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LEGAL PROTECTION FOR CHILDREN'S RIGHTS IN SRI LANKA

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provide values that must influence legislative and administrative policy and judicial interpretation in the Courts. (8)

The enactment of a new 'Children's Char-

ter of rights' was planned in 1979, as a reflection of national priorities, to coincide with the U. N. International Year of the Child. This Charter in fact did no more than put together modified but existing legislation in areas such as child employment, adoption, and juvenile justice. It did not represent a response to even some of the practical problems faced in implementing and enforcing the existing laws. The Charter did not emerge as legislation in the decade that followed. However the recent adoption of the U. N. Convention on the Rights of the Child has surfaced once again the idea of introducing a 'Children's Charter of Rights'. In his message to the U. N. Summit on Children in September 1990, President Premadasa has indicated that the enactment of a 'Children's Charter' is high on the list of priorities for national policy. (9) The discussion that follows will highlight the need for committed law enforcement and realistic legal reforms if the concept of children's rights is to become a meaningful reality in this country.

01. Introduction

Childhood or minority has been defined in different ways in the indigenous and received legal tradition of Sri Lanka. The statutory age of majority was reduced from twenty one to eighteen after more than a century in 1989. (1) A child from the point of view of the law is thus a person under the age of eighteen. We shall observe that older children enjoy a wider spectrum of rights and responsibilities that childhood or minority is a diminishing legal status.

The concept of the child as a person who is entitled to legal rights has a long history in Sri Lanka. In indigenous Sinhala and Tamil custom children were considered to belong to parents, and deemed an important economic resource for them. (1A) Yet the concept that a child had a right to care and nurturing introduced some limitations on parental rights. In the colonial period the concept of children's rights was expanded because it was recognised that the State and the Courts has a right and duty to interfere with parental rights in the interests of children. In Roman Law the concept of patria potestas gave the paterfamilias or head of the family a right of life and death over a child. However Roman Dutch Law that represents the Dutch colonial legal heritage in Sri Lanka, recognised that the State and the Courts had a protective role in relation to children.

The Courts status is described as that of an 'Upper Guardian of Minors'. (2) Both the State and the Courts had a duty to safeguard the welfare of children. When English law was introduced in the British period of colonial rule, the ancient legal proceeding known as the application for a writ of Habeas Corpus was used in child custody cases to deny parental rights in the Child's interests. (3)

The obligation of parents, the State or the Courts to provide protection for children

that is recognised in both the indigenous and received colonial legal traditions, came to be developed at a later stage into a concept of children's rights. Thus the status of minority was considered a diminishing status as the child grew from infancy to adolescence and majority. Judges in the British colonial period, influenced by English law, recognized an arbitrary age of discretion at which a boy of 14 and a girl of 16 could make their own decisions in some respects. (4) The children and Young Persons Ordinance (1939) was enacted in this century as a 'Children's Charter' of Rights. The Ordinance provided for controls on adult exploitation of children in employment, in society, and in the family. It also provided a special system of juvenile justice for children in trouble with the law. It was therefore described in the legislative assembly as a 'Charter of Children's Rights' that was meant to 'give them their right place in society.' (5)

The Constitution (1978) has carried this trend to its logical conclusion and envisaged the child as a person entitled to civic rights and the right to share in the resources of the community. The constitution gives the child, like an adult, important fundamental rights in respect of equality before the law, gender equality, freedom from torture and degrading treatment, freedom of speech, conscience and religion, as well as cultural rights. (6) However the 'protection' concept has not been eliminated. A specific article in the Constitution declares that the adult's right to equality shall not be interpreted so as to prevent the introduction of legislative and administrative policies of the State that benefit children in general and disabled children in particular. (7) The 'protective' philosophy also underlies the Directive Principle of State Policy which declares that the State shall promote 'with special care' the welfare and development of children and protect them from exploitation and discrimination. These Directive Principles cannot be enforced; yet they

02. Justice for Children

The delivery of justice to children through the legal system requires a combination of legal rights and enforcement strategies. Even though we do not have a special 'Charter of Children's Rights', in Sri Lanka, we do have a strong theoretical foundation of law and legal concepts that can be used to give children equity and justice in the community. What we lack most are effective law enforcement and social mobilisation strategies that can translate theoretical legal rights into every day realities that will touch the lives of our child population. This is evident if we examine selected areas of our law.

(a) Constitutional Rights

We have observed that the Constitution (1978) recognises fundamental rights that are available to adults and children. The right to life is not specifically articulated in the Constitution but rights such as the right to freedom from torture, and indeed all the other rights presume the existence of a right to life. In any event other laws, such as the strict abortion laws of this country (10) are based on a 'right to life' concept.

The legal right to life as well as the other fundamental rights can only be enforced in

an application presented to the Supreme Court within one month of becoming aware of a violation. They can be claimed only in respect of violations by State or executive authorities, so that violations by private persons or organisations cannot be challenged under the Constitution. The interests of national security, public order, the national economy and other specified factors also legalise the limitations placed on these fundamental rights. (11) The latter premise recognises that the fundamental rights cannot be enforced by seeking – judicial remedies in situations where political violence is met by State controls on personal liberty. The former constraints prevent the assertion of fundamental rights even in times of peace and political stability.

The absence of adequate facilities for free legal aid, and independent advocates of children's causes, such as Non-Governmental Organisations, make the Constitutional remedy very remote for the vast majority of Sri Lankan children. There have been a few instances of cases involving school admissions and torture or personal violence against children, where violations of their fundamental rights have been challenged in the Supreme Court. (12) Unless the one month rule is amended, the attitude to private sector violations modified, and independent legal representation for children provided, the Constitutional remedy will not give accessible relief for violations of fundamental rights, even under normal political conditions.

The concept of 'social action litigation' has been developed in India so as to permit concerned individuals or Non-governmental organisations to challenge the conduct of the State and private persons or authorities who violate the fundamental rights of any person. Courts also make orders requiring affirmative action that will ensure follow up action, so that fundamental rights do not continue to be violated. Non-governmental organisations and even individuals have locus standi to move the Supreme Court on behalf of vulnerable sectors of the population who cannot easily obtain access to this forum. 'Social Action litigation' in the Supreme Court has been used in India on behalf of vulnerable sectors of the child population, such as bonded workers. The recent action of the Sri Lankan Supreme Court in accepting a letter sent by Boosa detenués and its order to the Bar Association to report on their cases is a precedent that may be used to argue that Non-governmental organisations or individuals can apply for redress under the Constitution, on behalf of children.

The guarantees of equality in the Constitution and the other fundamental rights also confer limited jurisdiction on the Supreme Court of Sri Lanka, because it has only a



restricted power of judicial review of legislation and other existing laws. New legislation can be challenged during its passage through parliament, for violation of fundamental rights. However past laws that do so cannot be challenged under the Constitution. (13) Thus laws, such as the Citizenship Act, (1948) and various family laws that discriminate against illegitimate children cannot be challenged for violation of fundamental rights. Similarly inheritance or marriage laws, that express diverse legal attitudes in regard to the rights of male and female children cannot be challenged. The restrictive attitude of the legal system to judicial review of legislation thus limits the scope of legal relief under the Sri Lanka Constitution.

There is an even greater problem faced in implementing and enforcing constitutional rights in the face of the guarantee in regard to cultural rights. The guarantee on equality before the law comes into conflict with the guarantee on protection of cultural rights. The concept of cultural rights can be used to perpetuate discrimination between the rights of boys and girls and between children of different communities in the area of marriage and inheritance. Thus the attitude to inheritance rights, capacity to marry and the age of marriage in Muslim personal law, may continue to be recognised by the legal system even when the law on these matters in respect of other communities is modified to reflect health concerns and foster equitable distribution of economic resources.

In the past, uniformly applicable Sri Lankan legislation on matters such as wills, majority, adoption and maintenance, minimised the significance of pluralism in the area of children's rights. However, the present Constitutional provisions encourages pluralism in personal law. Recent cases on maintenance of Muslim children demonstrate how the maintenance rights of Muslim children are more limited than those of other children. (14) A recent decision on Muslim adoptions in the Supreme Court has undermined the inheritance rights of Muslim children adopted under the uniformly applicable adoption statute. (15) The Supreme Court did attempt to work within the scope of Muslim personal law in the Maintenance case, so as to ensure that a boy over fifteen years was not deprived of the right to claim financial support from his father. However, a majority in the Supreme Court has been insensitive to the plight of an adopted Muslim child who cannot now succeed to his or her adoptive parents. The valuable dissenting opinion of Justice Wanasundera, may continue to be ignored in

future on the ground that the Constitutional guarantees on cultural rights justify a different perception of the inheritance rights of adopted Muslim children.

(b) The Legal Status of Children in the Civil Law of the Country

Civil Court have jurisdiction both under Statutes and the Roman Dutch Law to ensure that the rights of children are protected. The Courts can in their role of 'Uper Guardian of minors' safeguard children's rights in civil litigation concerning their personal and proprietary rights. Indeed appellate courts have used this jurisdiction in the past to ensure that there is independent representation of the child's interests in property litigation. Transfers pertaining to the property of minor children are subject to strict control by the Courts. (15A) They have showed similar concern in custody litigation, and emphasised that they have the power to interfere with parental or adult rights in the child's interests. (16) We have observed that the Appeal Courts have no occasion interpreted the personal laws in such a way as to minimise prejudice to children. There are instances in which they have even interpreted the law on illegitimacy in 'such a way' as to minimise the discrimination against illegitimate children. This 'child oriented' judicial attitude was rejected in the recent adoption case, and is also not evidenced in the trial courts, which handle adoption cases. Sri Lanka law permits adoption only in the case of a child under fourteen. The concept of representation for the young child, obtaining adequate information on the adoptive parents home, and monitoring the child's progress are provided for in the adoption statute. However these legal procedures are not strictly adhered to, so that abuse of infants and young children in adoption has surfaced as a significant area of concern. (16A)

The courts are of course powerless to confer legal rights when Statute laws pertaining to illegitimacy and inheritance do not recognise a child's legal right to just and equitable treatment. We have observed that the law discriminates against illegitimate children born out of marriage. Though legitimate children governed by the General Law, Kandyan Law and Tesawalamai enjoy equal inheritance rights. (17) Muslim law differentiates between children on the basis of gender, and the factor of adoption. A parent of any community may dispose of his property by will according to a uniformly applicable pre-independence Wills Ordinance. This legal position however is a mixed blessing. For a parent may also dispose of property to others and leave minor children destitute. A creative concept of family provision that restricts the right of disposition for the benefit of the testator's close family has not been introduced in Sri Lanka.

Employment law is another area which affects children's rights. The minimum age of employment for children was removed from the Employment Act (1956) which now deals with this subject, and promulgated as a subsidiary regulation in 1957. (17A) Consequently many people are unaware that it is illegal to employ a child under twelve years. The detailed controls on child employment between the ages of twelve to fourteen set out in many statutes are also unrealistic, resulting in children in this age group being exploited in employment in the informal sector.

Legal controls that were enforced effectively in the early years appear to have established a tradition of excluding children under fourteen from employment in industry and the plantations. Factors such as female employment and free education may also have contributed to exclusion of young children from the formal labour force. However, the incidence of child labour in the informal sector and especially in domestic service is a matter of concern.

Compulsory education regulations have not been introduced so as to penalise employers who violate the laws on child labour. An Education Statute of 1939 and the free education scheme gave children a legal right to education from the age of five to sixteen. Yet indigency of parents and exploitative labour practices ensure that poor children are placed in employment and also fail to enter or drop out from the school's system. Employment as well as education laws need to be strengthened to prevent parental and adult exploitation of children in employment.

Sri Lankan statute law, perpetuates the philosophy of nineteenth century English law and makes failure by the father to maintain a minor child a criminal offence. Maintenance on behalf of a child is usually claimed in adversarial litigation in the Magistrate's Court. These legal procedures are ineffective to ensure that a child receives family support. The current 'Janasaviya' programme may in time operate as an effective social security system of support. At the moment, children of all classes cannot easily obtain financial support through maintenance litigation, particularly in circumstances where appeals are filed and they delay the enforcement of court orders. There is an urgent need to simplify the procedures for maintenance litigation so that child maintenance cases can be completed speedily. Legal aid and counselling for such litigation is also necessary. In addition some social security benefit system must be introduced on behalf of children, if parents without means are not to be exclusively dependent on litigation for the purpose of obtaining child support from liable relatives. Such a social security benefit system may also



help to minimise the risk of parents abandoning children or placing them in exploitative employment. It may even help to contain the Phenomenon of migration for Middle East employment, which has placed many children at risk of neglect and abandonment. (17 B)

The present system of justice in civil litigation is adversarial. This does not help children who are the focus of conflict in custody or matrimonial litigation between parents. Most countries have found that children's interests are best protected when family disputes are resolved in an atmosphere conducive to counselling and conciliation. The present Family Courts are in fact District Courts which are adversarial in their approach to litigation involving children.

(c) Protection for Children in the Criminal Justice system (18)

The legal system of Sri Lanka is positive in its approach to child survival and development, and even in regard to a child's civic rights. Laws in these areas focus mainly on rights rather than protections. The Criminal law by contrast adopts a significant protective stance and is meant to deter child exploitation and abuse. The Penal Code (1883) contains many offences such as abortion, infanticide, kidnapping, abduction and rape which are specially meant to protect children from physical abuse and prevent unlawful infringement of personal liberty. However law enforcement in this area is very weak. Besides, there has been no effort to resolve some important conceptual issues.

Sri Lankan laws such as those on custody and maternity leave identify the rights of a woman with those of her minor children. Yet the law on abortion is child oriented without recognising a woman's rights in respect of her own body. Therapeutic abortions are not allowed except in extremely narrow situations. The rigidity of abortion laws has placed both the mother and child at risk from back street abortions. The rape laws permit consent to be pleaded as a complete defence even in the case of a young child, if she is above the age of twelve. The consent defence can also be raised in custodial situations such as domestic employment, where the child is under the control of the man accused of rape. In some legal systems, the burden of proving consent is shifted to the accused in custodial situations, so that he must establish that the woman consented to sexual intercourse. This does not represent Sri Lankan law, so that it is difficult to obtain a conviction even

in cases where the victim of rape is a young child between the ages of twelve to fourteen.

The Laws on child abuse are also inadequate. Incest is not a crime under the Penal Code, while Part V of the Children and Young Persons Ordinance (1939) on cruelty to children has never been brought into operation. Physical assaults and abuse of children must be prosecuted as the highly technical offences defined in the Penal Code. This makes obtaining convictions for physical injury other than homicide, difficult. This is one reason why many of the acts of gross cruelty perpetrated against employed and adopted children or children in the family go unprosecuted. Besides the Juvenile Court Magistrate in Colombo, before whom the child victim of such abuse is usually produced has no jurisdiction to impose sanctions on the adult. The adult's conduct thus goes unpunished unless the Police is willing to make an effort to investigate the case and initiate a prosecution in the ordinary courts.

The law on prostitution and trafficking in children is based on nineteenth century colonial Legislation – the Vagrants Ordinance (1841), the Brothels Ordinance (1889) and the Penal code (1883). Inevitably the provisions regulating prostitution in public places in the former Ordinances, and those regulating female prostitution and traffic in women for the purpose of prostitution, do not bring within their net the new form of boy prostitution that has surfaced as a problem in recent years. The laws on trafficking are also inadequate to deal with problems concerning sale of children for adoption and export of small boys to the Gulf States for Camel riding. Some executive action has been taken recently to tighten immigration controls in regard to travel abroad by small children. However, many boys who are already in the Gulf States as camel riders have not been traced because of the failure to identify, their camps and negotiate through diplomatic channels with their employers.

Statutory controls on use of children in the film industry and for pornography can be found in the legislation regulating employment of children, and obscene publications. (19) Penalties in the Obscene Publications Ordinance (1927) have been increased recently. But it is not clear whether the controls cover use of children in pornography. Frequent use of children in advertising as well as the public advertisements for use of children in advertising suggests that the system of regulatory controls and licenses on this subject is not in operation. Inadequacies in drug law enforcement have encouraged the use of even small children as couriers in the local drug trade.

The Children and Young Persons Ordinance (1939) was a Statute that was enacted so as to provide a system of juvenile justice for children in trouble with the law. This statute provides for a system of probation, and the rehabilitation of children with criminal convictions, or with a history of delinquency. It created a system of juvenile courts and also provided for the removal of children from malfunctioning home environments and their placement 'in care,' either with a responsible adult or an institution. The statute provides for separation of child-offenders from adult prisoners. However the lack of an adequate cadre of probation officers and judicial, prison, and institutional facilities, has resulted in various problems.

There is only one Juvenile Court based in Colombo so that ordinary Magistrates Courts are required to handle cases of child offenders. Children are sometimes placed on remand with adult offenders for minor offences. On the other hand women who are detained or committed to serve sentences of imprisonment may be placed in these institutions with their small children. The recent practice of 'rehabilitating' street children appears to result in a misuse of both the Vagrants Ordinance and the Children Young persons Ordinance. Children are picked up by the police, separated from their parents, brought before the Juvenile Courts, and placed 'in care' in various institutions. (20) However, the official word used in making these placements is 'remand'. This in itself reflects the approach of the authorities to this interference with personal liberty.

The Wimalaratne Committee on Sentencing of Young Offenders produced a report on this subject (21) The suggestions for reform made in this report have not yet been implemented. However the concept of a 'Children's charter' of Rights has been surfaced once again by government, and it is likely that the subject of juvenile justice will receive attention. It is not clear whether there will be any effort to relate these reforms to new problems that have surfaced after the Wimalaratne Commission produced its report. This is partly due to the lack of an effective consultative process in initiating law reform.

Unlike in other areas, the major problem with the administration of criminal justice is the inadequacy of law enforcement. This situation is worsened by lack of public awareness of legal rights and responsibilities, and the virtual non-existence of mechanisms for obtaining representation for the child in legal proceedings. The Probation and Child Care Department does not have adequate resources. Unless individual lawyers are persuaded to intervene, and



agree to flow a case on child abuse, the child's situation does not attract special concern. Adult violations of the law, even as it is, go unprosecuted. The absence of a committed policy of law enforcement this encourages further violations. This is seen clearly in the area of child employment in domestic service, that is a fertile source of child abuse.

Conclusion

The theoretical framework of the law in regard to children's rights has areas of inadequacy. However, it is in the main geared to delivery of justice to children. Gaps and loopholes in the law in general, and the constitution in particular should not be continued, and some major reforms can be introduced in the areas discussed above. However, the need of the moment is not so much theoretical change in the statement of children's rights but an effective and committed enforcement policy. This need is specially urgent in regard to imposition of penalties for adult abuse and exploitation of children. The protective stance of the law cannot become meaningful unless there is such a committed law enforcement policy. Judges, lawyers and law enforcement authorities are required to respond with greater sensitivity to the child's right to receive justice through the legal system.

Crucial to this process is the provision of facilities for independent representation of the child's interests in legal proceedings. At the moment several official administrative units handle issues relating to children – the Children's Secretariat, the Probation and Child Care Department, The Women and Children's Affairs Division of the Ministry of Labour, and the Women and Children's Bureau of the City Police, in Borella. Yet when a problem such as that involving trafficking in boys for camel riding in the Middle East or child prostitution and pornography surfaces, there is no single authority that can be moved to take effective action on behalf of the child/victim. This is a lacuna in the existing administrative arrangements for dealing with problems relating to children. The gap in official response is felt more keenly because non-governmental organisations in Sri Lanka which do assist children placed in difficult circumstances have mainly service oriented programmes for them. These organisations have not, as in India emerged as activist organisations that seek justice for the child in society and through the legal system.

Unless the State, individuals and these organisations combine to place protection of children's rights high on their list of priorities, legislative reforms and a new children's charter will not bring justice to children. A child placed in a well functioning family unit will in general enjoy the rights granted by the legal system. Intervention on his or her behalf may be necessary only on occasion. It is the child in difficult circumstances or from the malfunctioning family unit that needs the special protection of the legal system. Such a child depends on effective law enforcement and legal representation to claim his legal rights.

Law enforcement is fraught with problems in a situation where there has been a total breakdown of law and order. The anguish and suffering of children conscripted forcibly for armed combat in the North and the East, and rendered homeless refugees in their own country cannot be alleviated by Charters and Conventions of Children's Rights. However, laws articulate values that can set standards when an effort is made to implement them. Thus enforcement of existing laws where political realities make law enforcement possible is an urgent need if children's rights in Sri Lanka are to mean something more than empty rhetoric.

Notes

1. Age of Majority Ordinance (1865) as amended (1989)
- 1A. Tesawalamai Code (1806) Part VII refers to sale of children; also, Robert Knox An Historical Relation of the Island of Ceylon (1681)
2. Spiro E. Law of Parent and Child (1985) p. 257; Goonesekera, S. Law of Parent and Child (1987)p. 206
3. Goonesekera *ibid.* ch. VI
4. *ibid.* p. 253
5. Hansard (1934) Vol. 1 & Vol. II, Debates on Children and Young Person's Ordinance.
6. Constitution (1978) Ch. III
7. Art. 12 (94)
8. Arts. 27 (13), 29
9. Ceylon Daily News Oct. 1990,
10. Penal Code (1883) S. 303
11. Arts. 15 (1) to 15 (8)
12. Unreported cases on school admission; Samanthilleke V Perera (1990) unreported; Wijesiriwardene V Kumara (1989) 2. Sri Lanka R 312
13. Art. 16 (1) Art 120 to 124
14. Ummul Marzoonal v Samad (1977) 79 NLR 209; Burhan v Ismail (1978) 2 Sri LR 218
15. Ghouse v Ghouse (1988) 1 Sri LR 25
- 15A. Goonesekera *op. cit.* ch. VII
16. *ibid.* Ch. VI
- 16A. *ibid.* Ch. II, IX; note 15 *Supra*;
Adoption of Children Ordinance (1941)
17. Matrimonial rights and inheritance Ordinance (1876); Kandayan Law Ordinance (1938); Jaffna Matrimonial Rights and Inheritance Ordinance (1911).
- 17A. Children and Young Persons Ordinance (1939) provisions were repealed. Now see Employment of Women Young Persons and Children Act (1956) and the Employment Regulation (1957).
- 17B. Cumararatunga L. K. Sri Lankan Domestic Aides in West Asia. Kiribamune S and Samarasinghe V. (ed) Women at the Crossroads, Vikas (1990)
18. Goonesekera S. Child Prostitution in Sri Lanka. Lawasia (1987); Goonesekera S. Violence against Women, Centre for Womens Research, National Convention Papers (1989).
19. Obscene Publications Ordinance (1927) as amended (1983)
20. Film screened on Rupavahini on 'rehabilitation' to coincide with Children's Week, October 1990.
21. Seasonal Paper No. VI (1988).