the Workplace**

Sri Lanka has a plethora of good legislation that protects women workers. These laws give protection against abuse and exploitation, including in industrial work places and factories. However these protections are not available to the large number of women in casual employment. Labour inspection and co-operation between Employers and labour authorities and decent work practices are at the heart of effective enforcement of Sri Lankan labour laws. Where these systems are ineffective women workers experience GBV in the work place. [See Annex].

Sexual harassment in the work place will be considered in the section on sexual violence. However poor employment practices such as mandatory production targets set during working hours, restricted toilet breaks and poor toilet facilities violate women worker’s reproductive rights. Psychological harm that impacts on these rights is caused by poor labour practices such as constant verbal abuse by managers and supervisors, and denial of maternity benefits and leave entitlement under labour laws.

The Labour laws of Sri Lanka are governed by Establishment Codes in certain sectors such as the Public Service, Universities, and similar institutions. The private sector is governed by separate legislation on maternity leave. All sectors are now governed by laws or Administrative regulations that provide 4 month maternity leave for two pregnancies, and six weeks for others. The public service and university sectors also provide extended leave according to government regulations introduced by the former government. This leave extends to an additional period of six months with half pay, and a further six months on no pay. Termination for pregnancy is also prohibited. There is anecdotal evidence that some private sector employers do not recruit women, deny this leave, or terminate employees when they become pregnant, indicating the failure of the labour law enforcement inspection system against persons in the private sector who violate the law and women’s reproductive rights. [See Annex].

## **Defences to Fatal and Non-Fatal Physical and Gender Based Violence**

We have noted that the Penal Code's defences to crimes of violence are gender neutral. Consequently the impact of GBV on women because of circumstances such as intoxication is not considered relevant in the formulation of the legal principles that determine whether the accused was in such a state of intoxication that he can plead culpable homicide not amounting to murder (unintentionally causing death), or a lesser offence of causing grave but not fatal injuries. Besides the interpretation of "provocation" as a defence to a charge of murder, or even culpable homicide not amounting to murder does not recognize the concept that a woman may have been provoked to violence herself by a violent male spouse, partner, family member or person in the community. Provocation as a defence must be proved to be "grave and sudden." The defence of "battered women syndrome" recognized in some countries has not emerged in interpretations of the defence in Sri Lankan Courts, which emphasize the "grave and sudden" element. However the concept of "continuing provocation" a man suffers at the hands of a woman has been recognized in cases where a man has been accused of murdering a woman (*Samitamby v Queen* (1971), *Premlal v Attorney General*, *Kelaniya Female University Student's Case* (2000)).

## **The Civil Law and Non-Fatal Physical Gender Based Violence**

Intentional acts of physical violence (eg. Assault) and intimidation, or negligent acts of physical violence that cause non-fatal injuries or psychological abuse may give rise to a remedy of financial compensation according to the principles of the Roman Dutch Law of civil wrong or "Delicts." Such acts which are done intentionally or negligently can be the basis of a claim in a civil court for damages. Common civil cases are medical negligence, or intentional harm caused through medical procedures, or denial of treatment, that can also impact on reproductive and sexual health. Such actions can be filed by women and girls against family members or service providers in the community. Actions based on claims for damage caused by "nervous shock" is a development of the jurisprudence on civil wrongs that can also give a remedy in the form of financial compensation for injuries suffered. (See Annex).

## **Kidnapping, Illegal Abduction and Illegal Detention, including in Situations of Conflict**

Abduction, especially in times of conflict can infringe women's reproductive rights. The Penal Code does not recognize a general offence of kidnapping of an adult male or female, as this offence deals only with kidnapping of children or abduction out of the country. (S. 350). However, compelling or inducing "any person to go from any place" constitutes a separate offence of "abduction." A higher punishment is imposed for kidnapping an adult woman from the Island, or a girl child under 16 years from lawful guardianship, or abduction to compel marriage, or for seduction or 'illicit' intercourse or to subject them to grievous hurt. (S. 357, 358). A writ of habeas corpus can also be filed against any private person or public official who has unlawfully arrested and detained a person in illegal custody.

The writ can be used to question the conduct of public officials or private persons alleged to have abducted a woman, a man or a child. (See Annex).

Wrongfully restraining a person's liberty and freedom of movement were recognized as minor crimes in the nineteenth century Penal Code through several offences. The Penal Code criminalises as an offence of wrongful restraint with minor penalties of imprisonment or fine, obstructing a person so as to prevent them from "proceeding in any direction in which they have a right to proceed." (S. 330). An exception to

this section suggests that if the restraint is in good faith in relation to action that obstructs a private right of property in the belief of a lawful right to do so, there is no criminal liability. This can be interpreted to justify gender based violence by restraining a woman on the ground of “belief in good faith” that the restraint in relation to a property right was legal and justified, and showing an absence of intent to act wrongfully. However the general defence of good faith in criminal law according to S. 51 of the Penal Code requires proof of “due care and attention” to plead good faith as a defence. This places some restriction on the capacity to plead good faith in a situation where there has been wrongful restraint.

An additional offence of wrongful confinement in S. 331 of the Penal Code refers to committing wrongful restraint so as to prevent freedom of movement beyond specified limits. This is also a minor offence. Since this offence is connected with the offence of wrongful restraint, the defence of good faith and the ensuing limitations will apply in cases of wrongful confinement.

The Constitution of 1978 introduced a fundamental human right to freedom from arbitrary arrest, detention and punishment, Art 13. [See Annex, section on Constitution]. However the legality of the arrest means that law enforcement agencies may act under specific legislation and claim powers of arrest. Arrest and detention powers exercised by the Police under the Vagrant’s Ordinance (1841) can be used against women who engage in street prostitution. This is a form of gender based violence that can impact on reproductive health and rights, which is justified as a lawful exercise of police powers and a response to creating a public nuisance. (See Annex). Wrongful restraint and confinement can now amount to domestic violence under the Domestic Violence Act 2005, giving the rights and remedies provided in that legislation, which will be discussed later. [See Annex section on Domestic Violence]. Sri Lanka has recently ratified the Convention on the Protection of All Persons from Enforced Disappearances (2016). This will perhaps encourage review and reform of the law in this area.

### **iii) GBV Associated with Financial Transactions**

This type of GBV can impact on the reproductive health and psychological wellbeing of a woman, and amount to an infringement of rights protected by the legal system. It is a topic that is often ignored in responding to GBV and infringement of reproductive health and rights.

#### **a. Domestic Violence Associated with Financial Transactions**

A violent husband can force a married woman to transfer her property. She can also be compelled to enter into contracts or transactions like mortgages and loans. Such conduct can constitute the gender neutral offence of Criminal Intimidation in the Penal Code. If the criminal intimidation is in relation to property, the property should belong to the woman (See Annex).

A separate offence of Extortion in the Penal Code, which is also gender neutral can be relevant in cases of GBV. This involves putting in fear of injury to a person or another and dishonestly inducing the victim to deliver property, a valuable security such as a fixed deposit or anything signed or sealed, which may be converted into a valuable security. (Penal Code S. 372.) Injury is defined widely in the early Penal Code and includes any illegal harm to body, mind, reputation or property. (Penal Code S. 43).

Today, domestic violence is defined in the Act of 2005 as including both these Penal Code offences. (Schedule I DV Act). We shall see emotional abuse is also considered as within the definition of domestic violence (S. 23 DV Act). Consequently emotional abuse defined in S. 23 as “a pattern of cruel inhuman and

degrading or humiliating conduct of a serious nature, directed at” the victim can cover conduct relating to any financial matters, even if it cannot amount to the criminal offences of intimidation and extortion, specifically referred to as domestic violence under the Act.

Interim Protection Orders and Protection Orders can be given under the Domestic Violence Act as relief so as to address the dimension of GBV. The nature and content of these orders, and the relief, and Supplementary Orders available under this Act S. 12 indicate that GBV in relation to financial transactions must be recognized by the court, and remedies and relief granted by making these orders. In all these cases a wife can give evidence against her husband. (DV Act S. 16).

### **b. GBV Relating to Financial Matters and Marital Rights : The Interlinkages**

Cohabiting parties are not covered by the law regarding marital rights and financial support in the Maintenance Act (1999). We have noted that intimidation, extortion and denial of financial support can be considered domestic violence under the Domestic Violence Act. Such conduct can also amount to violation of matrimonial property rights and provides a basis for divorce or legal separation under separate laws governing marriage. [See Annex]

We have noted that cruelty is a ground for judicial separation and divorce on the ground of constructive malicious desertion, in the fault based General law of marriage. GBV that has negative financial implications for women can therefore be a basis for this type of matrimonial relief. The General Law of marriage and the Kandyan and Muslim law recognize that women have separate and independent property rights as single or married women (See Annex). Intimidation and force that contributes to alienation and mortgage of property, or causes indebtedness, and deprivation of financial resources can therefore provide a basis for a fault based divorce or judicial separation in General law. A fault based divorce is not required in Kandyan law, as it is also possible to obtain a divorce purely on the ground of de facto separation or mutual consent. There are some special problems in regard to different types of marriage gifts in Muslim law, which may impact on the capacity to obtain a divorce for cruelty in Muslim personal law. [See Annex].

Dowry in all systems of Sri Lankan law is considered the separate property of the woman. It cannot be legally transferred to another, or to a spouse, or child and such a transaction has no force in law. Ownership will not pass to the transferee. However S. 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance of Jaffna (1911), states that a woman governed by the Tesawalamai system of law, applicable in the Northern Province, cannot transfer their property without the husband’s consent. This provision derived from a colonial statute repealed in the General law, gives the husband marital rights of property, and is used by lending institutions today to require this consent for loans and other transactions. This legal provision can encourage perpetration of GBV against married women, but has yet to be repealed. GBV perpetrated against an elderly woman can be a legal ground for revocation of a deed of gift [See Annex].

### **c. Other Criminal Offences Pertaining to Property and Finances**

There are many gender neutral offences relating to property in the Penal Code Chapter VII that can be used to prosecute a man who is a husband, cohabiting partner, family member or third party. These include Criminal Intimidation and Extortion, (discussed earlier), theft, criminal misappropriation of property, fraudulent deeds and dispositions of property.

Spouses can give evidence against each other in regard to civil matters. Consequently civil actions in regard to

claims involving contracts, financial transactions with property, both movable and immovable, can be brought by a woman against her husband. Though a spouse cannot be a witness for the prosecution she can do so if there is an attempt to cause violence (Evidence Ordinance S. 120 (3)(4). The exception will therefore apply if he is accused of committing any of the above offences in respect of his wife's property or finances (See Annex).

#### **(iv) Gender Based Sexual Violence**

##### **Introduction**

Gender based sexual violence can be perpetrated against women in the family and in the community, and sexual violence can be perpetrated in the course of inflicting fatal and non-fatal injuries discussed earlier.

The Sri Lanka criminal law as incorporated in the Penal Code, Chapter XVI considers the act of causing of fatal and non-fatal injuries serious criminal offences of bodily harm or offences affecting the human body and life. By including offences of sexual violence in this Chapter, the early Code reiterated the idea that these offences infringe a core human right to life and bodily integrity. Where sexual violence is perpetrated in the course of other offences of bodily harm the sexual offences are considered additional and separate criminal offences of bodily harm, provided the act falls within the categories of sexual violence covered by Chapter XVI of the Penal Code. The criminal justice system of Sri Lanka from the time the Penal Code was enacted in the nineteenth century, has considered sexual violence an infringement of the human right to life and protection from violence against the body. Sexual violence has never been considered a minor offence of a violation of a woman's chastity, as in some legal systems.

The Penal Code amendments of 1995 tried to strengthen this approach, creating new offences in response to emerging issues of GBV, and also modifying existing laws on rape and sexual violence in the nineteenth century Penal Code. These amendments created new offences of incest, (S. 364 A), grave sexual abuse, (S.365 B), cruelty to children (S. 308 A) and sexual harassment. (S. 345). These laws were strengthened further by an amendment to the Penal Code in 1998.

There was an effort to review and amend the Penal Code provisions which criminalise abortion and homosexuality in 1995. This failed, and the homosexuality offence was also broadened to include lesbianism or homosexual acts between females. (S. 365 A as amended 1995). The amendments of 1995 also included the concept of minimum sentences and financial compensation for the injury caused through the commitment of these offences. (See Annex). The Penal Code was further amended in 2006, and introduced the concept of including "psychological or mental trauma" in assessing financial compensation for injuries caused by sexual offences referred to earlier. S. 43 of the Penal Code refers to harm caused to the mind in the definition of the word "injury" used in the Code, but this may have been ignored earlier. All these changes were a policy clarification that sexual offences were grave infringements of a woman's right to protection from bodily harm, which in turn impacts on a range of rights including for reproductive health rights.

Sexual violence manifests in Sri Lanka in many forms. It can take place in forced and early marriage of girl children. It extends to sexual violence and harassment of female heads of households or widows, in communities that are facing the aftermath of years of armed conflict in the North. There is evidence of a form of FGM or female genital mutilation practiced in some Muslim communities, and a cultural practice of a virginity test requiring a bride to bleed on first intercourse on marriage, in some Sinhala communities. Puberty rituals, including dietary restrictions on first menstruation are also practiced in some Sinhala

and Tamil communities. There is indication from research and media reports that the concept of family honour motivates family members to kill a spouse, partner, or girlfriend who refuses to conform to male expectations on the duties of a woman in regard to sexual relations. The concept of personal choice is rejected in these situations, legitimizing male violence, coerced sex within marriage, or cohabitation as spouses/partners, and in the extended family, including through incest. Similarly, physical and sexual violence takes place during pregnancy, through coerced sex, and forced abortion. Preventing women from using contraceptives is a dimension of violence that occurs in intra family relationships, and recently in the community, when some extremist religious groups and politicians interfered with the work of family planning clinics and programmes. (See Annex)

Another dimension of sexual violence occurs when women are abducted in the community or by family members for the purpose of coerced sex. Similarly, when a man does not disclose that he is married and fraudulently persuades a woman to marry him, and has sex with her apparently with her consent, but in fact through false pretences, since bigamy is a punishable offence in the Penal Code, (S. 362 B), except for Muslim men. There are restrictions in Muslim marriage law regarding the practice of polygamy by men, and a Muslim man cannot generally marry a Non-Muslim woman, and practice polygamy. Such a purported marriage can be considered illegal cohabitation according to Muslim law. (See Annex)

All these types of gender based violence can have a negative impact on a woman's reproductive and sexual health and rights, and violate her fundamental human right to bodily integrity. Such conduct also has negative social costs in the family and community, including health costs and pressure on the delivery of health services. Some acts of sexual violence that involve coercion or interference with the right to contraception can lead to unwanted pregnancies, STD and HIV infection. Women can become infected through a spouse or partner who either has coercive sex, or withholds information from her. GBV or sexual violence can also contribute to forms of self-inflicted physical violence such as suicide by women, or abortion and infanticide, aimed at getting rid of the consequence of pregnancy. (See Annex).

The phenomenon of sexual harassment of women including through misuse of the internet and acts that should be considered cyber crimes, constitute a different type of sexual violence. It tends to be perceived as annoying conduct, rather than conduct which should be criminalized, especially because Sri Lanka's Constitution does not clearly recognize a right of privacy. However Article 11 of the Constitution recognizes the right to freedom from degrading treatment and the law on civil wrongs or torts recognizes a right of privacy and protection of dignity. Consequently sexual harassment too can be seen as an infringement of the right to bodily integrity which is grave enough to be criminalized and also prevented by self regulatory codes of ethics and conduct, especially when it occurs as it does in Sri Lanka on public transport and in work places. Sexual harassment can cause psychological stress and trauma, and create a hostile work environment and inhibit access to public spaces. It has been perceived in other jurisdictions, including South Asia, and in international standards, as a violation of the human right to equality and non-discrimination. This in itself can impact on reproductive and sexual health, and the right to experience wellbeing and personal security in these important areas. (See Annex).

The legal system of Sri Lanka responds to these different forms of violence in different ways. Some laws seek to create an environment of zero tolerance for some forms of violence, but do not address others. The legal system's approach to some aspects of sexual violence are outlined in the next section.



## **(1) Coerced Sex**

### **a. Rape**

From the time of the adoption of the Penal Code (1889) rape was considered a grave crime that infringes a woman's right to bodily security rather than a minor crime affecting her chastity. It was described initially as a crime that was committed "against her will and without her consent." (S. 363 prior to 1995 amendment). This definition focused on proof of the woman's physical resistance, and the accused was acquitted if there were no physical injuries on the man's body as evidence of rape. The credibility of the woman could be attacked during the prosecution on the basis that she had not resisted. No specific legislation on evidence and procedure in Sri Lanka requires independent evidence to "corroborate" or confirm the victim's evidence of rape if it is considered reliable. Yet by practice Sri Lankan Courts have been guided by early English Common law and required independent corroboration of her version of the events. (See Annex).

The Amendment of 1995 now defines rape in S. 363 as sexual intercourse by a man with a woman "without her consent," deleting the requirement "against her will." The 1995 amendment focuses on absence of consent as the central concern of all criminal law. It therefore reinforces the rights of a woman in respect of her sexual and reproductive health and her right to personal decision making in this regard, and her right to physical integrity and protection from unwanted interference with her body. Several specific definitions of rape in the 1995 amendment indicate that there can be absence of consent due to diverse factors (eg. unsoundness of mind, intoxication induced by alcohol or drugs, use of force, threat of detention or intimidation, or putting the victim in fear of hurt or death.) (S.363 (c)(d) and (b) repealed and as amended (1998). We have referred to amendments to provisions on punishment for offences including rape in 2006, indicating that compensation 'for injuries' in rape cases includes psychological injury. (Amendments to S. 364 Penal Code Amendment 2006).

One explanation to S. 363 on rape states that penetration of a woman's vagina is adequate evidence of resistance to prove rape. (Explanation (i) Amendment 1995). Another Explanation clarifies that evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent. (Explanation (ii) Amendment 1995). These changes make it abundantly clear that evidence of resistance is not required to prove rape. They also support the judicial view already taken in some cases that it is unnecessary to require independent corroboration, and it is possible to obtain a conviction on the basis of the woman's evidence. However unfortunately trial courts sometimes focus on proof of injuries and the evidentiary requirement of independent corroboration. There is no consistent judicial practice that has integrated the reproductive and human rights approach that the 1995 Penal Code Amendment tried to introduce into the criminal law. (See Annex).

### **b. Rape as Torture by Public Officials**

It is important for trial courts and law enforcement officers to recognize that rape is also considered torture, and a violation of the fundamental human right to freedom from torture guaranteed by Art 11 of the Constitution in a decision of our Supreme Court. (Maradana Rape Case, See Annex torture and the Constitution). Public officials are also liable under Art 11 for inaction, or on the basis of command responsibility. A Non-State actor or private person can be made a respondent to a fundamental rights

action brought against a public official, on the basis of inaction by the State in preventing a violation. (See Annex torture and the Constitution). However only public officials and the police can be prosecuted for torture under the Torture Act 1994, since the definition of Torture is more limited. (Torture Acts 12). This Act however clarifies that an offence committed by an official or police “when there was a state of war, threat of war, internal political instability or any public emergency” is not a defence. (Torture Act S. 3 (a)). The order of a public authority or superior officer is not a defence to culpability. S. 3 (b)).

### **Rape in Legal or Illegal Custody and Detention (Custodial Rape)**

The criminal law and jurisprudence on torture by a public official or person in authority has been strengthened by the changes to the law on custodial rape in the Penal Code. The amendment of 1995 introduced a new concept of rape in custodial situations that was modified again by an amendment of 1998. S 363 (b) as amended in 1998 now states that rape can be committed even with a woman’s consent in situations of “lawful or unlawful” detention. When a woman alleges rape while in lawful or unlawful detention, her consent will not be a defence and the proof of the fact of intercourse with a detainee will result in conviction for rape. This seems to be a form of strict liability for rape, and can be used to prosecute for sexual violence in times of civil or armed conflict. In the famous Kataragama Murder Case (*Wijesuriya v State*, see Annex), involving a female detainee, these provisions could have resulted in a conviction of rape based on sexual violence perpetrated in custody.

Custodial rape in other situations like in hospitals and shelters also attracts greater penalties and is considered a grave form of rape in amendments introduced in 1995. (S. 364 (a) to (c)).

### **c. Marital Rape**

In defining rape as non-consensual sexual intercourse with a woman, the 1995 amendment departed from the prohibition of prosecution for marital rape in English Common law. It recognized that rape could be committed in marriage, where there was coerced or non-consensual sex. Thus S.363 (a) says that rape occurs when sexual intercourse takes place without consent “even where such woman (the victim) is his wife.” However marital rape was only extended to one category of cases – where “she (the victim) is judicially separated from the man.” (S. 363 (a)). Judicial or legal separation in the Marriage law of Sri Lanka is a legal remedy available only after court proceedings. (See Annex, Marriage, earlier). Marital rape is therefore not an offence if a woman is not legally separated by court order, and she is living with her spouse, or is in a situation of de facto separation. A wider concept of marital rape to cover cases of de facto separation was advocated in the proposals for reform, but the government adopted the more limited interpretation of marital rape in the Indian Penal Code. (See Annex).

Intimate partner sexual violence in the form of coerced sex in situations of cohabitation will not come within the restrictions on the law on marital rape, but would have to be addressed within the general principles on rape in the Penal Code.

### **d. Statutory Rape or Rape of Underage Girl below Age of Consent**

The Penal Code amendment of 1995 modified the earlier law on sexual intercourse with a minor girl below the age recognized by law for expressing consent. S.363 (e) states that sexual intercourse “with or without her consent” is rape when she is under 16 years. This provision incorporates the concept



of “statutory rape,” because the offence is committed irrespective of whether the girl under 16 years consented or not. It is based on the idea that being under the age of sexual consent, she lacks legal capacity to consent, making the rape an offence of child abuse.

The law on statutory rape has become controversial in later years. It sets an age of 16 years for expressing consent to sex, an age already recognized in the law on minority as the relevant age of evolving capacity to make personal decisions. Since the age of majority in Sri Lanka is 18 years this amendment reflected a policy of recognizing the reality of adolescent sexuality, evolving maturity of girls, and their right to make decisions on reproductive and sexual health and well-being, at a lower age of 16 years. The age for expressing sexual consent in regard acts considered rape therefore is considered 16 years, conforming with the age of consent in other areas such as expressing consent to medical procedures.

This legal concept of statutory rape is not understood clearly by judges and lawyers in trial courts, because the amendments use the phrase “with or without her consent” in defining this offence in S.363 (e). This has created the impression that a girl of 14 or 15 in particular who has sex with a man has in fact consented to sex, and that it is a consensual act, and the man should not be punished for rape. We see therefore a disconnect between the legal concept of statutory rape as child sexual abuse perpetrated by a man on a minor child who lacks capacity to consent, and the perception that an under-age girl or teenager in fact consented to sex. This disconnect has led to cases where an accused charged with Statutory Rape is not given the punishment stated by law, but his sentence is “suspended.” This in turn leads to the legitimization of child sexual abuse of adult men. Several conversations have been held between women’s groups, gender advocates and the State agencies on law reform such as the Ministry of Women’s Affairs and the Law Commission without creating a consensus on the meaning and rationale of this law. (See Annex).

The severer punishment imposed for rape of a minor under the age of 16, or 18 (the age of majority). S. 364 (2)(e), indicates that the 1995 amendment considered this a grave form of rape. We have also noted the amendments to S. 364 in 2006, which in an Explanation 4, included psychological or mental trauma in the definition of “injury” for the purpose of payment of compensation. Yet the practice in the courts tends to ignore this rationale. (See Annex on Sentencing). A proviso to S. 364 that gives the court discretion to reduce the sentence when the sexual intercourse is by a minor under 18 years and a minor girl under 16 years, when she has “consented”, has also reinforced the perception that the underage girl “consents” to intercourse. This has led to arguments that the boy should not be considered to have raped the girl, leading to suspended sentences or non-prosecution. (See Annex).

#### **e. Gang Rape, Rape of Pregnant Women, or Women with a Mental or Physical Disability**

These forms of rape are not distinctly or separately defined, as criminal offences in the Penal Code, but attract greater penalties as a form of grave rape according to S. 364 (2) (d)(f) and (g). In gang rape each accused will be charged separately, and there is no additional penalty beyond that specified for the other form of rape, though gang rape is more brutal from the perspective of the victim.

#### **f. Grave Sexual Abuse that does not amount to the Offence of Rape**

Rape was defined in the Penal Code Amendments as non-consensual sexual intercourse by a man, and where she is his wife, she is judicially separated from him. The proposals for reform addressed the

need to keep this offence which was already incorporated in the law and address other forms of sexual violence through a new offence of grave sexual abuse defined in S. 365 B (1). The acts of sexual violence are specified in the section as “use of genital or any other part of the human body or any instrument or any orifice or part of the body of any person.” The emphasis here too is on the coercive and non-consensual nature of the act. (S. 363 (1)(a)(b)(c) as amended 1995).

In 1998 the provisions regarding evidence of absence of consent were further amended. The age of consent in this offence is also now 16 years in the case of both boys and girls, as a gender neutral offence. The law was also amended to indicate that when grave sexual abuse is committed in lawful or unlawful custody, the same concept of strict liability for custodial grave sexual abuse applies, as in custodial rape. (S. 365 B (1)(b) as amended 1998). Punishment was originally the same as for rape, though as in rape, grave sexual abuse of a minor under 16 years attracts more severe penalties. (S. 365 (B)(2)(b)). In 2006 the Penal Code was amended again to impose a lower punishment for grave sexual abuse in general (S. 365 (B)(2)(a) as amended 2006), and grave sexual abuse of a minor (S. 365 (B)(2)(b) as amended in 2006). This amendment has indicated that grave sexual abuse is considered a lesser offence than rape.

Grave sexual abuse can also be considered torture and violation of the human right to freedom from torture, in Art 11 of the Constitution. However only public officials or law enforcement officers who commit an act or acts of torture in the limited circumstances specified can be prosecuted under the separate Torture Act which criminalises torture. (Torture Act 1994 S. 12). We shall see that grave sexual abuse will also amount to Domestic Violence under the Domestic Violence Act 2005. (See Annex Constitution and Torture and section on Domestic Violence Act).

### **g. Incest**

Incest was not a criminal offence in the English Common law, and was dealt with only in marriage laws that prohibited persons in certain relationships marrying each other. Consequently the nineteenth century colonial Penal Code of Sri Lanka based on the Indian Penal Code did not recognize that incest was a criminal offence. Incest was considered an offence only in marriage laws which detailed the prohibited degrees of marriage. Incest became a grave Penal Code offence only after the amendment of 1995. (See Annex).

Incest is a form of Gender Based Violence as it involves abuse of relations of power within the family and extended family. The concept of consent to sexual intercourse in these relationships is therefore not recognised in the Penal Code as in the case of statutory rape or sexual abuse of persons who cannot express consent with autonomy and freedom. It is therefore considered coerced sex that infringes a woman’s reproductive and sexual rights which are also linked to her right to bodily integrity, non-discrimination on the ground of sex, and dignity. S. 364 A (1) as newly drafted in 1995 considers sexual intercourse between persons whose relationships are set out in the section, as the criminal offence of incest.

The focus is on the biological relationships by “full or half blood,” and adoptive relationships, and the relationship of children or spouses through marriage or adoption, irrespective of the legality of the marriage or adoption. The punishment imposed in S. 364 (A)(3) is the same as for rape.

The written sanction of the Attorney General the State prosecutor is required for a prosecution (S. 364 (A)(4)) reflecting an attitude of caution in situations where clear evidence is required to prove the sexual relationship between the relatives alleged to have committed incest.

There is anecdotal evidence from a lawyer in Ratnapura that the expressions “full or half-blood” in

translation has surfaced problems of interpretation, creating a perception that extended relationships with cousins related by blood are also covered in the definition of incest. These relationships have not been recognized in the definition of incest.

#### **h. GBV against Girl Children**

A specific gender neutral offence of cruelty to minor children under 18 years (S. 308 A(1)) was introduced in the Penal Code in 1995. The offence can cover forms of GBV including coerced sex, and sexual violence against girls, even if it is not specifically mentioned. However this attracts a lower sentence than in other cases of sexual violence (a minimum of 2 – 10 years). (S. 308 A (2)). The definition of cruelty is wide enough to indicate that the offence can be used to penalize customary practices such as denial of essential nutrition and food during menstruation, and female genital mutilation when it is practiced in some Muslim communities. Since these practices are not specifically mentioned, cultural norms in these communities may not be challenged by using these legal norms and standards, which are meant to implement children's right to protection from sexual and other forms of violence and abuse.

Violence against girls is covered by the Penal Code general offences on sexual violence discussed earlier. However other offences on sexual exploitation also applicable to children, apply to girls. Offences on sexual exploitation of children (S. 360 (B)) and exploitation of children in pornography and obscene publications apply to girl children. (S. 286 (A)(1995) and S. 286 (A)(2)(3) as amended (1998)). This law was further strengthened by an amendment of 2006 which added provisions to cover duties of persons providing computer services to prevent sexual abuse of a child. (S. 286 (B)). Failure to inform of uses of premises for child abuse is an offence. (S. 286 (C)).

#### **i. Sexual Harassment**

The Penal Code of 1995 repealed the earlier law which incorporated the concept in nineteenth century colonial law of "offending the modesty of a woman." S. 345 of the old Penal Code was therefore repealed, and a new offence of sexual harassment introduced into the Criminal law.

Sexual harassment is defined in S. 345 by incorporating the concept of assault or use of criminal force in offences of physical violence, though it is defined by the objective, which is harassment of a sexual nature. Causing sexual annoyance by using words and action is also included in the definition of sexual harassment. An explanation clarifies that "unwelcome sexual advances by words or action used by a person in authority in a work place or any other place can constitute sexual harassment." (Explanation 1). The words "any other place" is wide in scope and goes beyond sexual harassment in the workplace when there is proof of abuse of authority. The definition of the offence clarifies that it is not considered trivial but an infringement of the right to bodily integrity, personal dignity and autonomy, free of gender bias and discrimination.

The offence has been defined broadly enough to cover the kind of sexual harassment that occurs in public places, public transport and workplaces. It appears to also cover cyber violence through misuse of the internet, since "causing sexual annoyance" and "unwelcome sexual advances by words or action" is included. However lack of clarity in this regard makes prosecution more difficult than if this area was covered specifically.

A sentence of imprisonment of up to 5 years can be imposed for the offence of sexual harassment.

(S. 345). The Explanation to the section as modified by an amendment in 2006 indicates that sexual harassment can take place in situations which do not constitute rape or grave sexual abuse. (Explanation 2). Another Explanation added in 2006 clarifies that compensation payable for injuries includes psychological and mental trauma. (Explanation 3). Sexual harassment by ragging in educational institutions is specifically included in the Ragging Act (S. 17 defining sexual harassment) and S. 2 (2) defining ragging). In an unusual case which was decided in 1994, even before Penal Code Amendment of 1995, the High Court of Colombo convicted a man under the Bribery Act, for soliciting sex from a woman employee in return for a transfer. (See Annex).

## **j. Gender Based Sexual Violence in Marriage, and Intimate Partner Sexual Violence**

### **Spousal/Partner Violence**

Conduct of a male spouse that amounts to severe psychological and or sexual abuse, coerced sex, including marital rape and sexual abuse causing unwanted pregnancy, by sexual violence or denial of the right to use contraceptives, all of which deny the woman's reproductive rights and right to personal security and bodily integrity, can amount to cruelty as it relates to our law of marriage and divorce.

Similarly intentional communication of STD and HIV or failure to communicate information to a partner can be considered cruelty. (See section on Non-Fatal injuries and Law of Marriage). Spousal rights and the right of privacy can interface with the definition of cruelty for the purposes of the law. This aspect will be considered in dealing with pregnancy and GBV in the next section. We have noted already that the right to privacy is a concept of the law on civil wrongs, and is not guaranteed in the Constitution. Medical practice indicates that testing blood for STDs and HIV is voluntary, and patient confidentiality is maintained. (See Annex). The implication of this policy for women has not been considered in formulating law and policy. This type of violence can constitute domestic violence under the Domestic Violence Act of 2005 and give remedies that will be discussed later.

All the above are remedies provided in civil legal actions. However the criminal law is gender neutral. As pointed out earlier, there is no defined offence of cruelty to women in the Penal Code, and a spouse can be criminally prosecuted only for the general offences relating to causing fatal and non-fatal injuries, or sexual violence, that have already been discussed. We have noted the very limited circumstances in which marital rape is an offence.

The English Common law prohibition on prosecution for marital rape seems to have been retained by the language used in other sections of the Penal Code Amendment 1995 and 1998 which cover forced sex by threat or intimidation (S. 363 (b)) and after intoxication or administration of drugs (S. 363 (c)). However violence by cohabiting partners will be covered by these offences. The offence of grave sexual abuse (S. 365 B) does not specifically exclude married spouses, as in the definition of marital rape in S.363 A. A specific provision (S. 363 (d)) clarifies that rape can be committed by a man by deceit pretending to be a woman's husband, knowing that the woman consents to sexual intercourse because 'she believes he is another man to whom she is or believes herself to be lawfully married.' It may therefore be argued that the English Common law restricting prosecution for marital rape has been modified, and that prosecution for marital grave sexual abuse is possible after the amendments of 1995. The latter phrase includes situations of cohabitation with a man in the belief that there has been a lawful marriage.

A separate offence introduced in the early Penal Code, prior to these later amendments, deal with Gender Based Violence through deceit in regard to the status of the marriage, thus punishing men who have sexual intercourse or cohabit with a woman, pretending that there is a legal marriage. (S. 362 (A), S. 362 (C), S. 362 (D)). The original Penal Code considers this behavior a grave criminal offence. The new definition of rape by amendments in 1995 on non-consensual sexual intercourse that amounts to rape (S. 363 (d)) creates an overlap with these offences, which continue as offences in the Penal Code. The absence of a procedure of recording identity when registering a marriage, contributes to the ease with which men can in fact contract polygamous marriages by going through the procedures for solemnising legal marriages.

Other forms of gender based violence relevant to marriage and cohabitation in our country are abduction of a woman for sexual intercourse, cohabitation or marriage, honour killings or violence against a woman perceived as breaking a promise of marriage, or her marital duties, by having sexual relations in an adulterous relationship with another man, and customary practices such as demand for dowry and the performance of a virginity test.

Adultery is not a Penal Code offence. However the Penal Code criminalises kidnapping or abducting a woman to compel her marriage or force or seduce her to sexual intercourse. (S. 357). Honour killings or acts of violence relating to dowry or breaking promises of marriage, or adultery, will have to be prosecuted according to the gender neutral defences of homicide and physical violence under the Penal Code. There are no specific offences to deal with the diverse forms of violence perpetrated by a spouse or partner as a clear manifestation of GBV.

For instance there are no specific dowry prohibition laws in this country. Breach of promise of marriage gives rise to a civil action in damages under the general law of marriage, but the common incidence of violence perpetrated against a woman when she refuses to continue a relationship, has to be prosecuted under the Penal Code offences already described. Similarly the practice of performing a virginity test in some Sinhala communities comes within the ordinary criminal law offences discussed, but has not been specifically prohibited, despite its psychological and physical implications for women.

Disputes on custody, guardianship and financial support of children can cause stress, manifest as GBV and sexual violence, and impact on reproductive health rights of women. The Sri Lankan law on guardianship is based on a combination of non-statutory Roman Dutch Law and English law. Muslims are governed by their personal law. (See Annex). The law on child support is in the Maintenance Act (1999) which does not apply to Muslims.

In our general law the father is considered the preferred or natural guardian of children. This means he has a preferential right to custody and guardianship. However the ICCPR Act (2007) requires the Court to consider the best interests of the child in deciding custody and guardianship issues in litigation. (S. 5 (2)). This principle can be applied as it has been in case law and jurisprudence on custody, in the appeal courts to deny a male spousal rights of custody and guardianship, and give relief to a woman against an abusive spouse. Orders under the Domestic Violence Act (S. 11 (1)(b) 11 (1)(b)(iii) 12 (1)(b) ) can also be made in regard to children, so as to protect the woman's rights. A male partner in a situation of cohabitation or a sexual relationship has no right to children under the non-statutory Roman Dutch Law. Therefore all rights of custody and guardianship are with the mother, and his legal Status is not recognized. (See Annex).

The Maintenance Act (1999) creates joint and shared legal responsibility for spousal and child support,

including for adopted children. (S. 2). Support for children can also be awarded under the Domestic Violence Act (2005), in making a restraining order against an abusive spouse or partner. (S. 12 (1)(f)(g) and 12 (2) ). In either event, child and spousal support are additional orders under the Domestic Violence Act, as part of protection orders. Courts cannot divert cases to the Maintenance Act procedures which are parallel, and the choice of opting for either procedure is with the parties concerned. (DV Act S. 12 (2) proviso). Cohabiting parties are not considered persons with mutual support obligations under the Maintenance Act (1999). However there is an obligation on both parents to support a non-marital child provided paternity is proved by “cogent evidence” – a standard that only requires strong proof rather than the independent corroboration required in earlier law. (Maintenance Act S. 2 (1) S. (2) proviso), S. 2 (3) 2 (4)).

### **Early and Forced Marriage**

Early marriage below the minimum age of marriage (18 years) and forced marriage of minor girls is a form of GBV, and also interfaces with the law on statutory rape or sex with minors, discussed earlier. Sri Lanka was considered to have been largely successful in preventing early marriage of girls due to the country's education policies. However a new phenomenon of underage marriage sometimes solemnised as “customary marriages” has been documented as a family response to teenage sexuality, situations of statutory rape of an underage girl, and or due to the impact of years of armed conflict and displacement. The age of marriage for all communities except Muslims was raised to 18 years to conform to the age of majority, after the Penal Code amendments on statutory rape in 1995. (See Annex).

The law on prohibition of underage marriage for all communities except Muslims has been in place for many years and combined with access to a procedure of registration of marriage. There appears to be public awareness of the legal prohibition, and people try to circumvent these procedures by falsification of the date of birth of girls. Underage and forced marriages without consent are not permitted as customary marriages. These factors make the marriage illegal and without legal consequences. However lack of clarity on whether court actions are, or not, necessary to challenge the legality of an underage or forced marriage, has undermined the effectiveness of legal provisions in the legislation on marriage, which suggest that these marriages are “void ab initio,” or unlawful from the commencement of the relationship. (See Annex).

Muslim law does not recognize a minimum age of marriage but statutory changes introduced in the 1950s require a Muslim priest (Quazi) to consent to the marriage of a girl under 12 years. (Muslim Marriage and Divorce Act (1951) S. 21). The Penal Code as originally drafted also defined as rape sexual intercourse with a girl under the age of 12 years, (the general minimum age of marriage at the time for all other communities). This appeared to have been a colonial policy meant to undermine social practices on child marriage. When the age of sexual consent was changed to 16 years in 1995, it was argued that though Muslim law permitted child marriage, this provision of the early Penal Code which had also applied to Muslims should be retained as a disincentive to child marriage in that community. Consequently the prohibition on underage sex was drafted as “with or without the consent of a girl under 16 years of age, unless the woman is his wife who is over 12 years of age ...” The absence of a specific reference to Muslim law has created confusion on the scope of application of this provision, even though it is clear that it is inapplicable in Non-Muslim communities where the minimum age of marriage is now 18 years, and it is no longer possible to refer to “a wife who is over 12 years of age.” (General Marriage Ordinance S. 15 as amended (1995), Kandyan Marriage and Divorce Act, S.4 and 66 as amended (1995)).



## **GBV and Widows and Female Heads of Households**

Sri Lanka's legal system does not prohibit widow remarriage, and remarriage is common in the country, except in the Northern Province, where social custom and practice discourages remarriage. However the laws on inheritance and matrimonial property applicable to women governed by the personal laws such as Kandyan Law, Muslim Law, and Tesawalamai have discriminatory provisions. Similarly there are legal provisions that discriminate against women and children in non-marital families. These create a legal environment that can encourage GBV and sexual violence in particular against women and girls of non-marital families. Special policies and legal reforms have not been introduced to address the realities. (See Annex).

### **(v) Homosexuality**

The Penal Code incorporates legal values of the early English Common law, criminalizing homosexuality. When Penal Code amendments were introduced in 1995, efforts to decriminalize adult homosexuality after a century failed. In fact an amendment to S. 365 A of 1995 modified the earlier law by substituting the word "persons" for "males" in the definition, criminalising for the first time, sex between females. (S. 365 as amended 1995). (See Annex). Homosexuality is described in nineteenth century language as "an act of gross indecency in public or private." The punishment for homosexual conduct indicates that it is considered a minor offence, unless it is considered a grave offence because it involves an adult over 18 years and a child under the age of sexual consent (16 years). (S. 365).

This strict approach has been challenged by many human rights and other groups as a violation of the right to individual sexual orientation, but there has been no initiative to reform the law on adult homosexuality. It seems that the Police do not prosecute for the offence. However they use another nineteenth century colonial statute, the Vagrants Ordinance (1841) to harass, arrest and prosecute such conduct which occurs in a public place. A recent case indicates that a prosecution is always possible at the discretion of the law enforcement authorities. *Galabada Wimalasiri v OIC Maradana* (30.11.2016 (S.C)) related to an appeal by an accused convicted in the Magistrate Court for this offence under S. 365 A of the Penal Code. Aluvihare J. with whom the other two judges of the Supreme Court agreed, referred to the changing laws on adult consensual same sex in other jurisdictions, including in England, which had decriminalized this conduct. However he said the law on homosexuality in Sri Lanka remained intact after the Penal Code Amendment (1995). The Supreme Court substituted a suspended sentence for the custodial sentence of imprisonment imposed by the Magistrate. The approach of the court supports a review of the policy of criminalizing adult consensual same conduct sex. The selective administration of criminal justice is an infringement of rights on sexual health and wellbeing, bodily integrity and the right to equality and freedom from discrimination. The latter rights as observed are not only international treaty standards but also guaranteed in the Constitution. (Art 12 on equality and non-discrimination.)

These provisions in the Penal Code cannot be challenged in the Supreme Court for violation of fundamental rights because our Constitution does not permit judicial review of past laws (Art. 80 (3) and Art. 16). The 1995 amendment could have been challenged when it altered the original language of the Penal Code, at the stage when the Bill to amend the Penal Code (1995) was before Parliament. Advocates for changing the law were disappointed at the failure to introduce reforms to the colonial law on homosexuality. However by an oversight this provision was not challenged for violation of fundamental rights – a missed opportunity for judicial review of the law in the context of constitutionally guaranteed human rights.

Transgender persons are not recognized as a separate category, but there is anecdotal evidence to suggest that a change of identity can be recorded in registration of identity procedures. Homosexuals, lesbians and transgender persons do however have the right to equality and non-discrimination and in other respects the other fundamental rights recognized in the Constitution. Civil remedies are recognized in the case of humiliating behavior and insult to dignity. The ordinary gender neutral provisions of the Penal Code will apply to acts of violence perpetrated against them. The argument that apart from the Penal Code provision (which is not enforced) these persons have all other rights and are not discriminated is used to justify continuing with the criminal law as stated in the Penal Code.

#### **(vi) Gender Based Sexual Violence and Pregnancy**

Reference has been made to the fact that gender based violence during pregnancy and forced sex to make a woman pregnant can amount to Domestic Violence which can give rise to legal remedies in the law of divorce or remedies under the Domestic Violence Act, restraining such behavior. The criminal law also addresses this issue by imposing harsher penalties for rape of a pregnant woman (S. 364 (2)(d)) and by responding to such violence within the gender neutral offences on causing physical violence to the body. (See sections on Fatal and Non-Fatal injuries.)

Medical procedures covered by Health Ministry circulars in Sri Lanka require the consent of either spouse for sterilization and set an age limit, subject to a discretion given to the doctor. However contraceptives can be given without spousal consent or to unmarried women in State institutions providing health care to girls above the age of sexual consent (16 years), without the consent of parents and guardians. An attempt to prosecute health care para professionals for giving teenage girls under 16 who are cohabiting or have sexual relations access to contraception as abetment to statutory rape was stopped when the Attorney General clarified that this could be done as part of health care services. [See Annex]

Sri Lanka's norms on sex outside marriage still confer an inferior status on non-marital cohabitation and children born outside marriage. No interpersonal legal obligations flow from even long term cohabitation, though the Maintenance Act (1999) changed the law significantly, and now provides for joint and shared parental support obligations to non-marital children. The stigma of illegitimacy and social marginalization of the mother and child are a reality. This legal environment continues unchanged, despite guarantees on equality and non-discrimination in Article 12 of the Constitution. It also impacts on the pressure for termination of pregnancy by unmarried mothers, and can even push women to commit infanticide which is a serious criminal offence in the Penal Code.

#### **Abortion**

The high incidence of abortion has been a subject on which there is an evidence base of information. It has been the subject of controversy and discussion for decades, and professional bodies, women's groups and gender activists have recognized the violation of the human rights of women as GBV that infringes Reproductive Health rights. However an effort to reform the law when Penal Code Amendments were made in 1995 failed. When the proposal went to Parliament as part of the amending legislation, these provisions on abortion were withdrawn. The Minister of Justice promised to decriminalize abortion in health legislation, but this has never been done. (See Annex).

The violation of women's rights that occurs as many dimensions, including the difficulty of registering



drugs that are important for therapeutic abortion, encouraging illegal marketing of these drugs. Discrimination and livelihood issues of widows in the Northern Province who are not encouraged to remarry, and forced and early marriage of girls as a response to adolescent sex, have led to new problems of unwanted pregnancies in situations of marital and non-marital cohabitation. Yet the strict abortion laws encourage illegal instead of therapeutic abortions. (See Annex).

The law on termination of pregnancy continues to be rooted in 19th century colonial legal values that are incorporated in the Penal Code in several sections. Abortion is a criminal offence whether committed on or by an unmarried woman or a married woman seeking to terminate a pregnancy. (S. 303 S. 305). In both cases the Penal Code incorporates the English Common law exception of legality when termination is caused in good faith to “save the life of the mother.” (S. 303 S. 305). An explanation to S. 303 clarifies that a woman who causes herself to miscarry is within the definition of this offence. This means she too commits a criminal offence in terminating her pregnancy. The exception to culpability referred to above, requires proof that termination was necessary to save the life of the mother, not the foetus. However a medical practitioner who terminates pregnancy even in these circumstances exposes himself / herself to a prosecution where he/she will have to prove this defence. These factors provide disincentives to legal therapeutic abortions, and encourage illegal back street abortions. (See Annex)

S. 304 of the Penal Code also makes termination of pregnancy a criminal offence, when it is done without the consent of the woman. Coercing a woman to terminate a pregnancy will come within this offence, as well as the separate offence of criminal intimidation (S. 483) referred to earlier. Another offence specifically referred to in the Penal Code relates to causing death of a pregnant woman in the course of acting with intent to cause a miscarriage. This section does not incorporate the exception of good faith and saving the mother’s life. The judicial interpretation of this offence indicates that the accused would have to plead general defences under the Penal Code to avoid liability, if death occurs in the course of a miscarriage. (See Annex).

## **Infanticide**

S. 306 makes it an offence to do an act before the birth of a child with intent to cause its death after birth. In this case too the Exception of good faith for the purpose of saving the life of the mother applies. S. 307 creates an offence of causing the death of a “quick unborn child” by an act amounting to culpable homicide. This refers to causing death after the stage of foetal movements, and in situations where the woman does not die, but the child dies. (Illustration to S. 307). S. 308 creates an offence of exposure and abandonment of a child under 12 years by a parent of the child who has the care of the child. The intention to abandon the child by leaving it in some place (exposure) is essential to prove the offence. If the child dies there can be a charge of murder or culpable homicide not amounting to murder. S. 309 deals with the offence of intentional concealment of a child’s birth by secretly disposing of the dead body.

## **Trafficking and Pregnancy**

A new definition of trafficking introduced into the Penal Code in 2006 repealed the earlier law on trafficking in the Penal Code amendment of 1995. The 2006 amendment redefines the offence of trafficking in S. 360 C in line with international standards in the Palermo Protocol to the UN Convention on Transnational Organised Crime. This amendment also introduces new offences relating to trafficking

in children and adoption. (S. 360 D). It is an offence to “recruit a woman or couple to bear a child,” thus prohibiting surrogacy, but exclusively for the purpose of placing a child in adoption. (S. 360 D (iii)). Falsification of birth registration or records for adoption, procuring children from hospitals and other defined child care or welfare centres for money or other consideration by intimidation of the mother, is now a criminal offence. (S. 360 D (iv) and (v)). Impersonalisation of the mother or assistance to her to impersonate for purposes of adoption is also an offence (S. 360 D (vi)). Obtaining the consent of a pregnant woman for money or other consideration for the adoption of an unborn child is an offence. (S. 360 D (ii)). These are all grave offences with severe punishments.

## **Emergency Contraception and Blood Tests**

Emergency contraception is available in medical forensic procedures for cases of rape. As observed blood tests for STD and HIV require consent and there are issues of privacy. (See Annex).

## **II. PROCEDURAL LAW**

Sri Lanka’s legal system following English law received in the colonial period treats criminal justice and civil law procedures differently. It has different principles of law applicable to criminal and civil trial procedures. Commissions established by law may also investigate, inquire and take action (e.g. the Bribery Commission and the Human Rights Commission). The 19th Amendment now requires Parliament to enact a new law or Act to establish a Bribery Commission. These different procedures can impact in cases involving GBV and Reproductive Rights.

The criminal trial and prosecution procedures in Sri Lanka are set out in the colonial Code of Criminal Procedure Act (1979) with many amendments. Civil trial procedures are set out in the Civil Procedure Code with amendments, and are completely different. In cases of Domestic Violence the provisions in the Domestic Violence Act (2005) apply. (See Annex).

### **a. The Criminal Trial and Procedures**

#### **(i) Pretrial**

Investigations can be conducted by the Police on complaints. In many countries in South Asia there is a formal record of complaints called “the First Information Report.” Sri Lanka procedures record complaints in the incident book at police stations and there are complaints regarding this process, resulting in public dissatisfaction. (Punkuditivu Case, Kayts 2015; see literature referred to in Annex). It is also alleged that there is often no privacy for women when they make complaints of physical or sexual violence unless there is a special Women and Children’s unit in a police station. The police has the power to refer minor offences (eg. assault) to Mediation Boards that will try to settle the case. The police is sometimes criticized for inappropriately trying to settle and mediate, in cases of intra-family violence, when women want to use the provisions of the law to get legal relief, especially under the new Domestic Violence Act [See Annex for literature]. This can create a public perception that sexual and domestic violence is not taken seriously by the Police, even though the law considers this conduct grave crimes, and a violation of a woman’s human rights regarding her body.

In criminal trials the first important point of contact for the trial procedure is the examination by a

forensic medical doctor. This procedure also has problems which have been recognized by forensic medical practitioners (See Annex for literature). One of the procedures criticized is the practice of confining medical examinations by forensic medical experts to examination of bodily injuries, which usually takes place in hospitals. Collection of further evidence at the scene of the crime requires the police to get permission from a magistrate, a procedure that can result in loss of evidence and delays. This is a procedure to provide protection to accused persons to ensure that arbitrary policy procedures are not followed. However it can negatively impact prosecutions.

The Attorney General's Department handles prosecutions. In the case of an offence like incest the Penal Code provides that a person cannot be prosecuted without the consent of the Attorney General. Yet there are no guidelines in the law as to how this discretion should be exercised. In the case of grave crimes the Criminal Procedure law requires a "two stage" procedure. The first, "a Non-Summary" trial to establish whether there is a "prima facie" or clear case to prosecute. This is presided by the Magistrate. At the conclusion of this stage the Attorney General decides whether to prosecute. Though he/she can be guided by the findings of the Magistrate, the ultimate discretion to prosecute is with the Attorney General. This official has the power to decide not to prosecute on the ground that there is no case. The exercise of the Attorney General's discretion in regard to some high profile cases has been the subject of media attention and public scrutiny. However in other cases there may be no scrutiny at all, creating problems of access to justice for families and victims (See Annex).

Long delays in trials and the conclusion of legal proceedings, inadequacies in investigations and forensic procedures, discretion exercised on prosecutions as well as lack of close co-ordination between the police and the Attorney General, have been the subject of review and criticism. They combine to prevent victims and those affected having swift access to the justice system. This is compounded in cases of GBV against girls and children as the child may be in a shelter and taken to Court many times. The inadequacies in the system also very dangerously, create a public perception of impunity for serious crime. [See Annex]. Recently special units have been established in a few national hospitals with the support of the NGO Women in Need (WIN). These provide a range of services for victims of GBV who can be referred to a forensic expert and the police in an environment of confidentiality. This is a good initiative, though limited in scale. The special Women and Police Desks created after the Beijing World Conference in 1995 have been expanded and some also supported again by WIN. However some inadequacies have surfaced regarding human resources and the lack of an administrative structure and a clear line of authority in decision making to help these units effectively respond to GBV. Financial resources are also a serious constraint (See Annex). Recently some offices of the Attorney General, with a State prosecutor have been established in the Provinces. This can facilitate better coordination with the Police.

## **b. The Criminal Trial**

The Criminal trial derived from the procedures from colonial times is adversarial – i.e. the concept that the accused has the benefit of the principle "innocent until proved guilty." The protections of our law are based on the historical experience of Anglo American law where the accused was offered no protection and the system was heavily weighted against him. These corner stones of the criminal justice system have been recognized as important in international instruments that Sri Lanka has ratified, like the Covenant on Civil and Political Rights and our Constitution. However this system requires defence and prosecuting

lawyers to be jointly committed to finding the truth and ensuring that the norms of rule of law and justice prevail. Similarly the judge has to follow the proceeding carefully and use his/her professional judgment and strive to ensure that justice is done in fulfillment of the interests of the community. Where these standards are not observed consistently, an important core procedure of the legal system in responding to crime, the criminal trial, can end up being biased against the victim.

The adversarial style of prosecution can result in a trial for GBV being a traumatic experience for the victim, especially in sexual crimes. In Rape for instance, the consent of the victim is a defence to the crime. The prosecution will therefore try to prove that the victim consented to sexual intercourse. This adversarial environment means that she, as well as experts like forensic evidence witnesses and others are subject to harsh cross examination. The trial judge can intervene and control the procedure to ensure that it is not biased against the victim and key witnesses. If this control is not exercised, the negative environment impacts on the elicitation of the truth, as well as on the persons who are before the court as victim and witnesses. [See Annex].

### **(iii) Evidentiary Rules and Sentencing in Criminal Trials**

These are key aspects of the criminal Trial. There are specific matters that are of special relevance to the subject under consideration. [See Annex].

### **Burden of Proof and Evidence**

The guilt of the accused has to be proved beyond reasonable doubt under our Evidence Ordinance (1895) and the Criminal Procedure Code. This means that in some cases like rape where the offence is non-consensual sex, the burden of proof is on the defence to show that the victim did not consent. This can be difficult in a situation where rape occurs when a woman is in detention or custody or was in a place under the control of the accused. In this situation some countries have recognized that the prosecution must prove that the victim consented, [See Annex]. Amendments to the Penal Code have after 1998 created an offence of custodial rape, which suggests that a similar result has been achieved by creating liability for rape when a woman is in lawful or illegal custody, and it is proved that the accused had sexual intercourse with the woman. (See Custodial Rape earlier and Annex).

DNA evidence can be used today to establish the identity of the accused. It is now being used in criminal trials. However our criminal law recognizes the right to bodily integrity, and interference is considered violence. Consequently blood and body fluids can be obtained only with the consent of the accused.

Another principle of the criminal justice system that operates against the victim of GBV is the requirement that evidence of the victim in a sexual offence has to be "corroborated", or supported by independent evidence. As pointed out earlier, this is a principle of the English Common Law, and it has not been followed in some cases in our courts that have been willing to recognize that the accused can be convicted on the victim's evidence. There is also some continuing misunderstanding on what is required as "independent evidence" (e.g. that there must be evidence of resistance and physical bodily injuries) even though the amendment of 1995 to the Penal Code clarified that such evidence is unnecessary to prove rape. (See Annex).

There is a rule of evidence based on English Law that spouses cannot generally give evidence for the prosecution (Evidence Ordinance S.120 (4)). The reason for this is the idea that husband and wife are

considered one person in the law. This concept of unity of personality has been changed in the law of marriage, but even when it is applied, it was recognized that there were exceptions. Therefore if the criminal case is against a person accused of causing violence to the other spouse, he or she who is the victim can give evidence for the prosecution. [See Annex, and Evidence Ordinance S.120 (3)(4)(5)]

## Sentencing

The usual punishments recognized in our law based on the English law are imprisonment and sentencing. Whipping was allowed but it has been prohibited from 2005 by the repeal of the Act which provided for this punishment. (See Annex). The 1995 Amendment to the Penal Code modified the law on sentencing by setting a minimum sentence for sexual violence and including the concept of payment of financial compensation by the accused to the victim for injuries caused to the victim. The law was amended further in 2006 to clarify that “injuries” included “psychological” harm. (See section on Sexual Violence).

Despite these clear legislative statements of the principle of law, recent judicial decisions have adopted a policy of leniency in sentencing for sexual violence. The 1995 Penal Code amendments which changed the principles of law in this area also introduced the concept of minimum sentences for sexual violence. This change was a response to the disturbing manner in which trial courts were suspending sentences in the cases of rape, considered a grave form of sexual violence to the woman’s body in the Penal Code, and the English Common law on which it was based. (See section on Fatal and Non-Fatal Injuries). However in the controversial Anuradhapura Rape Case (see Annex) the Supreme Court with Sarath Silva CJ agreeing, decided that the imposition of minimum sentences was a violation of the judicial power of the courts under the Constitution. This was despite the fact that the Constitution in Article 80 (3) and 16 does not permit the courts to review laws that have already come into force. The Anuradhapura case has resulted in trial courts returning to the practice of suspending sentences in rape cases, including even in gang rape, on various grounds that ignore the victim’s right to ask for justice through the courts for what is considered grave bodily harm in the Penal Code. It is rare that a trial court sentences a rapist to long term imprisonment provided for in the 1995 amendments. This has also led to a lack of consistency. [See Annex]

In the recent Kurunegala Rape case, the Supreme Court reversed a decision of the Court of Appeal in a case where the Attorney General appealed a suspended sentence for rape imposed by the High Court of Kurunegala. The Attorney General argued before the Court of Appeal that the earlier Anuradhapura Rape Case approach to suspending a sentence of imprisonment for rape should not be followed, as it was contrary to the law. The Court of Appeal accepted the Attorney General’s arguments, and imposed a sentence of imprisonment. This case went to the Supreme Court in a further appeal. The Supreme Court overturned the Court of Appeal decision, and said that the approach to suspended sentences in the earlier Anuradhapura Rape Case was correct. They decided that the High Court decision to suspend the sentence in the Kurunegala Rape case was correct, on the ground that the accused was taking care of the child of the 15 year old girl raped, and that he was a good father acting in the best interests of that child. [See Annex].

This Supreme Court’s decision on sentencing for rape has drawn attention to the urgent need for the Supreme Court to ensure consistency in sentencing, and clarify the approach courts should follow in sentencing for sexual violence. This will prevent the current variations where there is a strong trend to trivialize serious sexual violence, and not take it seriously. The current lenient approach as we shall see, even violates the approach to sexual violence in the Supreme Court, since rape and sexual violence have

been considered as amounting to violation of the fundamental right to freedom from torture under Article 11 of the Constitution. [See Annex].

Trial courts however use their sentencing powers under the Penal Code as amended in 1995 to give financial compensation to the victim. In the recent Kurunegala rape case for instance the Supreme Court upheld the decision of the High Court to give a significant award of financial compensation to the victim. We have noted that the amendment to the Penal Code in 2006 called for psychological harm or mental trauma to be considered “injuries” for the purpose of awarding compensation. Compensation for the sexual offences of rape and, grave sexual abuse can be assessed on this basis. Either inadvertently or as a matter of policy, compensation which includes psychological harm has been included for homosexuality, but not for incest.

While the inclusion of psychological harm is a positive change, the overfocus on financial compensation can contribute to creating the impression that the violence can be excused by giving money to the victim. This perception undermines the legal policies of zero tolerance for sexual violence embedded in the Penal Code amendment, and encourages leniency and impunity in the community for GBV. There is also inconsistency in the manner in which compensation in cases of homosexuality and lesbianism and incest are viewed. There is a clear need to review the approach to the former offence, (see later discussion), and also include psychological harm as an aspect of compensation for injury in cases of incest. This would also be consistent with the approach of the legal system in including psychological harm in the definition of domestic violence for the purpose of obtaining remedies under the Domestic Violence Act 2005.

## **b. Civil Trials**

Actions for civil wrongs under Roman Dutch law that involve GBV that affects Reproductive Health Rights can be brought as individual civil actions in the District Courts of Sri Lanka – the court that usually deals with civil matters. The concept of a husband’s right to bring a civil action for rape of his wife, based on Roman Dutch law is an anachronism that has not been addressed in reform of laws on sexual offences (See Annex). Proceedings relating to marriage, divorce and separation under the General Law come before District courts and are regulated by the Civil Procedure Code as amended. (See Annex). All Sinhala and Tamil people must resolve therefore disputes relating to marriage, separation and divorce through Court proceedings. Muslims and Kandyans are governed by separate laws, but these proceedings are different and do not come initially to the civil courts. [See Annex].

Civil actions are brought by filing a plaint to which the other party must answer. Lawyers are retained for these proceedings by both parties and witnesses are called in the proceedings. These proceedings are also adversarial in nature and there can be aggressive questioning of the person who files a case and witnesses. Civil actions including the initial procedure of filing the plaint and answer can take years, and it is rare that such private actions are filed. [See Annex].

Matters relating to marriage and divorce are dealt with by entirely different procedures in Quazi Courts according to the Muslim Marriage and Divorce Act (1951). These proceedings involve a procedure of conciliation and may place women at a disadvantage. The procedure known as a fasah divorce for cruelty will come before the Quazi Court, and are decided by male quazis. Cases of divorce in Kandyan law are comparatively simple, since divorce is available for breakdown of the marriage and one year’s separation, or mutual consent. An official, a registrar of marriage under the Kandyan Marriage Act (1952) hears the parties. If separation is proved or the parties consent, the official registers the divorce. However there



is no procedure for making orders on maintenance and custody of children and these matters must be settled by actions in courts under General law, unless parties enter into a settlement and have it entered as part of the divorce proceedings.

Unlike in criminal prosecutions spouses can be witnesses in civil proceedings against each other or for or against third persons. (Evidence Ordinance S.120 (1)(2)). Proceedings under the Domestic Violence Act (2005) are civil in nature, though they are heard in the magistrate's court, and the respondent or the person against whom the case is filed can be punished if he violates an order made by a court under the Act.

### **Proceedings under the Prevention of Domestic Violence Act 2005 (DV Act)**

The title states that this is an Act to provide for the "Prevention of any Act of Domestic Violence". With that objective in view, the Act provides a procedure by which a person in respect of whom such an act has been committed or is likely to be committed (an aggrieved person), can apply for a Protection order for the prevention of such an Act. (S. 2 (1)). The purpose of the law is therefore clearly to protect the aggrieved person or victim of this type of violence, and ensure that her right to freedom from this violence is recognized by the courts as a serious infringement of her right to physical and bodily integrity. It is therefore critically important for judges and lawyers to understand the objective and purpose of the law. Similarly the police cannot adopt the approach that they take in the case of minor crimes and try to mediate and settle the case between the parties. The Act states that when an application is made the courts shall "forthwith" consider the application. (S.3). Judges and lawyers therefore cannot persuade the parties to "settle" the case through a procedure of mediation. The fact that the person bringing the action is described as "the aggrieved person," seeking a "protection order" clarifies that she is before Court demanding an order that will prevent further violence and protect her from such violence, responding proactively to violence and infliction of bodily harm that has already occurred before the case was filed. Several provisions on the type of court orders that can be made refer to the need to protect the health, safety and wellbeing of the person in preventing acts of domestic violence. (S. 11 (1)(k) S. 4 (2) S. 8, S. 12 (1) S. 5 (1)(b)). An aggrieved person who comes before the Magistrates' Court and takes steps under the DV Act must have access to these court procedures and the relief and remedies provided by this law.

### **Definition of Domestic Violence**

Domestic Violence is defined for the purpose of this act in a manner that cross references Penal Code offences on non-fatal injuries and sexual and other forms of violence in Chapter XVI of the Code, as Offences to the Human Body and Affecting Life. That conduct can also be considered Domestic Violence under this Act. Additionally the Penal Code offences of Extortion (S.372), Criminal Intimidation (S. 483) and attempt to commit these offences is included in the definition. Economic and financial violence is therefore covered. (S. 23 (a) and Schedule 1 to the Act). Most importantly the definition of domestic violence includes emotional abuse which as we have seen is not incorporated in a specific offence in the Penal Code. (S. 23 (b)). This conduct needs to be perpetrated:

- (a) within the home or outside and
- (b) must arise out of the personal relationship between the persons before court (S. 23).

Emotional abuse itself is defined as "a pattern (i.e. systemic) of cruel inhuman degrading or humiliating conduct of a serious nature directed toward" the aggrieved person who brings the case.

## Filing a Case

Some Domestic Violence Acts (as in India) are not gender neutral, and permit only women and girls to seek and obtain relief and remedies for domestic violence. Sri Lanka's law is gender neutral and men may also bring these actions. There is a risk that the dimension of gender based discrimination in domestic violence can be forgotten. It has been found for instance that men file cases in response to a case filed by women; courts and police therefore must be cautious in assessing the bona fides of a male applicant who alleges DV by a woman [See annex].

The person who files the case is described as "the aggrieved person." An adult woman or man who is an "aggrieved person" can come to court directly and seek relief. (S. 2 (2)(a)). A woman can therefore file these proceedings herself. In the case of a girl child, the proceedings can be brought by the parents, guardian, persons with whom she resides or a person authorized to do so in writing by the National Child Protection Authority. (S. 2 (2)(b)). The Police can also file a case on behalf of an adult woman or a girl child. (S. 2 (2)(c)). Since the latter type of application is a third category referred to in S. 2 (2) of the Act, women can and should bring these cases as individual complaints, as they can retain their own lawyers for this purpose.

## The Procedure the Magistrate must Follow

The purpose of bringing this action is to obtain speedy relief. This is why instead of going through a procedure of hearing witnesses the judge hears the parties and considers affidavits by any other person who has knowledge of the incidents, (S. 2 (4)). The judge considers the application and then decides whether to make an interim order of protection under S. 5 of the Act, until the conclusion of the inquiry. The purpose of this is to ensure the safety of the aggrieved person. In any event the Act states that an inquiry into these proceedings including after the interim order must take place swiftly within 14 days (S. 4) and the other party is noticed to be present and state his objection to the making of a Protection Order. The Act clarified that one spouse can give evidence against another spouse, despite the marriage relationship (S. 16). We have noted that each person can give evidence in civil proceedings, but only in cases of violence against each other can a spouse be a witness for the prosecution.

The Act makes it very clear that the Court can not merely prohibit acts of violence but make a wide range of orders as part of the Interim Protection Order. The clear purpose is to protect and prevent acts of violence in the period of two weeks before the inquiry is held. (S. 5 (1)(a) and (b) and S. 11). The Interim Order can for example prohibit:

1. entering or occupying the residence, including shared residence or place of work or school
  2. having contact with a child of the woman bringing the case
  3. establishing contact
  4. committing acts of violence against any person assisting her.
- S. 11 recognises a wide scope for Orders and this is relevant to RHR in particular. The Court can prohibit the person in engaging in any other conduct that will be detrimental to a woman's or girl child's "safety health or wellbeing" or any other person (such as a child) who may need to be protected from the abuse. (S. 11 (1)(k)).

Economic violence is also prevented through certain other orders which can be made, prohibiting the prevention of access to shared resources, selling, transferring, alienating or mortgaging the matrimonial house so as to make her destitute. S. 11 (1)(l). The latter phrase seems to be too restrictive, as the fact



of transfer and mortgage of an asset is in itself GBV, irrespective of whether the person affected by the violence has other assets or not. These same Orders and another type of order called a Supplementary Order can be made and incorporated when a Protection Order is issued at the conclusion of the inquiry. The concept of Supplementary Orders emphasizes the importance of taking proactive measures to protect the “immediate safety, health or welfare” of the victim of Domestic Violence. (S. 12 (1)) Supplementary Orders include the police seizing any weapon in the possession of the person against whom proceedings are brought. The police can be ordered to also accompany the woman to any place to assist her in collecting her personal property or that of her children.

Supplementary Orders for urgent financial assistance, when there is a duty of support can be made after an inquiry into the circumstances and having regard to both financial needs and resources (S. 12 (1)(f), S. 12 (2)). These Supplementary orders cannot affect rights of support and remedies under the Maintenance Act (1999), the law that regulates family support obligations in the General law of Sri Lanka. S. 21 also clarifies that other proceedings are not barred. Supplementary Orders can also be made requiring provision of payments or facilities for a residence even though the other person is prohibited from access to it. (S. 12 (1)(g))

### **The role of Mediation and Counselling**

Since the clear focus in the Act is on prevention and protection from domestic violence, counseling and mediating for a settlement is not an alternative that the Court or the police or lawyers can promote. A woman has a right to claim the remedies and relief granted under the Act as part of the State’s duty to provide relief and protection from domestic violence as a serious violation of her human rights and personal security.

Counseling is incorporated in the Act within the framework of the policy of zero tolerance from this violence. Both parties can be ordered by the Magistrate to attend mandatory counseling sessions only in an Interim Order, or a Supplementary Order, made after a Protection Order is issued. (S. 12 (1)(c) and S. 5 (2)(a)). We have noted that such Interim and Final Protection Orders must also prohibit the perpetration of domestic violence. (S. 5 (1)(a) and S. 10 (1)(a)). Besides, as pointed out, there is a range of relief under S. 11 and 12 that the victim can claim, and the Magistrate must address the need to consider those options.

### **Enforcement Mechanisms**

The Act provides several measures that can be used to make the protection afforded meaningful. The wide range of Protection and Supplementary Orders that can be made under S. 11 (1) indicates how the reality of GBV can be addressed. S. 11 (2) indicates that in imposing the protection orders the Court must address the need of the victim and children for “the accommodation,” and “any hardship that may be caused to the respondent.” These limitations are not clear, but they cannot take away from the need to fulfill the objective and purpose of the Act, which is to prevent DV and protect the victim.

The power to make Supplementary Orders under S.12 can be used by the Magistrate to make enforcement effective:

1. Supplementary Orders can be made placing the person in confidential alternative accommodation, or a shelter. S. 12 (1)(d).
2. Persons such as a Social Worker, Family Counsellor or Family Health Worker can be appointed to monitor the situation and see that an Interim Protection order or Protection Order is

observed and make a report to Court on the day specified for the inquiry (Interim order) and every 3 months (Protection Order) S.5 (2)(b) 12 (1)(e). Legislation in other countries like India appoint a cadre of protection officers to perform this task.

3. Where financial support is ordered and not paid by a person with a duty of support, the Magistrate can direct the employer of the person to pay this amount from remuneration due “as financial relief that the Court has ordered.” S. 12 (3).
4. The court can make an order compelling the respondent and any witnesses for the applicant to appear before the court (S. 15, and Code of Criminal Procedure Act) (1979) or for the production of any document.

## **Punishment**

Punishment is a last resort to ensure implementation. This is why these proceedings are civil in nature. Where an Interim Protection Order or a Protection Order has been issued and violated, an offence is committed. The offender can be tried for this offence in a summary trial before the Magistrate, and on conviction fined Rs. 10,000/- and or to imprisonment of 1 year. (S. 18).

## **Privacy**

The Act adopts a concept of privacy which aims to encourage parties especially women to access the relief available for GBV. Consequently publishing the name or any matter which can identify the applicant or the respondent in the case is prohibited. (S. 20). Printing or publishing any other matter relating to these proceedings, except a judgment of the superior courts of appeal, is also prohibited (S. 20).

## **c. Mediation**

The Mediation Boards Act of 1988 provides for settlement of certain minor criminal offences and also civil disputes that involve GBV. The police may in these cases require the parties to settle these disputes before a Mediation Board established for their respective area of residence. The police will prosecute only if there is a failure to come to a settlement. Even grave offences such as hurt and grievous hurt can be “mediated” in this way, though the usual criminal offences that the police forward to the Mediation Boards are cases of assault and use of criminal force referred to in the section on Non-Fatal Assault. Civil Courts may also divert disputes to the Mediation Boards. The whole purpose of mediation is to help parties to come to an amicable settlement and relieve the law enforcement authorities and the justice system from being burdened by what are considered “minor” infractions of the law. Lawyers and the police cannot participate and the police is present to merely bring the case to the attention of the Mediation Board, and record that a complaint has been registered. The atmosphere is informal and encourages the parties to avoid seeking legal remedies through amicable settlement. [See Annex].

While mediation can be a constructive alternative dispute resolution mechanism, it can also undermine the value system of the law on serious bodily harm and GBV, creating an environment of impunity for infringement of a woman’s right to freedom from bodily harm. This can help to legitimize this violence as a trivial and minor violation of the law when legislation like the Domestic Violence Act and the Penal Code amendments of 1995, 1998 and 2006 seek to promote zero tolerance for this violence.

### **III. THE CONSTITUTION (1978)**

#### **a. Devolution of Governance**

There are some aspects of the Constitution that are relevant to responses to Reproductive Health Rights and GBV.

Governance under the Constitution is based on the idea of a unitary State. The Central government and its agencies are therefore very important in responding to these issues. Health services and management of all but national schools are areas which under the 13th Amendment to the Constitution come within the Provincial Councils governance. The Provincial Councils can therefore legislate and regulate these areas.

The legislative power and administration in the Provinces are covered by the Provincial Council's Act. A provincial public service facilitates the administration of the provinces. However there is national legislation which prevails in the case of inconsistency in areas that impact on GBV. This is why the Penal Code and the other laws mentioned in this Compendium apply in all the provinces.

#### **b. Human Rights Protection**

The protection of human rights in Sri Lanka must be seen as a combination of State obligation under the Constitution and implementation through institutions such as the Courts and Human Rights Commission. The 19th Amendment to the Constitution has new provisions on the duties of the President, and the first is to “ensure that the Constitution is respected and upheld.” (Art 33 (1)(a)).

#### **1). State Obligation**

Chapter 3 of the Constitution has put in place a list of fundamental rights and also recognized that they can be enforced through legal procedures. The latter concept is important because the rights set out are not merely ideas but give the people the right to claim remedies for violation. This concept of enforcement of rights creates duties and obligations on the State to fulfill and implement fundamental rights in all areas of governance. The earlier 1972 Constitution did not provide for this procedure, so the 1978 Constitution introduced an important change. Chapter IV of the Constitution sets out separate guidelines for governance. These are called “Directive Principles of State Policy.” There is no procedure for enforcing these guidelines through legal procedures to ensure that government policy is formulated so as to implement them. However they can be used to reinforce the interpretation of fundamental rights guaranteed in the Constitution, which are enforceable through legal procedures.

### **The Scope of Fundamental Rights and their Relevance to Reproductive Health and Rights and GBV.**

#### **i) The Right to Equality and Equal Protection of the Law (Art 12 (1)(2))**

This is a very important right which has been interpreted in many cases in our Supreme Court and expanded to cover a wide range of arbitrary treatment [See Annex]. The right is clarified in the Constitution as a right to freedom from discrimination on identified grounds – race, religion, language, caste, sex, political opinion, and place of birth. Women therefore cannot be discriminated against on the ground of sex, and also any of the multiple causes that can heighten or increase sex based discrimination because of these factors. GBV and infringement of reproductive health rights as discussed above can be a violation

of the right to Equality.

Article 12 (4) goes even beyond this, by providing for special measures (affirmative action) that will give meaning to the right to equality in the case of groups specifically defined. Such measures will not be considered discriminatory of other groups. Thus the government can take special measures relating to women, children and disabled persons that will help to achieve equality for them. Consequently “affirmative action” or positive measures and special privileges can be given to women and girls to ensure that their special problems are addressed. Creating an environment to go beyond formal or de jure legal equality and achieving equality in substance or fact, (substantive equality) is therefore the goal of Art 12 (4).

However upto now, there has been a reluctance to introduce special measures. The Domestic Violence Act for instance did not provide for mandatory allocation of State budgetary resources for shelter for women and girls or hospital crisis centres for women affected by this violence as part of the legislative arrangements to enforce the law. Sri Lanka has not introduced a system of mandatory quotas for women in decision making bodies including legislative bodies like local government and provincial councils and national parliaments. This is despite the very poor representation of women in all these bodies, and other important institutions, even though there is a high rate of female participation in education and the professions. In the Local Government Bill Determination (See Annex) the Supreme Court unfortunately refused to accept arguments on the need for a separate quota for women as a special measure under Art 12 (4) that would facilitate implementing the right to equality. The Court did not use the opportunity given to develop jurisprudence on special measures or affirmative action under Art 12 (4) in this important area. An encouraging change of policy is seen in the recently enacted Local Authorities Amendment Act (2017) (S.27F). This ensures that “not less than 25% of the total number of members in each Local Authority shall be women members”

Art 12 (1) has been used in several cases denying school admissions to children in State schools (See Annex). Issues relating to access to health have not been litigated using the right to equality in Art 12, which suggests that there are no issues of lack of women’s access to health facilities. The transfer of a woman medical doctor from a hospital after she complained of attempted rape by a colleague was challenged under Art 12 in a case many years ago. The case was settled out of Court (See Annex). It is possible to argue that denial of drugs required for therapeutic abortion, or access to referrals in national hospitals, carelessly or deliberately, is also an infringement of equal access to health facilities. No such cases have come up in the Courts. In a very recent case, Manohari Pelaketiya v H.M. Gunsekera and others SC/FR/No 76 2012, decided 28.09.2016 Justice Anil Gooneratne, with whom Chief Justice Sripavan and Justice Abeyratne agreed, decided that “sexual harassment or workplace stress occasioned by oppressive.....conduct” of those holding executive office was a violation of women’s fundamental right to equality and non – discrimination under Act 12 (2) and 12 (4) of the Constitution. This judgement recognizes an important Constitutional remedy for sexual harassment in the workplace, which as we have seen also impacts on reproductive health and infringes reproductive rights.

## **ii) The Right to Freedom from Torture Cruel and Inhuman Degrading Treatment (Art 11)**

The incidence of torture in detention is high in Sri Lanka and has been the subject of national and international reports and media publicity. This is despite the fact that this specific Article in the Constitution gives rights to citizens and aims to promote State accountability to prevent this conduct.

Many leading cases in the Supreme Court have created a jurisprudence on torture in litigated cases involving

women, girls and others (See Annex). Disciplinary action against offending public officials including the police has been ordered by the Supreme Court in cases that have come before the court. Separate prosecutions can be initiated under the Torture Act (1994), which as we saw, aims to integrate Sri Lanka's obligations as a State party to the Convention on Torture (CAT). This Act permits a prosecution and holds the State officials responsible for inflicting torture and inhuman degrading treatment or failing to prevent this conduct by inaction. Cases of assault, excessive punishment in schools, rape and violence or grave sexual abuse not amounting to rape have been considered torture and or inhuman degrading treatment (See Annex). It can be argued that law enforcement officials who fail to respond and prevent the implementation of the Domestic Violence Act, by apathy or inaction, thus contributing to perpetrating domestic violence, infringe, Article 11. The definition of domestic violence in the Domestic Violence Act (2005) as well as ragging under the Ragging Act (1998) clearly comes within the definition of torture in Art 11 of the Constitution. It is also relevant that the Corporal Punishment Repeal Act 2005 reinforces the approach of the Supreme Court that this can be considered degrading and inhuman treatment. (See Annex).

In a very important case of death under torture the Supreme Court interpreted Art 11 to recognize a right to life which is not specifically mentioned in the Chapter on fundamental rights [See Annex]. A case brought against a State hospital for inhuman degrading treatment during a delivery in childbirth was filed under Article 11 but also settled before the litigation concluded. In the Manohari Pelaketiya case, the Supreme Court did not consider whether the sexual harassment proved amounted to inhuman degrading treatment in the workplace.

We have noted that the law on civil wrongs based on Roman Dutch Law recognizes a person's right to freedom from interference with bodily integrity and dignity. There is therefore a clear link between Art 11 and the law on civil wrongs in Sri Lanka which gives people an individual remedy for interference with dignity and bodily integrity in the civil courts of the country (See Annex).

### **iii) Right to freedom from Arbitrary Arrest and Detention**

This is covered by Article 13 and reinforces the criminal and civil law described in the Section on substantive law. There are many cases where the Supreme Court has recognized violations of this right and given remedies [See Annex]. Article 13 (6) also recognizes a right not to be prosecuted for a crime retrospectively. An exception applies if the act was a crime according to customary international law. The exception was recognized in the Sepala Ekanayaka case (1987) on hijacking (See annex). There have been many developments in the area of international customary law relating to crimes committed in armed conflict, and it is not clear whether these developments will be recognized by Constitutional interpretation, as within the exception to create criminal responsibility for conduct that was not a crime in our national law.

### **iv) Right to Freedom of Speech and Expression Art 14 1 (a) and the Right to Information Art 14 (A) (1)**

Supreme Court jurisprudence has recognized a right to information as part of this right [See Annex]. The 19th Amendment to the Constitution now recognizes a fundamental right to information. (Article 14 A). This right however can be exercised only where the information is held by State authorities or persons in possession of information in relation to any of these State institutions. Art. 14 (A)(1) to (d). The recent enactment of legislation on the Right to Information (Right to Information Act 2016) will help

to provide relief and remedies in this area. It can contribute to giving access to information, that can strengthen responses to GBV and protection of reproductive health and rights. In the Manohari Pelaketiya case, the Supreme Court held that disciplinary action taken by school authorities against a female teacher for publicly speaking about her sexual harassment on a TV programme, amounted to an infringement of her right to freedom of speech under the Constitution.

## **Important Rights that can impact on GBV and are not recognized in the Constitution**

### **1) Right to Privacy and Right to Express Informed Consent**

These rights are recognized in the law on civil wrongs based on Roman Dutch Law. We have observed that the Criminal Law as expressed in the Penal Code recognizes the concept of informed consent and the right to privacy in relation to the human body, in Chapter XVI on offences to the human body, and that these concepts determine the legal requirement of obtaining consent to blood tests.

The Constitution however does not recognize a fundamental right to privacy. The 19th Amendment now refers to the right to impose restrictions for the protection of privacy and confidentiality. (Art 14 (A) (2)). This appears to be an indirect recognition of a right to privacy.

### **2) Right to Health and Education**

Sri Lanka's Constitution (1978) following the Indian Constitution and others in South Asia influenced by this model, does not recognize access to health or education as justiciable rights that can be enforced by Court procedures. Access to education is encouraged by a Directive Principle on State Policy in Ch. IV which says that the "State has an obligation to eradicate illiteracy and assure all persons the right to universal and equal access to education at all levels." Art 27 (2). There is no reference at all to health though a Directive Principle requires the State to achieve an "adequate standard of living for all citizens and their families including adequate food." (Art 27 ((2)(c)).

Sri Lanka's State policies since the 1940s and prior to independence from British colonial rule recognized a State obligation to provide State resourced access to education at all levels and also health. There has been no backtracking on these policies, though budgeting for State facilities has been progressively reduced and private sector institutions encouraged to develop as an alternative path of access to education and health services.

As observed earlier the right to access to education has been litigated in cases of fundamental rights on the basis of violation of the right to equality in Art 12 (1). Similar cases have not been brought in regard to access to health services and food security, even though malnutrition in the country has reached serious levels that impact on health.

Compulsory Education Regulations introduced in 1997 under the Education Ordinance (1939) give children between the ages of 12-14 a right of access to a school. Recently introduced legislation, the ICCPR Act (2007), recognises every citizen's right of access to basic services provided to the public by the State (S. 6 (1)(b)). This provision would include education and health. It would include nutrition if and when there are facilities to provide that service to some sectors of the public such as children and pregnant women. A procedure of enforcement is included in the ICCPR Act. A person can petition the High Court against an infringement or threat of infringement of these rights by executive or administrative action by State officials. The procedure is outlined in S. 7 (2), and a proviso to that section, and excludes an infringement or threatened infringement



of fundamental rights in Chapter III. Since health education and nutrition are not covered by that Chapter, this procedure provides an important method of enforcement of rights relating to health, education and food security. The enforcement provision also allows the High Court to refer these matters to the Human Rights Commission for inquiry and report (S. 7 (3)). The relief to be granted by the High Court is also very wide and extends to giving the relief or remedy requested in the petition or “grant such other relief or make directive as it may consider just and equitable.” (S. 7 (1) and S. 7 (4)). Appeals against decisions of the High Court may be filed in the Supreme Court (S. 8). These important enforcement procedures to claim education and health rights do not appear to have surfaced in petitions in the High Court, and remain ignored.

We have noted that Art. 11 on freedom from torture and cruel inhuman treatment has been interpreted by the Supreme Court as a right to life and protection of dignity. This jurisprudence too can be creatively interpreted to recognize a right of access to basic health services and education.

### **Limitations in Access to Constitutional Remedies**

The Sri Lankan Supreme Court has developed a jurisprudence on Equality and Torture that is relevant for remedies regarding violation of human rights regarding reproductive health and GBV.

However the general limitations that apply in regard to enforcement of fundamental rights protected by the Constitution apply in this area [See Annex].

- 1) The power of judicial review is limited. New legislation can be challenged at the Bill stage, in its passage through Parliament, but cannot be reviewed after enactment for violation of the Constitution (Art. 80 (3)). Similarly Art 16 says that “written and unwritten laws” of the past cannot be challenged. This means that enacted laws cannot be reviewed. In the controversial Anuradhapura Rape Case referred to earlier however the Supreme Court did review and strike down the minimum sentence for sexual violence enacted by the Penal Code Amendment in 1995. This was clearly an extra Constitutional exercise of judicial review and is controversial, but was not reviewed by the Supreme Court in the recent Kurunegala Rape case (2015) of statutory rape of a girl child, where a sentence of imprisonment imposed by the Court of Appeal was suspended.
- 2) Art 126 (1) indicates that only “executive and administrative action” may be challenged. This means that infringements by private non-State actors may be excluded. However there is jurisprudence in the Supreme Court making private Non-State Actors accountable when the State has failed in its obligation to protect from violation of guaranteed fundamental rights, by their inaction. The concept of an individual public official “command responsibility” for violation has also been recognized. [See Annex]. Therefore Non-State and private actors such as individuals or private institutions like Hospitals, Schools and private Employers may become liable for infringements of fundamental rights together with the State, where it has a regulatory role and responsibility, and failed to fulfill that obligation.
- 3) General Restrictions incorporated in Constitutional provisions on fundamental rights.  
The Constitution incorporates limitations on fundamental rights on grounds such as national security, racial and religious harmony, public health (Art. 15 (1) (2) (7)). Yet the right to freedom of thought, conscience and religion, (Art 10) and freedom from torture (Art 11) are absolute,



and these limitations do not apply. The application of the Muslim law in defined areas such as marriage divorce and inheritance and connected matters as a religious law of the Muslim community is protected by Article 10. However there are other areas such as the criminal law where Muslims are governed by the law applicable to all other citizens [See Annex].

In the Manohari Pelaketiya Case, the Supreme Court held that the provisions in the Establishment Code, applicable to the service conditions of public servants could not be interpreted as lawful restrictions of the fundamental rights to equality and freedom of speech, guaranteed by the Constitution. The power of judicial review of already applicable subsidiary legislative regulations like the Establishment Code was not discussed by the Court.

### **Religious and Customary Law**

The Constitution has recognized the obligation of the State to restrict manifestation of religion and culture in the public interest, national security, public health, or for securing respect for the rights and freedom of others or “of meeting the just requirements of the general welfare of a democratic society” Art 15 (7). This clearly authorizes State interventions in regard to customary practices like the virginity test and female circumcision referred to earlier, that violate a woman’s human rights. In the past civil and criminal courts have exercised jurisdiction in many areas applicable to Muslims (See Annex, and earlier sections on statutory rape). The State has in recent years shown reluctance to intervene even when Muslim Women’s Groups have asked for reforms that seek to harmonise religious practices, Islamic law and human rights norms. The State has taken the view that reform initiatives must come from the community, a viewpoint reiterated by Sarath Silva CJ in a case on the ICCPR Act in the Supreme Court. (Determination, SC Reference 2008, Annex). The same approach has been taken in regard to reform of the Kandyan law of Marriage, and the Tesawalamai or Tamil Customary law applicable in the Northern Province regarding property rights of spouses. There has been no reform of these laws though there is information on the discriminatory impact of these provisions on the economic rights of women [See Annex]. Women's groups are not recognized as the voice of “the community.”

A provision in the ICCPR Act creates a serious generally non-bailable criminal offence which prohibits advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. ( S. 3). This provision is one that can be used to prevent advocacy of extremist views that can involve GBV and infringement of reproductive rights on religious grounds.

### **IV. INTERNATIONAL NORMS AND STANDARDS: THEIR RELEVANCE TO WOMEN’S REPRODUCTIVE RIGHTS AND GBV**

Sri Lanka is a member state of the United Nations and is therefore bound by the Charter of the United Nations to recognize human rights of the people. Human rights must not be considered “Western standards” as they were developed out of the experience of people all over the world on abuse of power and authority, and lack of government accountability to use national resources for the benefit of all the people. This Compendium documents the way in which these human rights standards have been recognized in our own Constitution of 1978, and developed in our Courts. We also have in our country local institutions such as the Human Rights Commission and the National Child Protection Authority, (both

created by legislation, passed in our Parliament). These institutions have a mandate to realize human rights standards that Sri Lanka has recognized in our own legislation and Constitution, and State obligations created by the international treaties or instruments that our governments have ratified.

Sri Lanka has ratified and become a State Party to the following United Nations treaties, which are relevant in this area. Successive governments have also enacted legislation (laws) and policies to incorporate or integrate these treaty obligations.

It is important to recognize this development which is clear from the adoption of the laws and policies given below.

- (1) The International Covenant on Civil and Political Rights (ICCPR), and its Optional Protocol, some aspects of which have been harmonized in national law by Parliament during the government of President Mahinda Rajapakse through the ICCPR Act (2007).
- (2) International Covenant on Economic Social and Cultural Rights (ICESCR) harmonized in some aspects and perhaps inadvertently by ICCPR Act 2007. (See S. 6)
- (3) The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol. CEDAW has been harmonized in a national policy document, The Women's Charter (1993), and laws such as the Penal Code Amendments of 1995, 2006, the Domestic Violence Act (2005), and the Citizenship Act (1948) Amended 2003.
- (4) The Convention on Torture (CAT) harmonized in national law in the Torture Act (1994) and the Corporal Punishment Repeal Act (2005).
- (5) The Convention on the Rights of the Child (CRC) and its Optional Protocols on Child Sexual Exploitation, Trafficking and Use of Children in Armed Conflict, and the Palermo Protocol to the UN Convention on Transnational Crime, harmonised in Penal Code Amendments 1995, 1998 and 2006 and the Corporal Punishment Repeal Act 2005. Amendments to the Penal Code are legislative efforts to harmonise international standards and norms of CEDAW and CRC on physical and sexual abuse and trafficking.

The following Conventions have been ratified, but the treaty obligations have not yet been incorporated in post ratification legislation or policies.

- (1) The Convention on the Rights of Migrant Workers.
- (2) The Convention on the Rights of Persons with Disabilities.

Parliament has also ratified very recently the Convention on Protection of All Persons from Enforced Disappearances. Parliament has therefore incorporated important international norms and standards in our domestic law. There have been periodic efforts to bring our law and governance in conformity with these international standards. Sri Lanka's Supreme Court has also used the standards of ICCPR and CAT in interpreting provisions of our own Constitution on fundamental rights protected in Chapter III. In the Manohari Pelaketiya case, the Supreme Court, for the first time referred to Sri Lanka's treaty obligations under CEDAW and linked this to the interpretation of Women's fundamental right to equality and non – discrimination (See Annex on Fundamental Rights Cases). Besides ratification of the Optional Protocols to ICCPR and CEDAW also give citizens who have gone through legal procedures in the country, and not obtained remedies, a right to send a communication to the Committees monitoring implementation, alleging a violation of the relevant treaty. Sri Lankans have filed such communications to the Human Rights Committee established under ICCPR, (eg. Singarasa Case, see Annex), though no case has been taken

to the CEDAW Committee. These Committees are not Courts but their views are respected since they are mandated to ensure that a country that has signed a treaty is fulfilling the obligation of the State to implement it (See Annex).

It is also important to recognize that successive governments have submitted progress reports to these international treaty Committees or bodies, and UN Committees have commented on these reports. Civil society organizations have a right to appear before these Committees, and give their own evaluation of the progress in implementing a treaty. Such reports are called “Shadow reports” and also considered by the Committee. The Committees complete the sessions with “Concluding Observations” on the reports presented by States. States have an obligation under these treaties to consider these Concluding Observations and amend their laws and policies. [See Annex for some Concluding Comments and references of the ICCPR and CEDAW Treaty Committees]. The list given above indicates that successive Sri Lankan governments have been influenced and persuaded by these Concluding Observations to bring laws in Parliament to harmonise treaty standards. Some Sri Lankans have been nominated by the Government of Sri Lanka and served as elected members of the Human Rights Committees of ICCPR, the CEDAW Committee, and until last year, the CRC Committee. A Sri Lankan Ambassador chaired the Committee monitoring the Convention on Migrant Workers.

The Sri Lankan governments have participated in major conferences on Human Rights including those that have dealt with Reproductive Health and Rights. It adopted the document that emerged from these major international conferences e.g. International Conference on Population and Development (ICPD) Beijing Platform for Action (BPFA), and follow up documents of these meetings.

Sri Lanka has also submitted country reports for the Universal Periodic Review process of the Human Rights Council (2008 and 2012) in Geneva (See Annex).

It is very important for those involved in the administration of justice including judges, lawyers and law enforcement officials of the Police to understand that the idea of human rights including reproductive rights and protecting women from GBV have been absorbed into the legal system of Sri Lanka. These are not culturally alien or foreign concepts imposed on us by foreigners or countries with a history of colonialism. Understanding this can help all those agencies to contribute to bringing these norms and standards into our legal system in diverse ways.

## **Challenge of Harmonizing International Laws and Obligations of Sri Lanka and Integrating them into the Legal System**

We have already noted that Parliament and our Supreme Court have made some efforts to integrate International law into domestic law. However these measures must be adopted in a proactive manner, since Sri Lanka influenced by our colonial legal heritage, follows the approach of English Law, and considers international law as a distinct and separate system unless there are specific interventions to incorporate these principles locally. This is described as the “duallist” approach to the application of international law.

This approach was followed in the Singarasa Case, referred to earlier. The case concerned the conviction of a Tamil taken into custody for acts of terrorism. The Supreme Court was petitioned by lawyers to review the decisions of our courts on the basis of views expressed by the Human Rights Committee on a communication filed by Singharasa before them, under the Optional Protocol to ICCPR. The Human Rights Committee expressed the view that the accused had not been afforded due process under the

law as required by ICCPR. The Supreme Court with Sarath Silva CJ presiding questioned the ratification of the Optional Protocol to ICCPR, and perceived the proceedings before the Committee as an interference with the domestic courts on the basis that Sri Lanka followed a dualist approach to International law. The decision has been criticized for misunderstanding the procedures under the Optional Protocol (See Annex). Despite this decision communications are being filed before the Human Rights Committee under the Optional Protocol and the Committee is expressing its views to the Government as it is fully authorized to do, and also requesting the Government to take action to ensure that ICCPR obligations of the State are fulfilled. [See Annex recent progress review by ICCPR 2014]. The Manohari Pelaketiya case also reaffirms a judicial approach in the Supreme Court that links international treaty obligations to the interpretation of Constitutionally guaranteed Fundamental Rights.

It is important to understand that the Sri Lanka government has an obligation to implement treaty obligations, even though they are not incorporated automatically into our legal system upon ratification of the instrument. This obligation on application of international law has only been incorporated in a very limited manner in our Constitution, and there has unfortunately been no clarification by the 19th Amendment adopted by Parliament recently. The 19th Amendment repealed the earlier Article on Presidential powers, but has incorporated the language in the repealed Article in regard to the application of International Law. The new Article introduced by the 19th Amendment to the Constitution reiterates (as before) that the President has the power to do all acts that he is authorized or required to do according to international law custom or usage that is “not inconsistent with the provisions of the Constitution or written law.” (Art 33 (2)(h)). However provisions requiring Parliament to set up a new Commission on Bribery and Corruption state that Parliament must pass a law which will also provide for “measures to implement the United Nations Convention Against Corruption and any other international Conventions relating to the prevention of corruption to which Sri Lanka is a party.” (Art 156 A (1)(c) introduced by the 19th Amendment). This is a new approach and incorporates for the first time a constitutionally mandated obligation to harmonize international law and domestic law, but in the specific area of corruption.

There are some other Constitutional provisions on treaties which can be used in efforts to incorporate international law. A Directive Principle of State Policy refers to the State being required to “promote international peace, security and co-operation and foster respect for international law and treaty obligations” (Art 27 (15)). We have also referred to the power of the State to enact laws fulfilling treaties that will bind Provincial Councils. Art 13 (6) of the Constitution permits the enactment of retrospective laws that create criminal liability if the conduct is a crime according to customary international law, a provision interpreted in Attorney General v Sepala Ekanayake (1987) (see Annex). All these provisions reinforce the State obligation in governance to harmonize domestic law with international law.

## **V. MECHANISMS FOR NATIONAL HUMAN RIGHTS PROTECTION**

### **a) Courts of Law**

The independence of the judiciary is at the heart of the impact of this agency in protecting human rights. We have seen that provisions on appointment of judges have been strengthened by the 19th Amendment through the Constitution Council. However as noted the limitations in Constitutional provisions on removal of Supreme Court judges illustrated in the recent impeachment of the former Chief Justice, have not been amended [See Annex].

The important courts that hear trials are the Magistrates' Court and the High Court. Major crimes are tried in the High Courts established at the Provincial level. The Magistrates' Court deals with the Summery Trials and the Non-Summery procedures and other matters such as Maintenance and Domestic Violence. Appeals are in three stages through the High Court to the Court of Appeal and the highest court, the Supreme Court (See Annex).

The Courts of law are a key agency in national human rights protection. Their understanding of the link between the Constitution and international human rights law and their duty to interpret legislative provisions and regulations in light of these sources can help to incorporate a human rights based approach to judicial decision making in all courts. This approach is relevant for Magistrates' Courts, District Courts, High Courts and the superior appellate Courts – the Court of Appeal and Supreme Court.

The 19th Amendment has included the office of Attorney General and Inspector General of Police as high posts which require recommendations from the Constitutional Council for an appointment by the President. This can help to ensure the independence of these officers and strengthen the administration of criminal justice (See Annex).

The Supreme Court as we have seen has the special power to interpret and enforce fundamental rights guaranteed by Chapter III of the Constitution against State officials and agencies under Art 126 of the Constitution, subject to the limitations already discussed. We have noted that the High Court also has jurisdiction to decide cases on violation of rights protected by the ICCPR Act (2007), subject to the exclusive jurisdiction of the Supreme Court if a case involves the violation of a fundamental right in Chapter III of the Constitution. The jurisprudence of the Supreme Court and the High Court can be a critical resource for developing a human rights based approach in relation to matters arising in Courts, where Reproductive rights and GBV are linked, or there is an interface.

Article 13 of the Constitution recognizes certain rights in relation to the administration of criminal justice in courts. Any person charged with an offence is entitled to be “heard in person or by an attorney at law at a fair trial by a competent court” (Art. 13 (3)). The presumption of innocence in criminal cases is stated as a fundamental right – S. 13 (5). Another important right prevents Parliament enacting retrospective criminal legislation (laws that criminalise conduct and apply to events that occurred at an earlier date). If the conduct is criminal according to the “General principle of law recognized by the Community of Nations,” retrospective legislation is legal (Art 13 (6)). This has been interpreted in the hijacking case, *Sepala Ekanayaka v Attorney General* (1987), as permitting retrospective legislation that seeks to create a criminal offence which is recognized by customary international law (See Annex).

## **b) The National Human Rights Commission**

The 19th Amendment to the Constitution now requires the Constitutional Council created by this amendment to recommend to the President for appointment the Chairman and members of the Human Rights Commission of Sri Lanka. The Constitutional Council is required to appoint “fit and proper” persons as Chairman or members “endeavoring to ensure that such recommendations reflect the pluralistic character of Sri Lankan society, including gender.” (Art 41 B (3)). This is an important change and can help to ensure that women and minorities are appointed to the Human Rights Commission.

The powers and mandate of the Commission are set out in the Human Rights Commission of Sri Lanka Act (1996). The manner in which the President exercised executive power under the 18th Amendment and

appointed the Human Rights Commission led to criticisms within and outside the country on the Sri Lanka Commission's lack of institutional independence in dealing with Human Rights matters in conformity with the Paris Principles - International standards on National Human Rights Institutions. The 19th Amendment has addressed that concern, since the President can only make appointments on the recommendation of the Constitutional Council, which recommends appointments to high posts and Commissions.

The Commission has wide powers and can investigate complaints of violation of Human Rights. It has a mediation role in that the Commission can interact with State authorities and give a remedy or prevent rights violations by them. The Commission has other powers which include initiating investigations into systemic violations, undertaking research in this area and preparing reports which can be a basis for improving national standards and influencing law and policy reform, programmes and allocation of resources for the implementation of human rights [See Annex].

### **c) The National Child Protection Authority (NCPA)**

This Authority was established as a nodal agency for child protection under a statute - the NCPA Act (1998). However from 2005 the NCPA has become a unit of the Ministry of Women and Children. This arrangement fails to recognize its institutional independence as a separate statutory authority with powers given under the Act of Parliament that created it.

### **d) Police Women and Children's Desks**

These Desks have been appointed to function within police stations to deal with all complaints and matters affecting women and children. Research on the functioning of these units indicates common problems of lack of adequate human and financial resources, training, and a high chain of command, so as to have the capacity and authority to impact on effective law enforcement in the area of GBV [See Annex].

### **e) The Legal Aid Commission**

This Commission has been established under an Act of Parliament, the Legal Aid Law (1978). It consists of some representatives of the legal profession nominated by the Bar Council of the professional body, the Bar Association of Sri Lanka. The Commission has offices in the provinces. They provide free legal aid to clients including women who need legal assistance especially in criminal cases. They conduct legal literacy programmes and also deliver services in mobile clinics and familiarize the community on regulatory procedures which impact on access to State facilities and services (S.3 and 4).

The ICCPR Act (2007) now specifically provides a right of access to free legal aid in criminal cases "where the interests of justice so require and .... where(he) does not have sufficient means to pay for such assistance" (S. 4 (1)(c)). Another provision specifically provides for free legal assistance from the State in criminal proceedings affecting the child, "if substantial injustice would otherwise result" (S. 5 (1)(d)). These rights can, as observed earlier, be enforced through proceedings in the High Court, and can help women and children to access free legal assistance in facing criminal charges brought against them. The right of children including girl children is confined to criminal cases brought against them, since the section refers to "criminal proceedings affecting the child" (Art 5 (1) compared with Art 4 (1)(c)). As mentioned earlier, this Act and its important provisions that can strengthen people's including women's rights have

been ignored, and not implemented.

#### **f) Commission of Right to Information**

The Commission has been established recently to implement the Right to Information Act (2016). This Commission can facilitate access to medical and other records from public and private institutions. This is relevant and important for obtaining relief and remedies for GBV connected to reproductive health and rights. The Commission can also be an important resource for creating public awareness on the role and responsibilities of these institutions in preventing impunity for GBV and in strengthening law enforcement. The legislation and the functioning of the Commission can therefore create an environment of zero tolerance for GBV, and so impact on the area of GBV and reproductive rights.



# 3. LAW, REPRODUCTIVE RIGHTS AND GENDER BASED VIOLENCE, SUMMARY OF GAPS AND RECOMMENDATIONS

The diverse Sri Lankan laws discussed in the Compendium that apply to the topic of GBV and Reproductive Rights indicate that there are many deficits in the regulatory controls that Parliament, administrators and or the judiciary have contributed to put in place. These gaps will be highlighted with recommendations for reform and an identification of the State agency that should take action.

## A. SUBSTANTIVE LEGAL PRINCIPLES

### CRIMINAL LAW

#### 1) Homicide

The Penal Code is gender neutral in its approach to femicide (murder of a woman) because of factors such as break up of a relationship, stereotypical values on male honour, demands for dowry, intoxication and battering, and severe domestic violence perpetrated against a spouse, partner or girlfriend.

The defence of intoxication and provocation are very narrowly defined encouraging male impunity and ignoring the impact of severe domestic violence in provoking a violent response from a woman. The Penal Code definitions of the defences of provocation and intoxication must be changed in light of realities of femicide in the family and community.

#### 2) Non-Fatal Physical Injuries, (Hurt Grievous Hurt and Domestic Violence)

The definitions of non-fatal physical injuries were broadened when the Penal Code was amended in 1995 but are still too limiting to address the diverse acts of physical violence perpetrated against women. The definitions in the Penal Code should be amended to include specific manifestations of violence such as property and dowry demand related violence, violence to genital organs, acid throwing, battery of a pregnant woman or as part of a distinct new and general offence of “Cruelty to Women.” A Cruelty offence could also cover conduct such as intimidation and denial of access to family planning and intentional communication of STD and HIV/AIDS. Such an offence could cover harmful customary practices like FGM and virginity testing of a bride and puberty practices.

#### 3) Abduction of an Adult

This should be a serious criminal offence. S. 357 of the Code covers a specific case of abduction for the purpose of forced marriage. Provisions in the Code should be amended to address current common acts of violence and abduction as gender neutral offences, as abduction also affects adult males. The Penal Code defines abduction and kidnapping as different offences, and the latter is so limited as not to refer to adults in the country. The different scope of these offences must be clarified.

#### 4) Torture and Inhuman Degrading Treatment Including Sexual Torture

This is covered by Art 11 of the Constitution which gives a remedy for violation of fundamental rights, and the Torture Act (1994). Torture should be a grave Penal Code offence which (unlike the Torture Act)

is broadly defined, and also covers Non-State actors. The Torture Act (1994) defines torture and inhuman degrading treatment very narrowly, and also confines it to non-State Actors. The Human Rights Committee has in the 2014 progress review of ICCPR implementation suggested that the burden of proving that a confession was not extracted under torture should be shifted to the prosecution, and this gap in the law on evidence should also be addressed through amendments in the relevant legislation.

## **5) Corporal Punishment**

There is a lack of clarity in the law in regard to corporal punishment, and a specific offence should be introduced into the Penal Code criminalizing corporal punishment.

## **6) Rape**

Marital rape is an offence in very limited circumstances of judicial separation. The definition of rape should be broadened to include marital rape, especially in situations of de facto separation. Rape in situations of cohabitation as intimate partner sexual violence should be included in the definition of rape in S. 363 of the Penal Code.

Gang Rape is not covered as a separate offence but is a factor that is relevant for sentencing. The Code should be amended to define gang rape as a distinct offence. The legal position of corroboration should be clarified in light of case law that has held that this is unnecessary, and the Explanation already included in the Penal Code amendment of 1995. (S. 363 Explanation II). An amendment of the Evidence Ordinance should state clearly that independent corroboration of the victim's evidence in rape cases is not required.

The law on Statutory rape of girl children under 16 years lacks clarity, and the current sections S 363 (e) and proviso to S 364 (2) should be amended. The reference to "with or without consent" should be deleted in both sections due to the fact that the issue of consent is irrelevant in the case of underage rape of a girl child.

The current reference a "wife under 12 years," a policy concession in the Penal Code amendment (1995) to the Muslim community, which does not recognize a minimum age of marriage, should be repealed as contrary to the human rights of girls of all communities, recognized in the Constitution, and CRC and CEDAW, treaties ratified by Sri Lanka. The exception conflicts with national education and health policies and Constitutional norms, and the obligation under the above treaties to harmonise domestic law with treaty provisions. It is important to strengthen the law and promote an attitude of zero tolerance for underage marriage and sex with underage girls

## **7) Propagating Racial or Religious Hatred**

This is not criminalized in the Penal Code. But the ICCPR Act S. 3 (1) creates an offence referred to as "propagating war or advocating national, racial or religious hatred that constitutes .... discrimination hostility or violence." This is a serious cognizable and in general a non-bailable offence under this Act, punishable by a trial and conviction in the High Court (S. 3 (3) and S. 3 (4)).

The offence of using Criminal Force in the Penal Code has an illustration (f) which refers to "intentionally pulling up a woman's veil without her consent, and intending or knowing it to be likely to injure, frighten or annoy her."

It may be important to incorporate the offence in the ICCPR Act in the Penal Code, and place this illustration to the Criminal Force offence more appropriately within S. 345 of the Penal Code which deals with the offence of Sexual Harassment.

## **8) Sexual Harassment**

The Penal Code definition should be amended to include specifically Cyber Crimes, and Sexual Harassment as Bribery, as Penal Code offences. These are not covered clearly in the current definition, and can be included only through judicial interpretation or administrative guidelines and self-regulatory codes of conduct in institutions. Sexual bribery should also be a specific offence in the Bribery Act.

The Ragging Act (1998) also covers Sexual Harassment both physical and psychological, but the provisions are gender neutral. The Act's response to GBV can be strengthened by requiring mandatory codes in educational institutions, which also provide for effective enforcement measures, and are gender sensitive. The jurisprudence in the Manohari Pelaketiya case indicates that the Constitutional remedy can provide important redress in cases of sexual harassment.

## **9) Grave Sexual Abuse**

The marital rape restrictions do not seem applicable to this offence, but this will require judicial interpretation. An amendment to the Penal Code should clarify this principle in the definition of the offence, if the policy on marital rape is reviewed.

## **10) Incest**

The definition of incest and reference to "full and half-blood" does not clearly indicate that extended family relationship as cousins are not covered. This can lead to confusion in regard to the interpretation of relationships that are covered in the incest offence. Besides guidelines on the exercise of the Attorney General's discretion to prosecute the offence are essential.

## **11) STDS and HIV/AIDS**

The Venereal Disease Ordinance (1938) is an old Statute which has the sole purpose of preventing treatment of Venereal Diseases (defined in S. 5 of the Ordinance) by persons other than registered medical practitioners or specially authorized Practitioners of Ayurvedic Medicine, and connected matters.

The ordinance can be amended to include other areas such as access to drugs, the responsibility of private Non-State Health facilities and access and provision of services without discrimination in conformity with Art 12 of the Constitution. Current policies on STDs and HIV including blood testing, issues of consent and privacy should be framed in human rights perspectives and can be incorporated in amendments to the Ordinance or in a comprehensive new Act which repeals the old Ordinance.

## **12) Homosexuality**

S. 365 (A) of the Penal code criminalizes adult homosexuality and lesbianism. It should be repealed in line with the norms on the right to equality and non-discrimination in Article 12 of the Constitution. The Human Rights Committee has, in its Concluding Observation on the Sri Lanka Report of 2014, on ICCPR obligations, suggested that a specific prohibition of discrimination for sexual orientation and identity should

be included in an amendment to Art 12 of the Constitution, which deals with the right to equality. This should be given priority in Constitutional reform, and has also been mentioned in the CEDAW committee's Concluding Observations of 2017. The CEDAW committee has in Concluding Observations of 2017 called for this reform. In Concluding Observations of 2011 the CEDAW committee urged Sri Lanka's government to repeal the provisions in the Penal Code criminalizing adult consensual same sex conduct. The Galabada Wimalasiri case (2016) draws attention to the need for policy change in this area.

### **13) Abduction, Illegal Detention, the Penal Code and Vagrant's Ordinance**

There is a serious gap in the Penal Code in regard to the offence of illegal restraint. The current procedure on questioning illegal detention through Writs of Habeas Corpus, or in proceedings for violation of fundamental rights guaranteed in the Constitution Art 13 does not compensate for the deficit in not treating these acts as grave Penal Code offences, which can be prosecuted as grave violence whether committed by officials or Non State actors. The provisions in the Vagrant's Ordinance (1841) can also be used to arbitrarily arrest women sex workers and harass homosexual and transgender persons even though homosexuals are not prosecuted, and S. 365 A remains an unenforced legal provision of the Penal Code. The Vagrant's Ordinance should be repealed and adult homosexuality decriminalized by repealing S. 365 A. Policies on public nuisance can be articulated in amendments to the Penal Code, so as to prevent arbitrary detention and arrest under the Vagrant's Ordinance.

Wrongful confinement is a very minor Penal Code offence in S. 330, S. 331 of the Penal Code. These provisions should be amended to respond to GBV. 'Good faith' can be a general defence in regard to the offence of illegal restraint in the Penal Code, as indicated in an Exception, and this can reduce impact in relation to illegal restraint and GBV.

Amendments to the Penal Code to strengthen a criminal justice response can be useful in addressing in this dimension of domestic violence. The DV Act 2005 (S. 330 and 331) includes this offence in definition of domestic violence in Schedule I for the purpose of the civil remedies under the Act. Ratification of the Convention on Protection of All Persons from Enforced Disappearances requires a serious review and reform of the law in this area.

### **14) Abortion and Termination of Pregnancy, and Infanticide**

There is an urgent need to review the current criminal law which adopts a nineteenth century approach to criminalizing termination of pregnancy "except to save the life of the mother." The law needs to consider changes in light of women's rights to equality and bodily integrity, and the need to prevent risk of illegal abortion. The exception to culpability, "saving the life of the mother" is itself a normative concept developed from the need to balance conflicting interests and rights.

Changes to principles of family law and marriage regarding the status of non-marital unions and the status of non-marital children are critical to respond to the reality of infanticide in the community and the family (See Marriage and GBV below).

### **15) Emotional Abuse and the Criminal Law**

This dimension of GBV is not captured in the substantive criminal law in the Penal Code, except through recent amendments to the law on sexual harassment in 1995, and ragging in 1998. Bodily harm is interpreted in general as harm to the body.

In 2005, the Domestic Violence Act that introduced a civil procedure for responding to domestic violence defined this phrase for the purposes of the Act, as “emotional abuse.” (S.23). Subsequently amendments to the Penal Code in 2006 introduced the concept of interpreting compensation for “injuries” in a range of criminal offences, including rape, as a reference to “psychological or mental trauma.”

This concept needs to be further strengthened as suggested earlier in this section by changes to the offences created by substantive law in Chapter XVI of the Penal Code, which deals with offences causing bodily harm. Such changes will hopefully help to integrate an understanding of the need to respond to dimensions of GBV as an infringement of human rights, including reproductive rights.

**Responsible State Agencies:** Ministry of Justice linked with Ministry of Women’s Affairs and NCPA. Ministry of Health, Family Health Bureau should be consulted, and link with professionals in the area of forensic medicine. Changes to Family Law – Ministry of Justice to act on Family Law Reform Report 2010, and link with the Ministry of Public Administration or an agency dealing with status of marriage and divorce.

## CIVIL LAW

### 1. Marriage and GBV

The Law on Marriage and Divorce is diverse and there are limitations in the General Law, the Kandyan Law and Muslim Law, which impact on GBV and reproductive rights. The General Law is more restrictive in regard to matrimonial relief procedures in court, and does not provide a clear no-fault basis for matrimonial relief through principles of law regarding grounds for divorce. There are also discriminatory provisions in regard to matrimonial property and its management and financial transactions, in Tamil personal law (Tesawalamai), and in relation to custody and guardianship.

In General Law, the legislation does not state clearly that a forced marriage without consent or an underage marriage is void and has no legal consequences at its inception, even if they are solemnized according to customs. There are judicial interpretations to support the view that such marriages do not have legal consequences. The low legal status of non-marital unions is also discriminatory, and has implications for abortion, infanticide and other aspects of GBV and Reproductive Rights.

A comprehensive agenda for reform of the General Law and Kandyan Law, including clarifications of the law on early and forced marriages has been discussed and outlined by an Expert Committee of 2010, appointed by the Minister of Justice, Milinda Moragoda. Action must be taken on this report which is in the Ministry of Justice. Lack of clarity results in official data recording situations of cohabitation below the age of marriage as legal marriages.

Underage marriage in Muslim Law is legal. Successive governments have been unwilling to change the law on Muslim marriage, despite frequent advocacy for reform by Muslim Women’s groups that have yet to be recognized as a voice for the community.

The Penal Code has created several offences in regard to deceit and marriage, and there is an overlap between S. 363 (d) (rape definition) and S. 362 A which is also a grave offence. This duplication is confusing.

There is current anecdotal evidence of men marrying under false pretences by moving from one district to another, and registering marriages in different areas. While this practice constitutes the grave offence of Bigamy in S. 362 B of the Penal Code, and can be rape or another offence under S. 362 A, the

woman confronts a situation where the marriage is considered void with no legal consequences. A simple amendment to the registration of marriage procedures has been recommended in the Family Law Reform Report 2010, requiring reference to the identity card of parties. This can prevent serial Bigamy which impacts on the lives of women.

**Responsible State Agencies :** Ministry of Justice, Ministry of Public Administration, Ministry of Women's Affairs, NCPA

## 2. Work Place Abuse

Labour law regulations enforced through a procedure of labour inspection of places of employment covered by labour laws have helped to prevent and control work place GBV, to some extent in the formal sector.

However in unregulated areas of work GBV manifests in verbal abuse, poor working conditions such as denial of toilet facilities, and sexual harassment. These have to be addressed as offences in the Penal Code as GBV causing non-fatal injuries, or sexual harassment and violence.

Though maternity leave legislation is generous, non-formal sector workers are denied these benefits. Labour inspection procedures can also be ineffective to respond to hidden pressure from employers in the private sector in recruiting or retaining staff who are or become pregnant. These dimensions of weak enforcement have not been addressed in a review of the current system of labour inspection.

**Responsible Agency :** Ministry of Labour, Ministry of Justice, Ministry of Health, Family Health Bureau, Ministry of Women's Affairs, NCPA

## B. PROCEDURE AND PRACTICE

### Criminal Law and Procedure

Co-ordination in prosecution between the police and the Attorney General's Department has been highlighted as a need, and the time may have come to introduce mandatory guidelines for initial stages of investigation and prosecution, including the concept of a First Information Report (FIR) that is used in other South Asian Countries.

Forensic procedures need to be strengthened in collaboration with professional medical associations, as this is a deficit in administration of criminal justice, especially in cases of sexual offences, though some work has been done to improve the environment.

The concept of privacy rights familiar to civil wrongs needs to be recognized generally, but this is a problem, as it requires Constitutional amendment. A privacy right has been introduced for the first time indirectly in reference to the Right to Information Act introduced by the 19th Amendment. This is a priority area for constitutional reform.

The Law of Evidence needs to be reformed to prevent aggressive and unfair prosecution of a victim of sexual violence, and eliminate the principle that independent corroboration is required of the victim's evidence for a conviction.

There is inordinate delay in both criminal and civil trials. "Fast track" procedures on the lines introduced in India may be required for grave crimes of physical and sexual violence, and the initial procedure of a "Non-Summary" court investigation before prosecution in a criminal trial, reviewed.

Sentencing guidelines are urgently needed to prevent the current practice of suspending sentences after

conviction for violent crimes, including grave offences of sexual violence. The Penal Code has in Chapter XVI considered sexual violence a grave offence, and an infringement of women and men's right to bodily integrity and personal security. Rape has never been considered an offence to chastity. All these offence are described as "affecting the human body or affecting life." More recent amendments to the Penal Code in 2006 as observed, also include psychological or mental trauma as a factor in assessing compensation in several cases of bodily harm. This ideology and conceptual framework must be reflected in sentencing guidelines, particularly in the context of the Anuradhapura Rape Case and the recent Kurunegala Rape Case, reiterating that minimum sentences for these crimes imposed by the 1995 Penal Code Amendment are unconstitutional, as an infringement of the judicial discretion in sentencing. If a Supreme Court review of these two cases does not take place, sentencing guidelines are critical to ensure justice to victims of GBV.

Evidence Ordinance procedures in regard to blood tests, need to be reviewed, in order to support criminal investigation procedures. Amendments to both the Penal Code and Evidence Ordinance may be required. The ICCPR Act now provides specifically for some aspects of legal aid in criminal prosecutions. Awareness of these provisions must be created through the Legal Aid Commission working with the Bar Association.

### **Civil Law and Procedure**

The factor of the law delays and difficulties of legal representation make access to justice through litigation in civil cases a remote prospect for most women. The Legal Aid Commission's resources to work with the Bar Association, and civil society organizations including women's counseling services for GBV should be increased to strengthen service delivery through an institutional network. Practice guidelines and procedures in regard to GBV cases can be helpful in preventing inconsistency within courts dealing with such cases.

**Responsible Agency :** Ministry of Justice, Attorney General's Department

### **The Domestic Violence Act (2005)**

#### **There are several gaps in the Act and they need to be addressed urgently.**

- i) The definition of domestic violence cross references Chapter XVI of the Penal Code and identified offences. The question of whether domestic violence should be criminalized as a separate offence to cover diverse acts of GBV by amendment to the Penal Code or creating a distinct and punishable offence under the DV Act should be considered. This will make it an Act that goes beyond providing a civil remedy. The current definition of relationships for the purpose of identifying the abuser in S. 23 does not include the spouse of a son, daughter etc. This excludes therefore a son-in-law or daughter-in-law who could perpetrate domestic violence, especially on an elderly woman.
- ii) S. 11 and 12 provide for interim orders, protection orders and supplementary protection orders. There are gaps in these provisions.
  - a) S. 11 (1)(l) provides for an order prohibiting selling and transferring etc. of the matrimonial home. But the restriction to the matrimonial home, and that this act should be in order "to place (the applicant for an order) in a destitute position" prevents a woman with some financial resources from asking for relief, including for other alienations of property, which also constitute financial violence.



- b) S. 12 (1)(f) and (g) and s. 12 (2) clarify that financial support and maintenance orders under the DV Act are a parallel remedy to claims under the Maintenance Act of 1999. Since the Magistrate's Courts deal with those procedures too, it should be possible to make a link, and ensure that access to this relief will be of immediate practical relevance, and without delay.

There is a strong case for reviewing these procedures on granting interim orders, protection orders and supplementary orders in light of practical experience, to ensure that Orders under S. 11 and 12 are not solely at the discretion of judges. Making some Orders indeed seem essential. (e.g. S. 12 (1) (e) monitoring the observance of the Orders and reporting to court).

An amendment to the Act can be introduced, requiring the judge to give reasons why he is not making an order. Guidelines in this regard set by the Supreme Court can also be useful, as the concept of unrestricted judicial discretion to make orders needs review.

- c) Supplementary orders can be made for counseling and rehabilitation therapy. However the range of orders in S. 11 and 12 suggest that the court is required to respond proactively to the situation of DV rather than "mediate" or "make a settlement" to prevent the violence. A lack of clarity in regard to the magistrate's role creates a danger that the judge may not make any orders besides a supplementary order for counseling under S. 12 (1)(c). Similarly S. 11 (2) of the Act on factors that should be considered in making Interim Protection or Protection Orders (need for "the accommodating of the aggrieved person or her children (the applicant) and the children of the respondent"(S. 11 (2)(a)) and "any hardship to the respondent or any other person." (S. 11 (2) (b)) are confusing and difficult to interpret, and should be repealed. These provisions can result in a woman being denied the relief available under the Act for GBV.

- iii) S. 20 restricts printing or publishing any matters relevant to these cases of DV and makes such conduct a punishable offence. These provisions should be reviewed in light of experience in litigation under the Act. Is publicity helpful in giving community recognition to GBV, and promoting zero tolerance? What is the balance between creating community awareness, respecting privacy, and victim's concern to keep DV a "hidden" phenomenon? These issues should be debated, and considered in a revisiting of the restriction.

- iv) There is no reference to monitoring in this Act except for S. 12 (1)(e) which gives a direction to make a supplementary order in this regard. "Protection officers" should be appointed, and this is recognized in the area of child protection to prevent child abuse. Can such a cadre of official be helpful for strengthening implementation of protection orders?

**Responsible Agencies :** Ministry of Justice, Ministry of Women's Affairs, NCPA, Ministry of Health, Family Health Bureau and professional institutions on Forensic Medicine.

## C. The Constitution

The provisions on treaty ratification should be clarified in Constitutional reform. Art 13 (6) should be reviewed and redrafted so that the application of customary international law is clarified, especially in the area of criminal justice.

Sri Lanka's Constitution (1978) does not recognize socio economic rights to health and education as fundamental rights that can be enforced through the court procedures provided by the Constitution. Health is not even referred to in the Chapter of the Constitution on Directive Principles (or Guidelines) of State Policy. However Article 12 on the right to equality and non-discrimination has been interpreted to recognize the right to education. Similar litigation has not clarified the legal position, or interpreted this right to equality with reference to health. The ICCPR Act (S. 6) recognizes a right to access basic services, which would include health, and gives a remedy in the form of an action in the High Court to enforce the right (S.7). This appears to have passed unnoticed in the legal community.

The Constitution does not recognize a right to privacy. The 19th Amendment to the Constitution now recognizes a right to information in Art 14 A (1). This right can be claimed against State authorities or private authorities linked to the State. In setting out the restrictions to access, Art 14 A (2) refers to "privacy." It may therefore be argued before courts that a right to privacy is now a legal right on the basis of this provision, and the law on civil wrongs (delict) that recognizes a right to privacy. This gap should be addressed in constitutional reform.

Constitutional jurisprudence has developed the concept of State inaction in preventing violations of Non-State actors, as part of the State obligation to implement Fundamental Rights. However there is limited jurisprudence on this aspect in cases litigated in the Supreme Court on violation of the right to freedom from torture and inhuman degrading treatment by private non-State actors. No case has been filed for instance on the basis of State inaction in preventing domestic violence, recognizing as the CEDAW Committee has done, that GBV in the form of domestic violence is torture and or a serious violation of the right to equality and non-discrimination (AT v Hungary Communication No 2/2003). This gap too must be addressed in Constitutional reform.

**Responsible Authorities :** Ministry of Justice, Attorney General's Department, Ministry of Health, Family Health Bureau.

#### **D. International Law**

The 19th Amendment was a missed opportunity to clarify the legal position on ratification of international treaties. More seriously the Singarasa Case which is embedded in the doctrine of dualism or the application of dual and distinct regime of international law and domestic law has not been reviewed by the Supreme Court. Sri Lanka has reported regularly both to the CEDAW Committee and the Human Rights Committee. The Concluding Observations/Comments of both Committees in the last periodic reviews of 2011 and 2017 highlight the gaps referred to in laws and procedures that impact on GBV and Human Rights (See Annex). In particular the Singarasa Case and its impact on Optional Protocol rights was mentioned by the Human Rights Committee, as well as failure to have an independent National Commission on Women. These Concluding Observations/Comments could have influenced the Constitution reform processes relating to the 19th Amendment, but they did not have any impact.

**Responsible Agencies :** Ministry of Justice, Ministry of Foreign Affairs, Attorney General's Department.

## E. Mechanisms

### i) The Courts

There is a vibrant jurisprudence on fundamental rights of equality, torture and illegal detention which is very relevant for the topic of GBV and Reproductive Rights. However this jurisprudence was not in general developed further in the post war period 2010-2014. (See review of Human Rights of Women Post Beijing World Conference 1995-2015 (cited in list of references)).

The 19th Amendment strengthened the provision on independence of the judiciary by improving the method of appointment of the Chief Justice and Judges of the Supreme Court, President and Judges of the Court of Appeal, and Members of the Judicial Services Commission, as well as the Attorney General (Art 41 (c)(1) and Schedule Part I, and Part II (a)). The President can appoint these persons only as recommended by the Constitutional Council. The Council is required in recommending persons for appointment to independent commissions to “endeavour to ensure that (they) reflect the pluralistic character of Sri Lankan society including gender.” (Art 41 (B)(1) and (3)). A similar provision has not been included in regard to the high posts in the judiciary.

The Chief Justice must be consulted in cases of appointment of judges to the Supreme Court and President and judges of the Court of Appeal (Art 41 (c)(4)). However the 19th Amendment did not amend the current provisions on removal of judges that received media publicity as an issue of public concern, during impeachment procedures in the recent Shirani Bandaranayake Cases (CA 411/2012 J.I 2013). The need to strengthen removal provisions is also evident in the response of the Human Rights Committee in the progress review 2014, but was ignored, (See Annex).

The High Court jurisdiction under the ICCPR Act 2005 does not appear to have been exercised in any cases involving access to services in health care.

**Responsible Agencies and Authorities:** The appellate judiciary trial courts, Judges Training Institute, Constitutional Council and President, Ministry of Justice, Attorney General’s Department.

### ii) Legal Aid Commission

The provisions on access to legal services in the ICCPR Act also do not appear to have been enforced, though the Legal Aid Commission was established by the Legal Aid Act (1978). The Commission and the Bar Association collaborate in the delivery of these services in Colombo and other important metropolitan areas. These programmes which also help women victims of GBV who are referred by the Women and Police Desks in Police Stations are under-resourced and must be strengthened.

**Responsible Agencies :** Ministry of Justice, Legal Aid Commission and Bar Association

### iii) Human Rights Commission

The Commission has (consequent to the 19th Amendment) been created as an “independent Commission” appointed by the President on the Recommendation of the Constitutional Council. (Art 41 B (1)). This helps to bring it in conformity with the Paris Principles or international guidelines on National Human Rights Commissions. There is also a reference to the need for membership to “reflect the pluralistic character of Sri Lankan Society including gender.” (Art 41 B (3)). This provides a basis for monitoring to ensure gender and ethnic balance in membership. The Commission has extensive and useful

powers under the Act which can be used to influence law reform, policy formulation and programmes on Women's Reproductive Rights and GBV. This remains an untapped potential and there is a need for stronger networking and influence, particularly on State institutions (Human Rights Commission of Sri Lanka Act (1996).

**Responsible Agencies:** Human Rights Commission, Ministry of Justice

#### **iv) Women's and Children's Units in Police Stations**

The reviews that have been done on these desks need to be used in strengthening the impact of these important institutions which are often the first point for complaints on violation of rights. In particular, the issue of infrastructure support and financial resources, as well as human resource development through skills training including language capacity, have yet to be addressed adequately. There are currently only 8 Police Crisis Centres throughout the country and 8 One Stop Hospital Crisis Centres which also link with the Police. Coverage of these important centres is therefore very limited and must be expanded.

**Responsible Agencies:** Police Department, Attorney General's Department

#### **v) National Child Protection Authority**

This is a statutory authority created by an Act of Parliament (1998), and should be recognised as such. It should not be placed as a unit under a Ministry as it has been since 2005. It should operate as a separate agency if it is to fulfill its mandate and exercise the powers and responsibilities given by act of Parliament.

#### **vi) Commission on Right to Information**

The Commission provides an important resource for creating awareness on zero tolerance for GBV and Reproductive Rights. The Right to Information Act (1998) should be studied by activists and persons concerned with these issues to maximise the opportunities to use this Act.

#### **vii) Monitoring Implementation of Concluding Observations of Treaty Bodies and Global Development Policies**

Though a rights based approach is today a clear dimension of State obligation, and the global development agenda (2015) there is no government mechanism to co-ordinate and ensure that these commitments are integrated in to national policy planning and resource allocation for effective implementation. This gap must be urgently addressed. Treaty body reporting and Policy Review is also not undertaken systematically.

A high level institutional mechanism such as a Committee of Heads of State Agencies is required. It should probably be located in the office of the Prime Minister or Ministry of Foreign Affairs.

**Responsible Agencies :** Ministry of Foreign Affairs, Attorney General's Department

# 4. ANNEX WITH REFERENCES

## 1. INTRODUCTION

Important International Policy Documents:

Beijing Platform for Action (BPFA) (1995)

Millennium Development Goals (MDG) (2000)

International Conference on Population and Development (ICPD) (1994)

Vienna World Conference on Human Rights (1993)

Sustainable Development Goals (2015)

### Literature

#### Review of Progress and Relevant Literature of Sri Lanka

1. ICPD – 15 years on: Sri Lanka, Family Planning Association Sri Lanka 2009
2. Review of the Implementation of Beijing Platform for Action Sri Lanka 1995-2014 Centre for Women’s Research (CENWOR) (2015) Section C (Health) Section I (Human Rights of Women) Section D (Violence Against Women)
3. CEDAW: a Manual CENWOR 2006

#### Meaning of Gender Based Violence

Goonesekere S. Violence Law and Women’s Rights in South Asia, Sage New Delhi, 2004

Goonesekere S. and Guneratna C. Women Sexual Violence and the Legal Process in Sri Lanka: A Study on Rape, CENWOR, 1998

Kishali Pinto Jayawardene. The Rule of Law in Decline in Sri Lanka, Rehabilitation and Research Centre for Torture Victims (2009)

Ramani Jayasundere Understanding Gendered Violence against Women in Sri Lanka

Women Defining Peace, Sri Lanka (2009)

Ramani Jayasundere Voices of Survivors, Women in Need (2012)

## 2. National Laws and regulations

Legislation – Acts Passed by Sri Lanka

Parliament:

### (a) Specifically Mentioning and Incorporating Treaty Standards

- Torture Act (1994) Torture Convention (CAT)
- Maintenance Act (1999) Convention on the Rights of the Child (CRC)
- Hague Convention on Civil Aspects of International Child Abduction Act (2001)(HC)
- Geneva Conventions Act (2006) (Geneva Conventions)
- International Covenant on Civil and Political Rights Convention (ICCPR) Act (2007) (ICCPR)
- Convention on the Suppression of Terrorist Financing Act (2005) (International Convention on Suppression of Terrorist Financing (ICTF)) (1999)

## **(b) Indirectly Incorporating Treaty Standards**

Penal Code Amendment Act (1995), (2006) (CRC, CEDAW)

Citizenship Act (1948) (CRC, CEDAW)

Penal Code Amendment Act (2006) (Palermo Protocol to UN Convention on Transnational Crime)

Domestic Violence Act (2005)(CRC, CEDAW)

Right to Information Act (2016) (ICCPR)

## **(c) Relevant Case Decided in the Supreme Court**

Bulankulame v Secretary, Ministry of Industrial Development (Eppawela case) 2000. 3 Sri Lanka Law Reports (SLR) 243

**See sources of International law and cases below.**

## **Sources of Law**

### **General Sources of Law**

#### **(i) International Law**

- Legislation Incorporating International law. (See Introduction)
- Case that has questioned application of international law  
Singarasa v Attorney General SC/Spl LA No. 182/199 SC Minutes 15.9 (2006)

#### **(ii) Cases that have Integrated International Law into Domestic Law**

- Sirisena V. Perera (1991) 2 Sri LR 97
- Weerawansa v Attorney General (2000) 1 Sri LR 367
- Sriyani Silva v Iddamalgoda(2003) 2 Sri LR 63
- Kaviratne v Commissioner of Examinations SC (FR) No 29/2012
- Abasin Banda v S.I. Gunaratna& Others, cited in ARB Amerasinghe, Our Fundamental Rights, Sarvodaya (1995) P-190, SC Application 109/95 SC Minutes 28/10/1994.
- Manohari Pelaketiya v H.M. Gunasekara and others SC/FR/No 76/2012

#### **(iii) Relevant International Conventions and Optional Protocols Ratified by Sri Lanka (Full references – see section 10, below)**

- ICCPR and Optional Protocol
- ICESCR
- CEDAW and Optional Protocol
- CRC and Optional Protocols
- CAT (Torture)
- CERD (Racial Discrimination)
- Migrant Workers Convention
- Hague Convention on Civil Aspects of International Child Abduction (HC)
- ICTF (Terrorist Financing)

- Convention on Rights of Persons with Disabilities

#### **(iv) Commonwealth Guideline for Judicial Interpretation on International Law**

- Bangalore Judicial Colloquium Principles on Domestic Application of International Human Rights Norms (1988) Commonwealth Secretariat

### **3. Substantive Laws**

#### **(i) Fatal Injuries**

Cases: Death under torture – Sriyani Silva v Iddamalgoda 2003 2 Sri LR 63

- (i) Non-Fatal Injuries: Criminal Offences and Legislation
- (i) Penal Code S. 311 – Note specific acts of violence covered and S. 311 (a)(d)(e)(i) which may be used to prosecute for GBV
- (ii) Cruelty to girls see S. 308A introduced to Penal Code in Amendment 1995.
- (iii) Torture Act (1994) S. 3(a) (application of offence in time of war, armed conflict etc.) Art 12 (definition) Applicable only to torture by officials or acting as officials – official order not a defence (Art 3(b))
- (iv) Corporal punishment.
  - (i) See Penal Code S. 341 illustration (i) exercise of “reasonable discretion as school master” in flogging is not illegal.
  - (ii) Education Department Regulations prohibiting use of corporal punishment in schools.
  - (iii) Penal Code Ch. IV on “General Exceptions” (or Defences) does not recognize a defence of causing “reasonable chastisement”. The Penal Code permits acts done in good faith for the benefit of persons under 12 years, but does not give a defence to causing grievous hurt (S.82 Exception 3).

#### **(ii) Marriage and GBV**

##### **Literature**

- For Muslim Law: Goonesekere S. Muslim Personal Law in Sri Lanka. Muslim Women’s Research and Action Forum, Colombo, 2000.
- For Divorce Grounds, Cruelty and Malicious Desertion in General Law and Kandyan Law. S. Goonesekere, Status of Women in the Family Law of Sri Lanka in S. Kiribamune and V. Samarasinghe ed. Women at the Cross Roads. Vikas India (1990) p. 153, Centre for Women’s Research, Facets of Change (1995) p.6, Post Beijing Reflections (2000) p.27-32

##### **Legislation**

- General Marriages Ordinance (1907) S. 19
- Kandyan Marriage and Divorce Act (1952)
 

(S.32 (b) gross cruelty and incest as ground for divorce. However S. 32(c)(d)(e) recognize divorce for desertion for two years, or separation for one year, and mutual consent, so cruelty as a ground of divorce becomes superfluous)
- Civil Procedure Code (1889) as amended (1973) and (1977) Chapter XLII Matrimonial Actions S.608(1)(2) (Judicial Separation).



## Cases

Tennekoon v Tennekoon (1986) (1) Sri LR 90 (Divorce and Judicial Separation under General Law).

## Muslim Law and Bigamy and Convert's Polygamous Marriage

- Attorney General v Reid (1964) 67 NLR 25, overruled in Abeyesundere v Abeyesundere (1998) 1 Sri LR 189 (convert's polygamous marriage not legal)

## (iii) Ragging in Educational Institutions and Psychological Abuse

### Legislation

Ragging Act 1998 S.17 defines ragging broadly to include physical harm and psychological harm

## (iv) Emotional Abuse of Adult Women

### Legislation

- Ragging Act (1998) S.17
- Penal Code Amendment Act (2006) defining "injury" for award of compensation for these offences in Penal Code (S. 308A cruelty to children S 345 sexual harassment S.364 punishment for rape S.365 homosexuality S.365B. grave sexual abuse).

## (v) Defences to Fatal and Non-Fatal Physical Violence

- Samitamby v Queen (1971) 75 NLR 49
- Premalal v Attorney General (2000) 2SriLR 403 (Kelaniya Student murder case).

### Literature

- S.Gomez and M. Gomez, Sri Lanka: The Law's Response to Women Victims of Violence in S.Goonesekere ed. Violence Law and Women's Rights in South Asia cited earlier p 207 especially at p. 223

## (vi) Civil Wrongs

### Literature

- For some civil wrongs which are relevant to GBV, S. Goonesekere and C Gunaratna Women Sexual Violence and the Legal Process in Sri Lanka. CENWOR 1998 p. 41.
- For Roman Dutch Law on Civil Injuries J.Burchell. Principles of Delict Juta & Co. 1993

## (vii) Abduction. Wrongful Arrest and Detention

Literature on Fundamental Rights Article 13

- S. Sharvananda Fundamental Rights in Sri Lanka, Arnolds Press Colombo 1993 Ch-X
- RKW Goonesekere Fundamental Rights and the Constitution. Law and Society Trust (2003) p 200

## Constitution Article 13

### Case Law

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- Leela Violet and Others v IGP, CA 2.12 1994 (Habeas Corpus)
- Re Sharmila Begum 1989 2 SriLR 239 (Muslim Parents restraining married daughter or abducting her)

- Fernando v Fernando 1968 70 NLR S34 (child custody)

## **(viii) Physical Violence in the Workplace and Maternity Leave and Benefits**

### **Legislation**

- Employment of Women Young Persons and Children Act (1956) amended (1973), (2003)
- (White Collar) S.18B Shop and Office Employers' Act (1954) ( Maternity leave, Private Sector amended (1985))
- (Blue Collar) S.3 Maternity Benefits Ordinance (1939) amended (1985)
- Factories Ordinance (1942) amended (1984)

### **Regulation**

- Establishment Code, Pubic Sector amended (1998)

### **Literature**

- S. Goonesekere. Facets of Change (1995) and Post Beijing Reflections (2000), Centre for Women's Research, cited earlier

## **(ix) Sexual Violence**

### **Literature**

Amendments to the Penal Code (1985), Sexual Violence and the Law

- S. Goonesekere and C. Guneratna cited earlier
- Study on Harmful Traditional Practices, CENWOR for ESCAP (2009)
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- S. Goonesekere and H. Amarasuriya, Emerging Concerns and Case Studies on Child Marriage in Sri Lanka. UNICEF (2013) (also statutory rape)
- S. Goonesekere L Senanayake and H. de Silva, Report of the Sri Lanka Field Test on Human Rights and Reproductive Health of Adoloscents, Ministry of Health and WHO Colombo (2012).
- K. Wijethileke Violence Against Women, Review of a Decade, in Facets of Change, CENWOR 1995 P.290

### **Selected Cases:**

- Nadaraja v Obeysekera 1971 76 NLR 268 (marital rape)
- Regina v Batcho 1955 57 NLR 100 (murder)
- Premalal v. Attorney General 2002 2 Sri LR 403
- KrishanthiKumaraswamy Case, (Rape and Murder by armed forces personnel) see Goonesekere and Guneratna cited earlier p. 283

- Wijesuriya v State 1973 77 NLR 25 (death and sexual violence in custody)
- Yogalingam Vijitha v Wijesekere SC Appl. FR 186/2001 (Fundamental Rights Application and Torture of women in detention)
- Velu Arasu Devi v Premathilake (Maradana Check Point case, rape as torture) SC Appl. FR 401/2001
- Wijesundera v Wijeykoon (1990) 2 SriLR 91 (unilateral repudiation when bridegrooms found girl not a virgin).
- Nayana Priyanthi Case (murder and physical violence) Goonesekera and Gunaratne cited earlier p. 281, p 218-221.
- Manohari Pelaketiya v H.M. Gunasekara and others SC/FR/No 76/2012

## **Sexual Crimes**

### **Rape**

#### **Literature:**

- Goonesekere and Guneratna cited earlier p. 17-78
- Gomes and Gomez cited earlier p. 211

#### **Cases:**

- Maradana Rape Case (2001) (Rape as Torture)
  - Faiz Mohamed v Attorney General 1995 1 Sri LR 372 (official inaction in preventing violence)
- Bandara v State 2001 2 Sri LR 63
- Rajapaksa v State 2001 2 SriLR 161
- Karunasena v Republic of Sri Lanka 1975 78 NLR 63 (Corroboration)
- Lal Deceased and Rane Fernando v OIC Seeduwa 2005 1 SriLR 40, Deshapriya v. Captain Weerakoon 2003 2 SriLR 99 (command responsibility)

### **Rape in Custody:**

#### **Cases cited earlier**

- Krishanthi Kumaraswamy Case
- Maradana check point Rape Case
- Wijesuriya v State

### **Marital Rape**

#### **Case:**

- Nadaraja v Obeysekere cited earlier

#### **Literature:**

- Goonesekere and Gunaratne cited earlier p.25
- Gomez and Gomez cited earlier p.211

### **Statutory Rape**

#### **Literature:**

- Goonesekere and Amarasuriya cited above.

- Anuradhapura Rape Case SC REF. 03/08 HC Anuradhapura 333/04 and Kurunegala Rape Case (unreported) discussed in S. Goonesekere Legislative Reforms and Judicial Interpretation, in ARB Amerasingheed. Matter of Esteem, Opro Printing Colombo 2010 p.208 at 228
- Goonesekere S. Island 13 May 2015, a critique of Kurunegala Rape Case
- Publication of Lawyers for Human Rights and Development on Sentencing (2003) and (2012) see Literature on Sentencing for Sexual Crimes

### **Gang Rape:**

#### **Case:**

- Piyasena v Attorney General 1986 2 SriLR 388

### **Grave Sexual Abuse:**

#### **Case:**

- See Yogalingam Vijitha v Wijesekere cited earlier

### **Incest**

#### **Literature**

- See Goonesekere and Guneratne cited earlier p. 69
- Gomez and Gomez cited earlier p. 214
- Silva KT and others cited earlier

### **Violence against Girl Children**

#### **Literature:**

Goonsekere S. Senanayake L. and de Silva H. cited earlier.

#### **Sexual Harassment**

Literature: Gomez and Gomez cited earlier p. 217-221

#### **Case:**

- Somavathi v Backson (1973) 72 NLR 204 (Sexual harassment in the Workplace)

### **Gender Based Sexual Violence in Marriages and Cohabitation**

#### **Literature:**

- See Goonesekere and Gunaratna cited earlier p. 25-31, 39-43.
- Gomez and Gomez cited earlier p. 216-217, 223-227
- Goonesekere S. Senanayake L. and de Silva H. cited earlier
- Goonesekere and Amarasuriya cited earlier (early marriage) p. 71-76, 81-83, 95-96, 118-122, 135, 164-172, 175-176
- Goonesekere S. Sri Lanka law of Parent and Child MD Gunasena 1987, Ch. VI, II (custody non-marital)

#### **Cases:**

- Nadaraja v Obeysekere cited earlier (spousal sexual violence)
- Premelal v. Attorney General and R v Batcho cited earlier
- Wijesundera v Wijeykoon, cited earlier

## **Literature on Sentencing for Sexual Crimes**

- Violation of Child Rights in implementing the law relating to Statutory Rape Report, Lawyers for Human Rights and Development Colombo (2003);
- “Justice Suspended”? A Study on Suspended Sentences for Sexual Offences, Lawyers for Human Rights and Development Colombo (2012).

## **(x) Homosexuality**

### **Case:**

- Galabada Wimalasiri v O.I.C. Maradana (30.11.2016) (S.C.)

### **Literature**

- Goonesekera S. Senanayaka L. and de Silva H. cited earlier p. 69

## **(xi) Women Heads of Household, Widows and Girls in Non-Marital Families**

### **Literature**

- T. Tambiah, Sexuality and Women’s Rights in Armed Conflict in Sri Lanka, Reproductive Health Matters,(2004) Vol. 12 No. 23, 78.
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- S.Goonesekere, Sri Lanka Women’s Rights to Housing and Land in Chartering Pathways to Gender Equality CENWOR 2010 p.25

## **(xii) Gender Based Violence and Pregnancy**

### **Literature**

- Goonesekere S. Senanayake L. and de Silva H. cited earlier p.78, 135, 95 (informed consent to medical treatment and blood tests) p.81 (privacy and confidentiality) p.95, 179,(testing for STD and HIV) p. 131-135, 141-144, Birth and Marriages Registration and Registration of Birth and Early Marriages p. 113-120 (family planning and contraception) Abortion (p.149-155, 157-159).
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- Y. Tambiah Sexuality and Women’s Rights in Armed Conflict in Sri Lanka cited earlier.
- ICPD, 15 years on Sri Lanka cited earlier Chapters 3,4,5,7

## **4. Procedural Laws and Practices**

### **(i) Criminal Trial and Procedures:**

#### **Legislation**

- Code of Criminal Procedure Act No. 15 of 1979
- Evidence Ordinance 1895

## Literature

- S. Goonesekere and C. Gunaratna cited earlier p.44
- Gomez and Gomez. Cited earlier p.227-246
- Jayasundere R. Understanding Gender Based Violence cited earlier
- Goonesekere S., Senanayake L and de Silva H. cited earlier p.209-211
- S. Wijeythilleke – Violence against Women, Review of a Decade, cited earlier.
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- Study on Police Women and Children’s Desks (CENWOR) )1997) 2011 (unpublished)
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## (ii) Evidence in Criminal Trials

### Literature

- See Literature above
- G.L. Pieris. The Law of Evidence in Sri Lanka, Lake House (1974) Chapters 11,14,15

## (iii) Sentencing

### Legislation:

- Penal Code Amendments (1995) (2006)
- Corporal Punishment Repeal Act (2005)

### Literature

- See Goonesekere and Gunaratna cited earlier p.44-63
- Goonesekere S. Senanayake L. and de Silva H. cited earlier
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- Publications of Lawyers for Human Rights and Development cited earlier in section Literature on Sentencing for Sexual Crimes, (2003) (2012)

## Cases

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- Kamal Addararachi v State 2000 3SLR 393 (CA)
- Inoka Gallage v Kamal Addararachi 2002 1 SriLR 307 (SC)

## (iv) Civil Trials

### Legislation:

- Civil Procedure Code (1889) restored (after repeal in 1973) by Civil Courts Procedure Law (1977), and as amended by Civil Procedure Code (Amendment) Law No.20 of 1977.
- Prevention of Domestic Violence Act No. 34 of 2005

### Literature

- Goonesekere S. and Gunaratna cited earlier P.39-43.

- Goonesekere S. Senanayake L. and de Silva H. cited earlier p. 113-119
- Gomez and Gomez cited earlier .p. 258-259
- Kodikara and Piyadasa, cited earlier

### **(v) Matrimonial Relief**

#### **Legislation:**

- General Marriages Ordinance (1907)
- Civil Procedure Code amended (1977) Chapter 42 (General Law)
- Kandyan Marriages and Divorce Act. (1952) Part IV.
- Muslim Marriages and Divorce Act (1951)

#### **Case**

- Nadaraja v Obeysekera 1971 76 NLR 268 (Civil action for damages by husband for attempted rape of wife)

#### **Literature**

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### **(vi) Domestic Violence**

#### **Literature**

- See C. Kodikara, and Kodikara and Piyadasa cited earlier.
- D.Wijayatilake, Cases filed under the Prevention of Domestic Violence Act No. 34 of 2005: An Analysis, Women in Need, Colombo 2009.

### **(vii) Mediation**

- Gomez and Gomez cited earlier p.259.

## **5. The Constitution**

- 13th Amendment (Devolution)
- 19th Amendment
- Chapters III, 15 and 16

#### **Literature**

#### **Fundamental Rights**

- S. Sharvananda, Fundamental Rights in Sri Lanka (1993) cited earlier
- R.K.W. Goonesekere, Fundamental Rights and the Constitution, (2003) cited earlier

#### **Equality**

#### **Cases:**

#### **Education:**

- Karunathilake v. Jayalath 2003 1 SriLR35
- Haputantrige v Sujatha Vidyalaya SC App 10/2007
- Fernando v Director General Medical Services, S. Goonesekere in Facets of Change (CENWOR) Chapter 2 note 24 (penalty transfer of doctor for alleging rape by colleague)



- Local Authorities Special Provision Bill Determination SD No.02/2010 (Supreme Court) (affirmative action quotas not recognized).
- See Compulsory Education Regulation (1997), in section, Right to Education

### **Sexual Harassment**

- Manohari Pelaketiya v H.M. Gunasekara and others SC/FR/No 76/2012

### **Torture**

#### **Literature**

- See S. Sharvananda cited earlier.
- R.K.W. Goonewardane cited earlier
- A.R.B. Amerasinghe, Our Fundamental Rights of Personal Security and Physical Liberty, Sarvodaya 1995 Ch.II
- Kishali Pinto Jayawardena, The Rule of Law in Decline cited earlier.
- S. Goonesekere Fundamental Rights and the Law of Delict in A.R.B. Amerasinghe and S.S. Wijeratna (ed.) Human Rights, Human Values and the Rule of Law, Legal Aid Foundation Colombo (2003) p.51 at p.57.

#### **Cases**

- Sriyani Silva v Iddamal goda 2003 2 SriL14 cited earlier (right to life and torture)
- YogalingamVijitha v Wijesundera, cited earlier (sexual violence as torture)
- Maradana Rape Case(2001) cited earlier (rape as torture)
- NalinkaKumudini v Nihal Mahinda 1997 3 SriLR331 ( torture of girl child)
- Kumarasena v. S.Y. Sriyantha 1994 SC 257/53 (sexual harassment as torture)
- Bandara v. Wickremasinghe 1995 2 Sri LR 167 (corporal Punishment as inhuman degrading treatment).
- Faiz Mohamed Attorney General 1951 1 Sri LR372( State inaction)
- Deshapriya v Captain Weerakoon 2003 2 SriLR 90 Lal Deceased and Raneer Fernando v OIC Seeduwa 2005 1 SriLR 40 (command responsibility).

### **Constitution and Other Fundamental Rights**

#### **Literature**

- See Sharvananda cited earlier
- R.K.W. Goonewardane cited earlier
- A.R.B. Amerasinghe cited earlier
- S.Goonesekere, L. Senanayake and H de Silva cited earlier p. 40-48

### **Rights to Health and Education**

#### **Literature**

- S Sharvananda cited earlier
- Goonesekere S. , Senanayake L and de Silva H cited earlier p.43

## **Cases**

- Cases cited under Equality

## **Regulation**

- Compulsory Education Regulation (1997)

## **Religion and Customary Law**

### **Literature**

- Goonesekere S. Senanayake L and de Silva H.cited earlier p.46
- S.Goonesekere, Muslim Family Law in Sri Lanka cited earlier, and Facets of Change cited earlier.

## **Cases**

- Ghouse v Ghouse 1988 1 SriLR 25
- ICCPR Act Supreme Court, SC Reference No. 1/2008

## **Constitution, State Inaction and Violations by Non-State Actors**

### **Case**

- Faiz Mohamed v Attorney General 1995 1 SriLR 372

## **Right to Life and Command Responsibility**

### **Cases**

- Sriyani Silva v Iddamalgoda 2003 2 SriLR 63
- Deshapriya v Captain Weerakoon 2003 2 Sri LR 90
- Lal (Deceased) and Ranee Fernando v OIC Seeduwa 2005 1 Sri LR 40.

## **Freedom from Arbitrary Arrest and Detention as a Right to bodily integrity**

### **Case**

- Saman v Leeladasa 1989 1 SriLR1.

## **Freedom of Speech**

- 19th Amendment to the Constitution S.14 A, Constitution S.14 (1)(a)
- Right to Information Act (2016)

### **Case**

- Manohari Pelaketiya v H.M. Gunasekara and others SC/FR/No 76/2012

## **6. Mechanism for Human Rights Protection**

### **Legal Aid Commission**

#### **Legislation:**

- Legal Aid Act 1978

### **Human Rights Commission**

#### **Legislation:**

- Human Rights Commission of Sri Lanka Act (1996)

## **Right to Information Commission**

### **Legislation:**

- Right to Information Act (2016)

### **Literature: after 'Police Women and Children's Desk'**

- Study on Police, Women and Children's Desks, (CENWOR) cited earlier
- S.Goonesekere and C. Gunaratne cited earlier. P. 79-81
- K. Wijetilleke and C. Gunaratne, Domestic Violence in Sri Lanka CENWOR (2002) p.80

## **National Child Protection Authority (NCPA)**

### **Legislation:**

- National Child Protection Authority Act (1998)

## **Human Rights Commission and NCPA**

- S. Goonesekere, L Senanayake and H. de Silva cited earlier p. 50-52

## **Constitution**

### **19th Amendment to the Constitution**

#### **a) Courts of Law:**

- Ch. VIIA S.41 (c) (1) S. 41(c) 4
- Schedule Part I (a) (b) (c)

#### **b) Human Rights Commission**

- Ch. VIIA Art 41 B(1) Schedule (e)

#### **c) Attorney General and Inspector General of Police**

- 41( c) (1) Schedule Part II (a)(c)
- S. Goonesekere, Attorney General and the Constitution, Kanchana Abeyapala Memorial Lecture, Sarvodaya, Nov. 25 1994

## **7. International Law**

### **Literature**

- S. Goonesekere, L. Senanayake and H. de Silva cited earlier p.31-34, 38-40.
- Review of Implementation of Beijing Platform for Action, CENWOR (2015)  
Chapter I Human Rights of Women p.161 at 174-175.
- R.K.W. Goonesekere, Comment on Singarasa Case, in CEDAW:A Manual. CENWOR (2005) p.15

### **Legislation and Policy Harmonizing International Law with Treaties ratified by Sri Lanka.**

- ICCPR – ICCPR Act 2007, Right to Information Act (2016)
- ICESCR – ICCPR Act 2007 s.6.
- CEDAW – Women's Rights Charter (1993) (policy)  
Penal Code Amendment (1995)(2006)

Citizenship Amendment Act (2003)

Domestic Violence Act (2005)

- CAT Torture Act (1994)

Corporal Punishment Repeal Act (2009)

- CRC Penal Code Amendments (1995) and (2006) Maintenance Act (1999)
- Palermo Protocol Penal Code Amendment (2006)

(See references, section, Introduction)

### **Cases on Application of International Law**

- Sepala Ekanayake v Attorney General 1987 1 SriLR 107 (hijacking of aircraft, treaties and Customary International law).
- Singarasa v Attorney General SC Spl LA No. 182/1999 SC Minutes 15.9.2006  
(Optional Protocol ICCPR), Principle of dualism and two systems of domestic law and international law)
- Manohari Pelaketiya v H.M. Gunasekara and others SC/FR/No 76/2012

## **8. Recent Concluding Observations of Treaty bodies, (Committees monitoring progress)**

### **Review of Fifth Periodic Report of Sri Lanka to Human Rights Committee of ICCPR**

CCPR/C/LKA/CO/5 21.11.2014

- Para 5 (independence of the judiciary)
- Para 6 (failure to fulfil obligations under Optional Protocol, Singharasa Case)
- Para 7 (discrimination against women and land rights)
- Para 8 (amendment to Penal Code provisions criminalizing homosexuality and constitutional amendment to prohibit explicit discrimination on ground of sexual orientation and identity).
- Para 9 comprehensive approach to address gender based violence
- Para 10 exceptions to permit therapeutic abortion, (rape, incest, abortion and maternal mortality).
- Para 16 torture – strengthen response, including shifting burden of proof that confession not under torture, to prosecution
- Para 16 banning corporal punishment in all settings.

### **Concluding Observations of Committee on the Elimination of Discrimination Against Women: Sri Lanka**

1. CEDAW/C/LKA/CO/7 17 Jan-4 Feb 2011 – Review of Fifth, Sixth and Seventh Periodic Reports

- Para 12, 15 incorporation of CEDAW Convention in domestic legislation or Constitution not done. Appointment of Independent National Commission on Women
- Para 23 eliminate practices and stereotypes that discriminate against women including in relation to sexual and reproductive education, sexual harassment and other forms of violence against women, and violence in family relations.
- Para 24 violence against women, including marital rape.

- Para 34 lack of protection of women in informal sector, including regarding sexual harassment.
- Para 36 limited knowledge of reproductive health and low rate of contraceptive use, high level of teenage pregnancies increasing prevalence of HIV/AIDS among women, abortion, maternal mortality and clandestine abortion.
- Para 44 marriage and family law – customary and religious laws that discriminate against women, and absence of minimum age of marriage in Muslim law, husband’s consent required to appear in court or undertake transaction, absence of no fault divorce, and women’s economic rights after divorce.

2. See also CEDAW/C/LKA/CO/8 3 March 2017 – Review of Eighth Periodic Reports

## 9. Policy Documents

- International Policy Document on Sustainable Development Goals 2015 United Nations A/RES/70/1
- Policy Documents, ICPD, BPFA, MDG

## 10. Full titles and dates on relevant international Conventions

### Ratified by Sri Lanka

- International Covenant on Civil and Political Rights (1966) (ICCPR)
- International Covenants on Economic Social and Cultural Rights (1966) (ICESCR)
- International Convention on Elimination of Racial Discrimination (1965) (ICERD)
- Convention on Torture (1984) (CAT)
- Convention on Elimination of All Forms of Discrimination Against Women (1979) (CEDAW) and Optional Protocol (1999)
- Convention on the Rights of Child (1989) (CRC) and Optional Protocols
- Convention on Protection of the Rights of Migrant Workers (1990)
- Convention on Terrorist Financing (1999) (CTF)
- Hague Convention on Civil Aspects of International Child Abduction (1980) (HC)
- Convention on the Rights of Persons with Disabilities (2006) (CRPD)
- Convention Against Transnational Organised Crime (2000) and Palermo Protocol
- Convention on the Protection of All Persons from Enforced Disappearances (2016) (CPPED)

## Ratification Status for Sri Lanka

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
CAT – Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		03 Jan 1994 (a)
CAT-OP - Optional Protocol of the Convention against Torture		
CCPR – International Covenant on Civil and Political Rights		11 Jun 1980 (a)
CCPR – OP2 – DP – Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
CED – Convention for the Protection of All Persons from Enforced Disappearance	10 Dec 2015	25 May 2016
CEDAW – Convention on the Elimination of All Forms of Discrimination against Women	17 Jul 1980	05 Oct 1981
CERD – International Convention on the Elimination of All Forms of Racial Discrimination		18 Feb 1982 (a)
CESCR – International Covenant on Economic, Social and Cultural Rights		11 Jun 1980 (a)
CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		11 Mar 1996 (a)
CRC – Convention on the Rights of the Child	26 Jan 1990	12 Jul 1991
CRC-OP-AC – Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	21 Aug 2000	08 Sep 2000
CRC-OP-SC- Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	08 May 2002	22 Sep 2006
CRPD – Convention on the Rights of Persons with Disabilities	30 Mar 2007	08 Feb 2016
CCPR – OP1 – Optional Protocol to the International Covenant on Civil and Political Rights	YES	03 Oct 1997
CEDAW – OP – Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	YES	15 Oct 2002







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