

# “Abandoning the Sinking Ship or Solo in a Battle Ground?” Role of Sri Lankan Judiciary in Strengthening of *De-Jure* Equality among Genders

RBWMH Rathnamalala<sup>1#</sup> and MPC Wijesooriya<sup>1</sup>

<sup>1</sup>Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

#rathn016@umn.edu

**Abstract :** *This research aims at re-evaluating the Sri Lankan judiciary’s adherence into the concept of the de-jure equality between genders as set forth in the Convention on the Elimination of all forms of Discrimination against Women (Herein after referred to as CEDAW). The main objective of the research is to analyse the judicial interpretations/approaches on the concept of de-jure equality between genders under Sri Lankan Law. Secondary objective is to evaluate the whether the Sri Lankan judiciary has creatively and progressively interpreted the concept of de-jure equality, in absence of an enabling statute for CEDAW in the domestic jurisdiction.*

*On the other hand, it should also be considered that Sri Lanka has signed and ratified CEDAW, therefore, as a state party, it indicates the positive intention on implementing CEDAW in the domestic jurisprudence. To achieve the above indicated objectives, researchers utilize the relevant theoretical framework and selected case law decided by the Supreme Court of Sri Lanka. Research methodology is qualitative and further, it adopts legal research methodology, which is fundamentally desk research. It should be verified that for the analysis on case law, cases were selected based on the purposive sampling method. Outcome of the research is focused on policy-implementation.*

**KeyWords:** *Judiciary, CEDAW, De-jure Equality*

## 1. Introduction

CEDAW is recognized as the corner stone for women’s human rights law. It is one of the key UN Human Rights Treaty Based mechanisms in the United Nations’ system. It is the only legal document which solely on the protection of women’s human rights law which binds state parties under international law. CEDAW was adopted in 1979 by the General Assembly and came into force in 1981. Sri Lanka is a state party to CEDAW since 1981. Unfortunately, it should be emphasised that there is no enabling statute in Sri Lanka to enforce CEDAW in domestic law. Hence, the judiciary could play a progressive role in achieving CEDAW’s key terminology in absence of an enabling statute for the same. However, when carefully concerns on the nature of the obligations, several other domestic laws including the 1978 Constitution, protect *de-jure* equality between men and women in domestic law. On the other hand, there are still gaps in gender equality law provisions in specific areas such as property inheritance, land acquisition and in divorce under the scopes of special laws in the country.

In light of the above indicated reflections on Sri Lankan legal system on achieving gender equality, it should be focused on the judicial interpretations on the theoretical concept of *de-jure* equality among genders. This study will focus on the judicial interpretations; mainly areas such as in Family Law, Laws on the Sexual Violence against Women and Laws on Sexual

Harassment in the Workplace in light of achieving *de-jure* equality among genders.

*A. CEDAW's Role in Achieving of De-Jure Equality Between Genders*

Equality and Non-discrimination between men and women is the key terminology of CEDAW (Weissbroadt, 2009). It has two facets, *de-jure* equality, which basically means the 'legal equality' and on the other hand, *de-facto* equality, interpreted by the Committee on the Elimination of Discrimination against Women as the 'substantive equality or equality of results. *De-jure* equality between genders is an important element in achieving substantive equality between genders. In line with the CEDAW's obligations, state parties must respect, protect and fulfill *de-jure* equality between men and women in their respective domains such as executive, legislation and judicial spheres.

Sri Lankan legal system has dualistic approach when incorporating its international treaty obligations into domestic legal system. In this aspect, it should be noted that even though Sri Lanka has signed and ratified CEDAW before few decades ago, it has not adopted an enabling statute yet. However, it could be emphasized that based on the equality provision enshrined in the article 12 of the 1978 Constitution's fundamental rights chapter on gender as a non-discriminatory ground. Therefore, the judiciary could play a vital role in absent of such enabling statute in the domestic jurisprudence.

*B. Laws Against Sexual Harrassment In The Workplace and De-Jure Equality*

Men were the sole breadwinners of the family up until recent times, however, in current context, both men and women enjoy equal right to employment. Regardless of the equal right to employment, the inferior societal role of women as subordinates mostly leads to perpetuate the violence against them. Considering the aforesaid socio-legal underpinnings, sexual harassment in

the workplace could be recognized as one of the most significant areas in which progressive interpretations of law could play a key role to achieve *de-jure* equality between genders. Therefore, it is important to review judicial interpretations in recent case law in the area of sexual harassment in the workplace.

*In the case Manohari Pelaketiya v H.M. Gunasekera and Others (SC/FR/No 76 [2012]-herein after referred to as Manohari case).* The Petitioner was serving as the teacher in Eastern Music in a reputed College in Colombo. This is a case of sexual abuse and harassment caused to the Petitioner by the Principal and another teacher at the same school. Leave to proceed was granted for alleged violations of Articles 12(1) and 14(1)(a) of the Constitution. Honourable Justice Gooneratne indicates that 'Article 12(2) declares that no citizen shall be discriminated against on the ground of sex... Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court cannot simply ignore.' (SC/FR/No 76 [2012] Going more beyond, Justice Gooneratne emphasised the importance of adhering into CEDAW obligations, interpreting in broad manner. While acknowledging the progressive interpretation of the judiciary in *Manohari* case, it should be noted that Indian judiciary has adopted the similar views on sexual harassment in the work place in the case of *Vishaka & Ors vs State of Rajasthan & Ors,* (1997) 6 SCC 241, indicating constitutional and international law obligation on achieving *de-jure* equality through addressing sexual harassment in the workplace. In that aspect too, it is commendable that Sri Lankan courts are inline with the progressive interpretations on the same area in regional court systems.

*C. Laws Against Sexual Violence and De-Jure Equality*

This part of the research focuses on the interpretations on the elements in the laws of sexual violence against women by the judiciary. It is important to analyse interpretations on the element of 'consent' by the Supreme Court of Sri Lanka. It should be noted that the element of the consent in rape laws has been subjected to criticism in CEDAW based international law (*Vertido V. Philipines*, 2010) as well as by Feminist Legal Theorists, in general. As indicated by Susan Estrich, one of the eminent scholars in Feminist Legal Theory, 'it is important to note that the male rape fantasy is not a nightmare about all rapes, and all women, but only about some; the law of rape has focused its greatest distrust not on all victims, but only on some. As indicated further by Estrich, 'the formal prohibitions of the statute do not distinguish between the stranger and the neighbor, between the man who climbs in the car and the one offered a ride home. (Estrich, 1987)

*Inoka Gallage v Kamal Addararachchi and Another* ([2002] 1 SriLR 307-Herein after referred to as *Kamal Addrararachchi* case) is one of the benchmark cases in Sri Lankan law. Firstly, when carefully consider, judicial interpretations on establishing the element 'consent,' it was seen in the judgement that 'the Court of Appeal has taken into consideration the previous and subsequent conduct of the prosecutrix. The court also has considered the absence of injuries on the prosecutrix despite the fact of her saying that she offered vigorous resistance. The doctor's evidence was that she is still a virgin. Hence the Court of Appeal concluded that if any sexual act had taken place, it had been with her consent. Secondly, as the court indicated based on the evidence of the friend it appears that the prosecutrix is a person who changes her version of the events when it suits her. ([2002] 1 SriLR 307) 'Since the Court of Appeal had considered the prosecutrix as an unreliable witness not worthy of credit, there was no duty cast on the

Court of Appeal to consider the evidence of the accused.' ([2002] 1 SriLR 307).

*Ajith vs Attorney General* ([2009] 1SLR 23) was a kidnapping and rape case. The issue to be determined by the Court of Appeal was whether the witness (i.e. the victim) was reliable and whether the court should require corroborative evidence when the witness is deemed non-reliable. In this case, the Appeal Court indicated that 'in a charge of rape why does Court expect the victim's evidence to be corroborated by independent evidence. In the case of *Ajith vs Attorney General* ([2009] 1SLR 23), bench indicates that 'I now advert to this question. Charge of rape being the easiest charge that a woman can make against a man in this world'. The above indicated generalization is also yet another example of certain prejudices and biasness's of courts which has a direct impact on achieving of *de-jure* equality between genders. In both rape cases indicated above, the establishing the element of 'consent' was ambiguous. This very ambiguity, on the other hand supports the theoretical underpinnings introduced by the Feminist Legal Theorists as indicated above by the authors such as Estrich as the "male fantasy on rape." (Estrich, 1987)

When considering the establishment of the element of consent, it should mainly consider on achieving *de-jure* equality between genders. It should be unbiased. 'In practice, distinctions have always been drawn. It is the male fantasy cases-the "simple" cases in which the unarmed man rapes the woman he knows- that these rules have been articulated and applied most conscientiously to punish the victims and to protect male defendants. And it is in those cases that prosecutors, courts, and juries continue to enforce them in practice.' (Estrich, 1987).

As indicated above, it should be emphasised that court must strictly adhere into the concept of *de-jure* equality when considering sexual violence against women cases. Therefore, right to

equality before law and right to fair trial should not be contradict with the individual opinions on 'moral certainty' when establishing the evidence in sexual violence against women.

#### *D. Divorce, Maintenance Laws and De-jure Equality*

##### *Sri Lankan*

legal system entails with the influence of both Roman Dutch Law and the English Law. Roman Dutch Law has made a great impact in the family law. Therefore, the shadows of the earlier concepts such as preferential treatment for fathers in custody matters still maintains its presence time to time in judgements. In those aspects, achieving *de-jure* equality through judicial interpretations might be influenced by the archaic concepts such as 'father is the sole breadwinner' or 'women's character is the vessel of the family honour.' In the case of *Premanie Samarasinghe v Leelaraja Samarasinghe* (C.A. APPLICATION No. 587/89), the issue was for the consideration that when could the dowry property be reclaimed by the wife in a suit for divorce or separation. In line with the Roman Dutch Law principles, the court held that 'Dowry is a marriage portion where movable or immovable property is given by a parent or a third party to a woman in consideration of marriage.' Further, court held that 'when dowry or any portion thereof given on behalf of a wife is actually given to or used by the husband, or if the husband has already derived any benefits therefrom or will derive in the future any benefits by reason of that marriage, then if the marriage is dissolved due to the fault of the husband, he has to forfeit those benefits. Where the wife has not put matrimonial fault of her husband in issue, she cannot seek settlement of property on the basis of forfeiture of benefits.' (C.A. APPLICATION No. 587/89). However, the above judicial interpretation implies a far-cry from achieving *de-jure* equality between genders through judicial interpretations.

In the case of *Wijesundera v Wijeykoon* ([1992] 2 Sri LR 1), Magistrate Court dismissed the application made by the Applicant Appellant, for maintenance for herself and her child. It was held that 'the claim also made for maintenance by the wife, because a valid marriage is still subsisting between the appellant and the respondent. Section 2 of the Maintenance Ordinance, per se, gives a wife the right to claim maintenance from her husband. However, section 4 imposes certain restrictions on that right. a wife living in adultery is denied the right to claim maintenance from her husband. This provision accords with maintaining public morals and the sanctity of marriage. It is implicit in that finding that the appellant has had an adulterous union. This would mean that the appellant is living in adultery and therefore would not be entitled to claim maintenance from the respondent.' ([1992] 2 Sri LR 1). However, it should be noted that the concepts of morality and legality should be in line with achieving of the *de-jure* equality.

On the other hand, in the case named *Fernando v Fernando* (Precia W. Fernando (Nee Perera) v Dudley W. Fernando and 2 Others [1968] 70 NLR 534), which was reported in 1970, 'The interest of the child is the paramount factor. The rule is that the custody of very young children ought ordinarily to be given to the mother, a rule which ought not to be lightly departed from. It is no answer to this rule that the law ordinarily gives the father a superior right to custody and it is too late in the day to urge that the father's right to custody is absolute and not to be interfered with. Overriding considerations taking their force from the mother's past character or conduct or from her inability to give the children a suitable home may no doubt in individual cases prevail over this principle...' ([1968] 70 NLR 534).

After careful consideration of the above cases, it could be recognized that the courts are still adhering into archaic Roman Dutch Law principles on deciding custody and divorce matters in some cases, rather than focusing on the necessity of achieving *de-jure* equality between genders. It should be noted that depending on the Roman Dutch Law principles would not necessarily be harmful if those principles are being interpreted in the progressive manner, in line with achieving of *de-jure* equality between genders.

## 2. Recommendations and Conclusions

It could be concluded that Sri Lankan judiciary has played a key role in establishing *de-jure* equality in absence of an enabling statute for CEDAW. However, it was also discussed that due to certain inhibitions such as adhering into archaic principles/theories, and perpetuation of gender-biasness, there were difficulties in establishing the elements of certain crimes. On the other hand, it was seen that stereotypical attitudes on gender sometimes filled the void in the absence of strong evidence to establish the compulsory elements such as the consent in the rape cases.

Prejudices and unconscious biases and stereotypical attitudes on gender roles, the full achievement of *de-jure* equality becomes a difficult task. Most importantly, achieving *de-jure* equality between genders is not the sole expected outcome but only one step in the path of achieving substantive equality or *de-facto* equality between genders. Therefore, achieving of *de-jure* equality between genders is essential and integral element in the process of achieving of *de-facto* equality between genders.

To achieve the successful outcome, firstly, Sri Lanka must adopt an enabling statute for CEDAW. Secondly, judiciary must be in line with the progressive judicial interpretations/developments in the regional level courts as socio-political scenarios and

socio-legal aspects of the South Asian region mostly similar to that of other countries. Thirdly, the progressive judicial interpretations on the theoretical concepts such as *de-jure* equality and substantive equality or *de-facto* equality between genders in regional human rights mechanisms, such as the European Human Rights system should be utilized as guiding authorities in the domestic legal interpretation process.

## Acknowledgment

Authors thank Dr Darshana Sumanadasa, Senior Lecturer, Faculty of Law, University of Colombo and Ms Ashmi de Silva, University of Colombo.

## References

### Case Law

- Ajith vs Attorney General* [2009] 1 Sri LR 23  
*Inoka Gallage v Kamal Addararachchi and Another* [2002] 1 SriLR 307  
*Manohari Pelaketiya v H.M. Gunesekera and Others* SC/FR/No 76 [2012]  
*Precia W. Fernando (Nee Perera) v Dudley W. Fernando and 2 Others* [1968] 70 NLR 534  
*Premanie Samarasinghe v Leelaraja Samarasinghe* C.A. APPLICATION No. 587/89  
*Vishaka & Ors vs State of Rajasthan & Ors Vishaka v. State of Rajasthan* (1997) 6 SCC 241  
*Wijesundera v Wijeykoon* [1992] 2 Sri LR 1

### Books

- Cook, RJ and Cusack S, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010)  
Estrich, S, *'Real Rape'* (Harvard University Press, 1987)  
Levit N and Verchick RRM, *Feminist Legal Theory: A Primer* (New York University Press, 2016)  
Weissbroad, D, *Law, Policy and Process* (Lexis Nexis 2009)

#### Journals

Devarsha, D, 'Implementation of Vishaka Guidelines: Post Vishaka Judgement' (2014) 1 Indian JL & Pub Pol'y 104.

#### Weblinks

[https://www.supremecourt.lk/images/documents/sc\\_apeal\\_76\\_2018.pdf](https://www.supremecourt.lk/images/documents/sc_apeal_76_2018.pdf)

[https://www.supremecourt.lk/images/documents/scfr\\_76\\_2012\\_ed.pdf](https://www.supremecourt.lk/images/documents/scfr_76_2012_ed.pdf)

#### Author Biography



Authors are lecturers in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. They are Attorneys-at-Law and currently reading for their M.Phil/Ph.Ds in Law. Authors hold LLM and LL.B. (Hon) from the Faculty of Law, University of Colombo. Hasini Rathnamalala holds LLM in Human Rights Law (University of Minnesota Law School-USA) and her research areas are Human Rights Law, Jurisprudence and International Humanitarian Law. Padmaja Wijesooriya, who is a Commonwealth scholar, holds LLM in Intellectual Property Law (Faculty of Law, University of Exeter, UK). Her research areas are Intellectual Property Law and Traditional Knowledge.