

# CHILD RIGHTS IN SRI LANKA

## THE GAP BETWEEN THEORY AND PRACTICE

Indira Samarasinghe PC

---

It was Nelson Mandela who said:

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

On 12<sup>th</sup> July 1991 Sri Lanka ratified the UN Convention on the Rights of the Child. Sri Lanka had already recognized the inextricable link between needs and rights, the indivisibility of rights and the importance of responding need of children within a right based contextual framework. A short time later the Children’s Charter was promulgated incorporating the accepted commitments under the Convention.

The ratification of the Convention without reservations and the promulgation of a Children’s Charter reflect a will on the part of the State to promote the interests of children and youth and to ensure their full mental, moral, religious and social development.

In Sri Lanka, law defines “children” as beings below the age of eighteen. Under the Charter of the Rights of the Child, a child means “every human being below the age of eighteen years.”

The unborn are regarded as persons in so far as it may tend to their benefit, but not to their disadvantage. Children yet unborn are

considered as already born, whenever their interests are in question; and they may therefore succeed *ab intestato*, though they may not have been conceived at the time the person whose succession is in question.

The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body.

If we look at our domestic law Chapter 3 of our Constitution embodies provisions relating to Fundamental Rights. The Fundamental Rights applicable to children are:

1. The right to Freedom of thought, conscience and religion
2. The right not to be subjected to torture or to cruel, inhuman, degrading treatment or punishment
3. The right to equality and equal protection under the law and non-discrimination on the ground of race, religion, language, caste, sex, political opinion or place of birth
4. The right not to be arrested except according to the procedure established by the law and only upon being informed of the reason for the arrest. A child so charged is

---

\* LL.B (Colombo), LL.M (Monash)

entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court.

A child like any other person will be presumed innocent but maybe called upon to prove particular facts. In terms of the Penal Code a child below the age of 8 years is not liable for any offence. Those between 8 and 12 will be liable only if the prosecution proves that the child was mature enough to realize the gravity of the offence.

The Directive Principles of State Policy is contained in Chapter 6 of our Constitution. Here the State pledges to secure an adequate standard of living for all citizens and their families. To protect the family unit as a basic unit of society, to promote with special care the interests of children and youth, so as that to ensure their full development., physical, mental, moral, religious and social and to protect them from exploitation and discrimination and finally its pledge to the complete eradication of illiteracy and assurance to all persons of the right to universal and equal access to education at all levels.

Adoption was completely unknown to the Roman Dutch Law and the General Law relating to adoption is entirely statutory. The State shall ensure that the adoption of a child is authorized only in accordance with applicable law and procedures and on the basis of all information, ascertained as regards the child's status, relating to his parents, relatives and guardians and where necessary consent of the parents or guardians shall be obtained for the adoption. The prevailing law recognizes inter country adoption as an alternative means of childcare if the child cannot be

placed in a foster or an adoptive family or cared for in any suitable manner locally.

Article 19 of the Child Rights Convention imposes an obligation on the State to take appropriate measures to prevent maltreatment or abuse of the child.

The statutory framework for Judicial Intervention in Sri Lanka found in the Children's and Young Person's Act which empowers a Magistrate to deal with a child 'in need of care and protection'.

Once a child has been found to be 'in need of care and protection' a Magistrate may order him to be sent to an approved or certified school if he has reached the age of 12, or commit him to the care of any 'fit' person whether such a person be a relative or not.

The child protection issues became visible during this time. Media exposure was very much centered on the commercial sexual exploitation of children as a global industry, including child phonography.

The optional protocol on the sale of children, child prostitution and child phonography came into force in 2002 and was ratified by Sri Lanka. It clearly defines State responsibility to take necessary legal and administrative measures related to implementation. There was much concern to protect children from perpetrators of child abuse through internet "grooming". Perpetrators of abuse can include parents, members of the extended family, friends, friends of the family, neighbours, teachers, principals, caretakers, including clergy, all of whom children are taught to trust and respect from childhood as people of authority. Older children could also be perpetrators.

Later the issues relating to abuse and violence to children in families were recognized. These include schools, childcare institutions and juvenile detention centres. After the CRC non-violent forms and alternative forms of discipline, began being promoted, but are yet to be completely adopted and practiced. Though children have rights as adults do, they lack the awareness and power to report and respond to such situations and the younger the child, the greater the vulnerability and inability to articulate traumatic events.

Many children recruited by separatist groups lost their lives, their childhood and their families during war. They became disabled and were traumatized. The UNICEF data base on child soldiers set up from 2006 till 2008 recorded more than 6700 children, boys and girls who had been forcibly recruited as child soldiers.

As a response to protection concerns, a presidential task force on child protection was established in 1996. The National Child Protection Authority (NCPA) saw the light of day in 1998. The NCPA was established by Act, No.50 of 1998. This was intended to be a strong and powerful mechanism functioning independent of the Government. It was empowered to conduct investigations into child abuse and monitor the court proceedings on behalf of the victim child. The NCPA was also entrusted with the task of formulating national policies on the protection of children. The NCPA currently provides services in relation to therapy, counseling and rehabilitation for children who have been victims of abuse, violence and exploitation.

The Penal Code was amended in 1995 and 1997 to include child sexual abuse as a Penal Code offence. Since laws alone are

not effective, a law enforcement dedicated to women and children was set up with trained women police. A help line for reporting was also established by the police as well as the National Child Protection Authority.

The Daily News reported (in 2019) that a total of 4568 cases of statutory rape of girls below 16 years of age had been reported in the country in the last three years (2016 to 2018), the Performance Report of Sri Lanka Police indicated. The Report, which was tabled in Parliament last month said 3796 cases of them happened with the consent of the victim as a result of love affairs, whereas 772 statutory rape were without the consent of the victim. The total number of rape cases of women reported in the last three year stood 5558.

Most of those cases of consensual sex are between young children having an intimate relationship. The boy is also below the age of 18 and yet a child. The law provides mandatory sentence for sexual offences. The Supreme Court has held that notwithstanding the mandatory provisions court has discretion, mainly due to these cases. The male child is penalized though he too is a child.

The tsunami of December 2004 raised fresh concerns for children. The Tsunami (Special Provisions) Act was enacted which included special legal provisions to protect children who had lost their parents. Public pressure promoting institutionalization for children, who had lost their parents, was circumvented by government policy introducing aftercare for such children through foster care. A data base was established by the NCPA.

Access to education, and not education, but quality education remains a child right concern, and always will be. This includes reduction of school drop-outs, which occurs in disadvantaged families. State should ensure the child's access to the highest attainable standard of health and treatment of illness, including action to reduce infant and child mortality, and to guarantee appropriate maternal, prenatal and postnatal health care.

It's connected with child labour. Another important area for continued attention. Elimination of hazardous child labour, particularly domestic labour was undertaken by the Ministry of Labour, supported by the International Labour Organization. Children who are involved in child labour are at risk of violence and abuse, deprivation of education and separation from home. Children in child labour including working children, child domestic labour, child combatants, children caught in commercial sex networks, street children and disabled children are particularly vulnerable to abuse.

Children with disabilities need greater care, both prevention and early detection and better access to special education. They are often at greater risk of neglect and abuse and therefore need protection. Corporal punishment still continues in homes, schools, childcare institutions and juvenile detention centres. Fulfilling another 2019 Budget proposal, the government has increased the monthly allowance of over 7000 differently abled persons to Rs.5000/-

Today, there are child rights concerns still to address. This includes abuse and violence in homes, schools, childcare homes and abandonment. The root causes lie in family background, poverty,

alcoholism, drug abuse, domestic violence, single parent families, those with migrant mothers and unemployment. Children in such families need protection.

Since I have been highlighting the main legal provisions relating to Child Rights it is apt to look at two case studies. These relate to child rights violations that took place in 2018.

A homeless mother of a ten-year-old girl handed over her child to an orphanage. The mother then went in search of jobs and worked as a domestic help in a house. The mother was accused of stealing jewellery from the house and ended up in prison. The child was physically and psychologically abused on a daily basis. She was woken up every morning by the carer kicking her on her face. The child suffered abuse in silence wondering why the mother did not even come on New Year's Day to see her. The child didn't know her Mother was in prison. The mother was released from prison and she went in search of the government official who took over the child. The official refused to tell her where the child was. A lady lawyer was consulted by the mother. She made a round of calls and found the child. She and the mother visited the child. The child was unhappy and wanted to live with the Mother. The Lawyer cleared the mother's criminal cases and convinced the Judge of the Juvenile Courts that the mother is fit to provide care and protection for the child.

After careful observation of the mother's economic status and the report of the Forensic psychiatrist on the mother's parenting skills the judge after obtaining a Probation report on the dwelling that the lawyer had found for the mother where she also could carry out income generation

activities the judge gave the custody of the child to the mother.

The mother and child are living happily. This is classic example of an effective family strengthening program. Regulations for childcare institutions should be based on child rights. Regular monitoring and access to confidential reporting systems for children are necessary, including remedial action.

A mother of a three-day old baby informed an agent sending housemaids to the Middle East that she did not want the child. The agent who was a young lady asked her mother to take the baby and look after her. The child lived happily with her foster mother and was studying at Elementary School in an International school. The foster mother was economically strong to look after her as she was a person engaging in business. After 3 years the biological mother wanted the child back.

The child only knew the foster mother and refused to go. The biological mother made a complaint to the Police that the Foster Mother kidnapped the child. The Judge hearing the case sent the child to an orphanage, the child while in the orphanage did not eat or drink but cried nonstop. The child could speak only Tamil and English and was unable to communicate in Sinhala with the staff at the orphanage.

A lady lawyer made an application to court after seeing the child suffering in the orphanage. The Judge after listening to her submissions said that there was a strong suspicion that the biological mother was asking for the child to be trafficked to a foreign country. The Judge considered the foster mother a 'fit person' as stipulated under the

Children's and Young Person's Act and gave custody to the foster mother.

The two case studies illustrate that mere laws in law books are insufficient to make child rights a reality, the community leaders have to come forward and play a proactive role to make child rights a reality. There should be a commitment by all to improve the lives of all the children living in one's community. Although legislation has been passed by Parliament there is the problem of implementing these laws together with the commitment of the Government there is a need for trained manpower and adequate institutional structure for their effective implementation. In addition, in most countries, there is limitation of resources, cultural factors and a lack of awareness on child rights which have had a negative impact on the implementation of existing laws.

Who is really responsible for the implementation of the rights of the children in Sri Lanka? Since it is the State which ratified the CRC, it has the primary obligation to undertake necessary measures to develop policy and action plans and to allocate sufficient resources. The civil society organizations, professional bodies, religious organizations, the business sector, the media, the judiciary and care systems also have a greater responsibility to make child rights a reality.

Dr. Hiranthi Wijemanne, a mother and grandmother herself stated that in her experience children are extremely precious and that a country should put its children first in the family and the community. She said that the development of a country cannot be judged by the number of skyscrapers it has or the number of luxury shops. The development of a country is

judged by how that country looks after it's children. If we are looking after our children we will automatically be looking after the future of our nation.

Once incidents have occurred, the response in terms of law enforcement, judicial action, rehabilitation and reintegration could take a very long time. This can contribute to continuation of abuse. The criminal justice system must place high penalties on the victimization of children. The majority of Sri Lankan communities still do not view crimes against children as serious. Unless perpetrators are made to know that their actions will have severe consequences, and they cannot get away with impunity even if they are related to the child victim, such incidents will continue.

Effective responses must be ensured for child victims and child witnesses by all those involved in the criminal justice system, starting with the scene of the crime, and continuing through prosecution. A positive environment, without child abuse or exploitation should be created in homes, communities, schools and childcare institutions. This will require public and parent education, advocacy and the training of teachers and care givers. This must be accompanied by the development of child friendly and child sensitive procedures for investigating cases of child abuse which avoid child victims being subjected to various interviews and investigations.

We have to work at least in a small way to promote and protect the rights of children because they are the future leaders and the life blood of our society.

We should all be alert and speak out and do whatever we can to prevent violence

against children and prevent all forms of child abuse.

Children need to have outdoor playtime, they need to listen to stories, to paint draw and make music and dance.

The Guardian newspaper reported recently that a Secondary School Teacher complained that the Year 7 intake no longer knew how to tell a story.

Miss Gaby Hinsliff (Journalist) said that our children were being turned into Grammar Robots. She said Writing stories is craft that is crucial for life. And if the Government insists, you can test it, measure it and use it in commerce too!' She suggests.

It is necessary to give priority to the ideas of the children in matters affect them, provide opportunities for the freedom of expression and to access relevant information. Child participation needs greater priority. Access to leisure, play and recreation is a child's right. Most of the parents give priority for studies only and concentrate on academic/professional qualifications.

It was Frederick Douglas (Social Reformer/writer) who said:

"It is easier to build strong children than to repair broken adults."

Society is changing and we must look after the young ones. We need to have compassion. I feel every child has a right to love and care by his or her parents.

Just don't let your child be the MEAN kid!