

# **RIGHT TO BE A PARENT IN SRI LANKA; ADOPTION, ABORTION, SURROGATION & ARTIFICIAL INSEMINATION.**

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## **Introduction**

Humans are yet another species living on Earth. Even though the civilization along with the development of skills and technology vary humans from other animals, the basic purpose of living beings remains the same; That is reproduction. The only preliminary way of becoming a parent is the process of natural reproduction. Yet, with the complicated lifestyles of mankind and the different forms which have been emerged to the concept of family, the way of becoming a parent no longer depends on the basic natural reproduction system.

Until the recent past the world recognized marriage as '*a union for life of one man and one woman*' (*Hyde v. Hyde*, [1866]). A marriage between a man and a woman, setting aside circumstantial health issues, allow them to start a family in the natural and the conservative way. The issue is the world no more remains conservative.

In the modern world marriages are no more heterosexual. Yet, there are heterosexual couples who are unable to have children due to medical reasons. Further, there are couples involved in homosexual relationships who are willing to be parents; there are couples compelled to avoid reproduction due to socially transmitting diseases (STD) yet desire to be parents and

have a family. There are couple who are in a living in relationship yet expect to start a family; further, there are independent singles who are willing to be single parents.

Therefore, it is clear that being a parent is not as simple as it used to be decades ago. The above-mentioned scenarios are very much common in the western society. Not only in the western society, our neighbour country India too has recognized many of the abovementioned situations thus has implemented laws to address them. Yet, Sri Lanka still being a self-enclosed society regarding many socially important legal matters, has successfully ignored addressing this prominent social need.

Right to be parent also known as the right to form a family has been identified by Article 16 of the Universal Declaration of Human Rights (1948). Similarly, 'the right of men and women of marriageable age to marry and to find a family' has been recognized by Article 23(2) of the International Covenant on Civil and Political Rights (1966). Article 8 of the European Convention on Human Rights (1953) and article 9 of European Union Charter of Fundamental Rights (2009) too have recognized the right to find a family as one of the most important rights of human beings several decades ago.

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Parenthood is a reciprocal process. It must be a responsibility as much as it should be a right. The responsibilities vest on parents are being monitored and governed by the laws and government bodies in Sri Lanka such as the Ministry of Women and Child Affairs and National Child Protection Authority.

Therefore it is important to identify the right to be a parent in Sri Lankan context in the light of adoption, abortion, surrogation - when only the womb is being surrogated, surrogation - when one partner of the intended parents is infertile therefore either the gamete of the mother or the gamete of the father is involved in the process and artificial insemination when a woman intends to become a single mother without a designated father.

The cultural beliefs of the Sri Lankan society have blocked most of the abovementioned options of becoming parents to an extent where majority of Sri Lankans who have been deprived of the opportunity of having a family due to medical or other circumstantial reasons do not even know that they have such wide options and most importantly they have a right as human beings to become a parent and form a family. It is very important to study the developments in the laws related to this topic in India as its judiciary has successfully upheld the liberty and human rights of its citizens despite being the largest conservative traditional hub in Asia.

## **Adoption**

An adoption of a child involves a two-step judicial process where the rights of the biological parents towards the child are being terminated and new rights and obligations between the child and the

adoptive parents are being created. Adoption is a creation of parent – child relationship between individuals who do not biologically share the same bond. This process of adoption gives the child the rights, privileges and duties of a natural child and heir of the adoptive family (Adoption, 2003).

The common law governing adoption in Sri Lanka is the Adoption of Children Ordinance No. 24 of 1941. This Ordinance has been amended several times thereafter. Kandyan Law Ordinance No. 39 of 1938 and Thesawalamai Regulation No. 10 of 1806 govern the laws related to adoption under Kandyan law and Thesawalamai law respectively. Adoption is not recognized under the Muslim law of Sri Lanka. Yet, the Muslims can adopt a child under the common law, yet the adopted child is not entitled to success inheritance of the said parents (*Ghouse v. Ghouse, [1988]*).

The Adoption of Children Ordinance recognizes children under the age of fourteen as a child for the purpose of this Ordinance (s.30). According to the Sri Lankan ordinance generally an individual must make an application to adopt a child (s.2). If two people are intending to adopt the same child, they must be spouses to be qualified to adopt the child jointly (s.2). Further the Applicant must be at least twenty-five years old and he/she must be at least twenty-one years older than the adoptee (ss. 3[1][a], 3[1][b]).

The only legally recognized form of marriage in Sri Lanka is the heterosexual marriages. If a married couple decides to adopt a child and successfully meets the abovementioned requirements, they can apply to adopt a child and court will issue

the order of adoption upon receiving the consent of both spouses.

This clearly indicates that the couples who are in live in relationships are not allowed to jointly apply to adopt a child in Sri Lanka. It is arguable that one of the partners in the live-in relationship can apply for an adoption. This could raise many legal issues if the child is a girl. It is not an easy task for the intended father to adopt her as he must satisfy the courts that there are 'justifiable special circumstances' to adopt this child (s.3[2]). On the other hand, the intended mother can singlehandedly adopt a child. Yet, the issue here is the child will remain without a legal father and he/she will not receive succession rights of the intended father.

Reports regarding adoption cases filed by an individual with intention of becoming a single parent and/or a couple in a live in relationship who are intending to adopt a child or a parent who is diagnosed with a socially transmitting disease thus intending to adopt a child in Sri Lanka are not to be found. Further, since Sri Lanka does not recognize homosexual marriages before law, adopting children by such couples is a matter that is not even remotely foreseeable in near future, yet an address-worthy topic.

Independent singles who are willing to start a family by adopting a child and becoming a single parent must be encouraged in Sri Lanka. There are a lot of financially stable, successful, unmarried individuals in Sri Lanka who grow old without forming a family. The reason for them being prevented from having a family is the traditional belief system in Sri Lanka that makes people believe the only way of starting a family is marriage. This has resulted a generation of successful

individuals dying without an heir and support during old age and hundreds of children stuck at orphanages never having the opportunity to be a part of a family.

The right of an unmarried individual to adopt a child and form a family in Sri Lanka can be addressed under the existing adoption law of Sri Lanka. Therefore, what requires regarding that is the mental liberalism of independent individuals in Sri Lanka as the law has been opened for them since 1941.

India being one of the largest conservative countries in the world and as a country with a majority of young citizens has started moving forward with the requirements of the modern world and its young blood by implementing and updating necessary rules and regulations to address issues that concerns the current generation of the nation.

One of the earliest and most famous examples of single parenting by an unmarried individual is the Bollywood celebrity Sushmitha Sen stepping forward and adopting a child. This set an example for many individuals all around India and inspired them to follow her footsteps.

The Juvenile Justice (Care and Protection of Children) Act, 2015 governs the law of adoption in India. The Central Adoption Resource Authority which comes under the Ministry of Women and Child Development is the authoritative body which handles adoptions regarding Indian children (CARA- Central Adoption Resource Authority, 2014). The Juvenile Justice Act, 2015 has set out eligibility criteria for prospective adoptive parents. This Act has created space to for singles and divorcees to adopt children upon

fulfilling the criteria set out by the Authority (s.57[3]). Similar to Sri Lanka, Indian law too requires a prospective parent to be at least twenty-five years of age. Yet, considering the nature of the society of India and protection of children the Act has prohibited single men from adopting girl children (s.57 [4]).

## **Abortion**

Sri Lanka is considered as one of the strictest countries regarding the laws of abortion. Abortion is allowed in Sri Lanka only for the purpose of saving the life in good faith of a mother carrying a child. Except for that reason abortion is identified as a criminal offence under the Penal Code of the country (s.303).

According to the Penal Code of Sri Lanka any person causes a woman with child to miscarry except in good faith for the purpose of saving the woman's life is committing a criminal offence and shall be punished with imprisonment extend to three years or with fine or with both. In the explanation of section 303 the woman who causes a miscarriage herself too has been included within the meaning of the said section.

The Penal Code has further identified causing miscarriage without the consent of the woman, death of a woman caused by an act done with the intention of causing a miscarriage and an act done with the intention of preventing a child from being born as offences related abortion in Sri Lanka (ss. 304,305,306,307).

Sri Lankan Penal Code was enacted in 1883, more than a century ago. Proposals to amend the laws related to abortion to meet the needs of the modern society have been

brought up several times, especially in 1995 and 2013 which did not succeed. In 1995 the Ministry of Justice drafted a bill to present the parliament to amend the provisions of the Penal Code in order to relax the strict prohibition on the termination of pregnancy. It was proposed to de-criminalize abortion of pregnancy in cases of rape, incest and congenital abnormalities incompatible with life. Yet, the said proposal was withdrawn from the bill before it was presented to the parliament thus section 306 remained unamended.

In 2013 the Law Commission of Sri Lanka brought forward a proposal to amend the abovementioned rules and introduce 'medical termination of pregnancy' in order to expand the law related to abortion. According to section 3 of the proposed Medical Termination of Pregnancy (Special Provisions) Act three circumstances have been introduced under which medical termination of pregnancy must be allowed apart from the ground already exists under section 303 of the Penal Code. According to the proposed act a pregnancy caused by rape, statutory rape and foetal impairment have been introduced as grounds under which termination of pregnancy must be allowed (Law Commission of Sri Lanka, 2013). Unfortunately, this Bill too was not passed by the parliament of Sri Lanka.

Different jurisdictions around the world have identified eight grounds on which termination of pregnancy must be allowed. By 2013, 97 per cent of the countries in the world had permitted abortion for the purpose of saving a woman's life. Apart from that, preserving the physical health of a woman, preserving the mental health of a woman, pregnancy caused as a result of

rape or incest, foetal impairment, economic or social reasons and upon request are recognized as the other circumstances under which different countries of the world legally allow termination of pregnancy (Abortion policies and reproductive health around the world, 2014).

Therefore, it is evident that Sri Lanka has one of the strictest stands regarding the law of abortion compared to the other countries of the world. Yet, considering the grounds that have already being accepted by the rest of the world it can be argued that Sri Lanka needs to address this issue in a modern perspective without sticking with a centuries old Law and consider abortion in the perspective of women and having a child as a part of her right to be a parent as the birth of a child is equally a responsibility and a right.

## **Surrogation**

Surrogacy can be defined as an agreement by which a woman agrees to get pregnant and deliver a child for another couple. There are two types of surrogacy, such as the traditional surrogacy and the gestational surrogacy. In traditional surrogacy the surrogate mother gets pregnant with the sperm of the husband of the intended couple with the understanding that the resulting child would be legally the child of the intended couple – sperm donor husband and his legally married wife (Surrogacy Law and Legal Definition, 2019).

On the other hand, in gestational surrogacy the sperm of a married man and the egg of his wife are artificially inseminated and the resulting embryo will be implanted in another woman's womb. A famous example for a gestational surrogacy is the

birth of the third son of the famous Bollywood celebrity ShahRukh Khan and his wife.

In Sri Lanka there are no legal provisions to regulate surrogacy. This does not mean surrogation does not take place in Sri Lanka. Many foreigners come to Sri Lanka seeking surrogate mothers as it has become a cheap destination for surrogacy (Abeyrathna, 2019). Such foreigners do not have to spend much money on medical treatments of the surrogate mothers in Sri Lanka as they would have to do in other countries. The silence in law regarding surrogacy in Sri Lanka is welcoming commercial surrogation as well. Therefore, it is essential to address this issue as it has already become a serious issue as human trafficking in countries like India and Bangladesh.

India to address the abovementioned issue enacted the Surrogacy (Regulation) Bill, 2019 which is a very much detailed piece of legislation. Section 4 of the said Act has set out the circumstances under which surrogation is allowed in India. According to that either or both members of the intended parents must be proven to suffer from infertility and the surrogation must take place without the involvement of a money consideration or commercial purpose. Further, under section 2 of the Act, a couple has been defined as a married couple thus India has blocked single parents and couples in live-in relationships the right to become parents by way of surrogation.

Human Fertilisation and Embryology Act, 2008 of the United Kingdom has recognized surrogacy and surrogacy agreements yet does not accept commercializing surrogation. Yet in the USA intended parents can a surrogate a fee

called as 'inconvenience fee' in addition to other expenses (Young, 2019).

## **Artificial Insemination**

Artificial insemination is defined as a solution for infertility, impotence or as a way by which an unmarried woman can become pregnant. This has a reported history since 1884 in the USA and is generally done by injecting collected semen into the uterus of the woman under a physician's supervision (Luetkemeyer and West, 2015).

There are two types of artificial insemination procedures that have been identified by medical practitioners. "A child born as a result of artificial insemination using the sperm of the intended father is referred as AIH while a child born as a result of artificial insemination using the sperm of a third-party donor is referred to as AID" (Artificial Insemination, 2020). The later procedure is mostly used in the western world with women who are intending to become single mothers. In the USA eighty thousand such procedures using sperm donors are performed each year, resulting in the birth of thirty thousand babies.

Yet, even in the USA the legitimacy of an AID child remains unanswered in matters where the intended mother of a married couple goes under AID process as the child born as a result of such procedure is not biologically related to the intended mothers' husband. This clashes with the laws related to adultery therefore calls for new law enforcements (Radler, 1955).

Therefore, it is evident that even though artificial insemination is a great opportunity for those who are willing to become

parents, yet it comes with a lot of legal issues especially regarding the legitimacy of the child which can be sorted only by introducing new laws to address the said issues.

## **Conclusion**

South Africa can be considered as one of the most progressive countries when it comes to laws related to alternative reproduction options. The Children's Act, 2005 of South Africa has accepted artificial insemination, surrogacy, LGBT parenting rights and co-parenting allowing its citizens to enjoy their right to form a family in a wide space (Sperm Donor & Co-Parenting Laws in South Africa, 2020). This should be set as an example for the level of liberty people should have regarding being a parent as it can reduce the number of children who suffer in shelters.

Right to be a parent and form a family can be identified as yet another human right which most people are not even aware of. In Sri Lanka there are many married couples who are childless due to medical reasons and the only option they are aware of is adoption. Thus, having the conservative mind setup of needing to have a biological child of their own prevents them from adopting a child. This issue can be easily addressed if options like surrogation or artificial insemination is introduced to such couples.

Sri Lanka unlike India is still not mentally or socially prepared to accept single parenting, live-in relationships and homosexual marriages. Therefore, even the open minded people who are willing to be a parent in a non-conservative way are being deprived from their basic human right of being a parent and forming a family which

has been recognized by the International Conventions, as a result of the non-flexibility of the Sri Lankan society and law makers.

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