

Children in criminal justice: a critical review of the contemporary penal laws in Sri Lanka

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Abstract— *Today's children are future of any society. If there is no proper protection and guidance for children today, the future of the country will be in dark. Therefore, it is the obligation of every generation to bring up children who will be adult citizens tomorrow in a proper way and in crime free environment. Unlike the other vulnerable groups, children are exceptionally vulnerable due to their dependency on adults. Therefore, it is the responsibility of all members of the society to ensure their protection which include proper care, guidance and training. However, in Sri Lanka both violence against children and juvenile delinquency have been increased during the last few years. According to the official crime statistics, children are subjected to violence in a range of contexts, including psychological, physical and sexual violence while on the other hand juvenile criminality also is extended to a variety of criminal offences. This situation is led to a considerable concern of the efficacy of the criminal justice and its system in Sri Lanka.*

It is true that, in recent years children and their problems in criminal justice as victims of crimes and delinquents, have been receiving attention both of the Government and as of the Sri Lankan society. Being a member State to some international instruments in preventing violence against children and dealing with children who are in conflict with the law, Sri Lanka has introduced some penal laws to address the issues related to children as victims and delinquents in criminal justice. However, it may be pointed out that these problems of higher level reflect that all what have been done are not sufficient.

Therefore this study intends to critically evaluate the contemporary substantive penal laws and procedural laws relating to the violence against children and juvenile delinquency. This research is based on the qualitative research method which basically entails with an extensive examination of relevant provisions of the legal instruments available from national front as well as the legal and non legal instruments available from international front in some extent.

Keywords— Child victims, Juvenile delinquents, Penal laws

I. INTRODUCTION AND BACKGROUND OF THE STUDY

Child population is approximately 36% of the total population of Sri Lanka. Protection of children from all types of violent activities and reduce the delinquency rate are equally important for the social stability of the country. Media in Sri Lanka, reports many incidents relating to violence against children in a range of contexts, including physical, sexual and psychological which take place both outside and inside the home. It also reports many incidents relating to juvenile delinquency. Crime statistics in the Annual Police Administration Statistical Reports also reveal the increase of the offences committed against children and offences committed by the children in the country. Both these informal and formal information reflect and endorse the protection extending to children in the country is inadequate. Since children are the most vulnerable group of society due to the high dependency on their parents or guardians (adults) and immaturity it is the responsibility of family members to understand, support and ensure the rights of the children and policy makers to strengthen the laws relating to protect the children from all forms of violent activities and prevent them committing offences. This research is a critical analysis of the contemporary penal laws (criminal law) relating to offences committed against children and offences committed by children.

II. PROBLEM STATEMENT

Sri Lanka ratified the Convention on the Rights of the Child on July 12, 1991 and became a member to the Convention. Since Sri Lanka adopts the dualist theory in relation to the application of the international Law in the national jurisdiction, it is required to translate such international agreements in to the domestic level by enacting national laws. Article 157 of the 1978 Constitution of Sri Lanka stipulates that the duly ratified international agreements may have the force of law in the country and no regulation/rule/law may be enacted contrary to the international agreement (Article 157 of the 1978 Constitution of Sri Lanka). Therefore, it is clear that the legal system of Sri Lanka should take necessary steps to pass child protection laws against violence and establish other appropriate mechanisms which align with the provisions in Convention on the Rights of the Child (CRC). Further, Sri Lanka adopted a policy document, Children's Charter in 1992, to protect the children from all types of violent activities

and to protect their rights. In 1999, the National Child Protection Authority (a special institution) which consisted of local monitoring and child protection committees was established to specifically address the child related problems in the country.

Several statutes have been enacted to protect the rights of the children especially protect them all forms of violent activities. Some of them are as follows: Penal Code (Amendment) Act No 22 of 1995, Penal Code Amendment Act No 27 of 1999, National Child Protection Authority Act No. 50 of 1998, Employment of Women, Young Persons and Children Act, No 08 of 2003, Prevention of Child Molestation Act, No 30 of 2005, Prevention of Domestic Violence Act, No 34 of 2005 and Penal Code Amendment Act No 16 of 2006.

Although Sri Lanka Law has been developing to recognize and protect rights and interests of children, violent activities against children have been drastically increased during the last decade. Therefore, there is a necessity to look at this issue from socio economic and legal aspects to ensure the protection of the children. This research is an attempt look at this issue through the legal perspective: human rights and penal laws. On the other hand, the delinquency rate in Sri Lanka also has been increased during the same period. Sri Lanka adopts a separate judicial process to try child/juvenile delinquency cases and implements distinct methods of punishments which focus on their rehabilitation and reintegration into the society as law abiding persons.

The Children and Young Persons Ordinance (CYPO) No. 48 of 1939 (as amended) continues to function as the basic law dealing with the administration of juvenile justice. This legislation also provides provisions for the establishment of the juvenile court and the correctional system for juvenile offenders in the country. Youthful Offenders (Training Schools) Ordinance No. 28 of 1939, Probation of Offenders Ordinance No. 42 of 1944, Penal Code Act No. 2 of 1882, Code of Criminal Procedure Act No. 15 of 1979 and Prison Ordinance No. 16 of 1877 also contain some special legal provisions applicable to child/juvenile offenders and their correction. However, the existing penal laws and the process could not reach to achieve its aim; reduce the rate of the child/juvenile delinquency. Especially the correctional methods which are currently adopted in Sri Lanka do not assist to reach the above said goal. Therefore, it is important to examine the above said penal laws in view of the protection and best interest of the children.

III. HYPOTHESIS OF THE RESEARCH

The drawbacks of the penal laws contribute to increase the problem in Sri Lanka.

IV. OBJECTIVES AND JUSTIFICATION

This research basically attempts to:

Critically examine the existing substantive and procedural penal laws relating to the protection of children from violence;

Critically examine the penal laws which are applicable to children who are in conflict with law.

IV. METHODOLOGY

This research adopted qualitative research method to complete the paper by identifying the legal issues associated with the child victims and offenders. The qualitative research method in this study involved in examination of relevant international and national standards and data collection from authoritative sources. Data collection was basically conducted through library research and internet based data bases. Primary sources which were relevant to the research area of this paper included statutory provisions, international standards, judicial decisions were strongly analyzed. The relevant secondary sources such as reports, research articles, website articles and text books on this topic also were examined to complete the paper.

V. LIMITATION

Although this research is focused on child victims and offenders it was not conducted face to face interviews with victimized children and children who are in conflict with law in order to maintain the research ethics and privacy of children as well as due to other practical difficulties.

VI. DISCUSSION

This particular section of this paper deals with two aspects:

The contemporary penal laws relating to violence against children where the children are considered as victims of crime. Being protected from violence as a right of a child will be discussed as a part of this particular discussion. Violence against children as a social problem in the country, variety of violence against children, main reasons for aggravating the situation, and ill-consequences of violence against child will be discussed to provide an idea of the present scenario of this problem.

Contemporary penal laws relating child offenders who are in conflict with law. A critical study of the existing correctional methods for child/juvenile offenders will be discussed as a part of this particular discussion. Further, this paper will discuss the offences committed by children, causes for commissions of delinquent activities and prevailing laws in relation to correctional system.

A. Children as victims of crime

1) *Variety of offences¹ and violence against children as a social problem in Sri Lanka:* Though the quality, coverage and reliability of information is uncertain (vague), some national statistics on reported crimes are available in the police statistical records and in the National Child Protection Authority (NCPA). According to the information gathered from NCPA, Police Administration Reports and Prison Statistics published by the Department of Prisons, children in Sri Lanka are more vulnerable to sexual offences. Non-fatal offences against body, take the next place in the hierarchy of the crime index. Rape, grave sexual abuse, sexual abuse/sexual harassment, incest, procuring, using children for obscene and exhibition and child prostitution/commercial sexual exploitation of children are more common among the sexually related offences. Being subjected to kidnapping, being stranded and neglected, employing children in begging, hurt, force, criminal force, assault, unlawful restraint, unlawful confinement, cruelty to children and child labour are the common offences committed against children under the category of non-fatal offences against human body. Murder, capable homicides not amounting to murder and causing death by negligence are the common fatal offences committed against children. The offences committed against children are categorized under two groups (minor offences and grave crimes) in Police Administration Reports. In these reports, minor physical injuries, sexual abuse, sexual exploitation, child prostitution, forced participation in pornography, used in obscene publications, incest, unnatural offences, subjected to cruelty, abduction, kidnapping, employing children in domestic labour, employing children for begging, denying education are mainly categorized as minor offences. Murder, attempted murder, culpable homicide not amounting to murder, grievous hurt, rape, and grave sexual abuse are categorized under grave crime group.

The number of reported cases relating to violence against children, which could be classified as minor in nature, was in the range of 700 to 900 per year during the period from 2000 to 2002. However, there was a 65% increase in the number of such offences in 2003 compared to that of year 2000. It was from 900 to 1488. The minor sexual offences such as sexual abuse, sexual exploitation, child prostitution, pornography and obscene publications contributed between 60% to 70% of the total minor offences reported during the period from 2000 to 2002 (i.e. 68.6% in 2000, 67.4% in 2001 and 60.8% in 2002). However, this percentage has decreased drastically in the year 2003 to 34.7%. It is significant to note that a very high number of offences (60.1%) recorded under the category of "others" (such as simple hurt, force, criminal force, assault, unlawful restraint and unlawful confinement) in 2003.

¹ The discussion under this sub topic is based on the statistics published by the Department of Police, National Child Protection Authority and Department of Prisons.

According to the Police Administration Reports murder, attempted murder, culpable homicide not amounting to murder, grievous injuries and grave sexual abuses are classified as major offences against children. From 2000 to 2004, there was a 50% increase which was from 1288 to 1933 in the number of reported grave crimes against children. Crimes under the broader category of sexual abuse (rape, and other varieties of grave sexual abuses) were contributed the range between 65% and 70% of the grave crimes reported to the police during this period (i.e. 65.1% in 2000, 67.0% in 2001, 68.4% in 2002 and 68.9% in 2003).

Though the reliability of the reporting figures of both minor offences and grave crimes against children are questionable, the number of commissions of minor offences and grave crimes were gradually increased from 2003 to 2010. Further, when statistics are analyzed it seems that the number of offences reported in last two years (2011 and 2012) were relatively higher than the previous years in the last decade. There were 5132 cases of violence (both minor offences and grave crimes) against children were reported in 2011. It was 1/20 of the total number of minor offences and grave crimes, reported to the police in the year 2011. However, the statistics published by the above said three institutions indicate that the violence against has been gradually increased during the last decade. Further, those statistics indicate that girl children between 10-14 years of age are more vulnerable for violence, especially sexual violence.

2) *Reasons for violence against children:* Due to immaturity and low level of mental and physical capacity, children are unable to understand the reality of the situations/incidents that they faced and obtain the available formal legal support. Therefore, they may be vulnerable for violence repeatedly. This is the main contributory factor to increase the violence against children. In addition to the above said factor some socio-economic factors such as family breakdown, poverty, peer pressure, poor attention of the parent on their children, urbanization and migration from rural to urban areas are contributed to increase the violence against children. According to the information gathered from NCPA migration of married women for foreign employments is made the situation worst. Especially when mothers employing in abroad, Middle East countries leaving their children behind, those children (between 200,000 and 300,000) often live in difficult circumstances and being subjected to different types of violent activities. Further, vacuums in substantive law especially penal laws and procedural laws also contributed to increase the number of cases of violence against children considerably.

3) *Consequences of violence against children:* According to Jim Hopper (Child Abuse: Statistics, Research and Resources. www.jimhopper.com) the ill consequences of child abuse depends on a variety of factors. They are

intensity and frequency of abuse, the gravity of the violence activity, the time period that the violence takes place, age of the child, the relationship of the perpetrator, response from the other who know the problem of the child. As immediate consequences, abused children generally become quiet, reserved and avoid social settings. Their performance in schools is poor. They experience long-term adverse effects including permanent physical, mental and intellectual impairment, educational and emotional failure, criminal or delinquent behavior, and the possibility that the abused children in turn become abusers. These children may try to deal with stress and anxiety through substance abuse, deliberate self-harm or other harmful types of behaviour. Bodily injuries, unwanted pregnancies, gynecological problems, sexually transmitted disease headaches, permanent disabilities, asthma, irritable bowel syndrome and self-injurious behaviors such as smoking, unprotected sex etc.. are physical problems that the victim children are faced due to violence that they have being subjected to. Depression, fear, anxiety, low self esteem, eating problems, obsessive compulsive disorder, post traumatic stress disorder and alcohol or substance addict are the mental/psychological ill effects of child abuse. Additionally, the abused children may feel to commit suicide due to social stigma.

4) Legal framework: i) Application of the international and regional standards: Sri Lanka ratified the international agreements which are specially focused on child protection (violence and abuse against children) such as the Rights of the Child (CRC 1989) in 1991, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC, 2000) in 2006, the ILO Convention on the Worst Forms of Child Labour (No. 182, 1999) in 2001 and became a Member State to those international conventions. Although, Sri Lanka signed the UN Convention against Transnational organized Crime in 2000, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) and the ILO Minimum Age Convention (1973) has not yet ratified them.

Sri Lanka ratified the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002. It also ratified the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia in 2002.

With regard to the application of the international, as said earlier Sri Lanka follows the dualist system. Therefore, in Sri Lanka international law (treaty law) is not directly applicable domestically. It must first be translated into national legislation (enabling statute) before it can be applied by the national courts. Further, Article 157 of the 1978 Constitution of Sri Lanka stipulates that the duly ratified international agreements may have the force of law in the country and no regulation/rule may be enacted

contrary to such international agreement. Therefore, it is clear that Sri Lanka legal system should enact the child protection laws and other appropriate legal procedures which align with the provisions in CRC, OPSC and ILO conventions.

5) Constitutional provisions and policies in the Children's Charter: After ratifying the CRC, Sri Lanka has introduced the Children's Charter, the first policy document relating to the protection of the rights of children based on the CRC, in 1992 aiming at the protection of the children from all forms of violent activities and ensures their rights and benefits. Thereafter, in 1999, the National Child Protection Authority (NCPA) which consisted of local monitoring and child protection committees was established under the National Child Protection Authority Act No. 50 of 1998 to specifically address the problem of child abuse in Sri Lanka. In 2002 a Special Investigations Police Unit was established at the NCPA to deal with child abuse matters. Prior to 2002 the NCPA had two officers attached to deal with the cases relating to child abuse cases. At present the new unit consists of a total of 16 police officers to deal with such cases. This Police Unit, which operates under the Deputy Inspector General of Police - Crimes and Operation, handles (receive complaints, conduct investigation) the cases of child abuse and report those cases to the NCPA. In terms of the NCPA Act, No. 50 of 1998, the NCPA has been monitoring the progress of all investigations and criminal proceedings relating to such cases. In 2002, 14 complaints of grave crimes and 50 complaints relating to minor offences were reported to the unit directly. The unit itself has detected commissions of child sexual abuse by foreign nationals and has referred those cases to the Interpol and relevant embassies for further action. In addition to the aforementioned Police Unit there are 36 Children & Women Bureau Desks operating in the Island in following police divisions to handle child abuse cases. Those desks are functioned in Ampara, Anuradhapura, Badulla, Bandarawela, Batticaloa, Chilaw, Colombo – North, Colombo – South, Colombo-Central, Elpitiya, Galle, Gampaha, Gampola, Hatton, Jaffna, Kaluthara, Kandy, Kantale, Kegalle, Kelaniya, Kuliyaipitiya, kurunegala, Matale, Matara, Monaragala, Mount Lavinia, Negombo, Nikaweratiya, Nugegoda, NuwaraEliya, Panadura, Polonnaruwa, Rathnapura, Tangalle, Trincomalee and Vavuniya police divisions. The respective ASPP Districts have been supervising such desks.

Non-discrimination and the best interest (well being) of the child are the two basic conceptual policies adopted by the Children's Charter. The Children's Charter well respects to equality before the law and equal protection of the laws. In other words children should not be discriminated due to their age or total dependency situation. The State of Sri Lanka should take the necessary steps including enacting relevant laws to adopt the two policies.

The 1978 Constitution guarantees equal rights without discrimination on the grounds of sex or age and permitted in achieving substantive equality for every human being. According to the Article 12 (4), nothing in the Article 12 prevent special provisions being made by law, subordinate legislation or executive action for the advancement of women, children or disabled people. Unfortunately, the aforementioned right is limited only to the constitution and child victims (especially child victims of crime) are marginalized or forgotten in the criminal justice system in Sri Lanka except in few penal laws which focused on latter in this paper.

Articles 2, 3 and 6 of the Children's Charter, enshrines the best interests of the child concept/policy. Chapter VI (Articles 27 to 29) of the Constitution deals with Directive Principles of State Policy and Fundamental Duties. Article 27 (13) of the Constitution stipulates that State shall promote with special care the interests of children and youth so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination. Since both the Directive Principles of State Policy and the Children's Charter are not legally enforceable, best interest of child victims are not completely covered in statutory law in the country except in a few statutes. Section 5(2) of the ICCPR Act No 56). However, it is significant to note that no single provision is included to define the term child victims in this charter.

Penal Code (Amendment) Act No 22 of 1995, National Child Protection Authority ACT. No. 50 of 1998, Employment of Women, Young Persons and Children Act, No 8 of 2003, Prevention of Child molestation Act, No 30 of 2005, Prevention of Domestic Violence Act, No 34 of 2005, Act, No 7 of 2006 (Amendment), Act No, 16 of 2006 and Act, No 24 of 2006 (Amendments) are some recent legislations enacted to protect the rights of the children and also to protect them from various types of violent activities committed against them.

6) *Penal Code (Amendment) Act No 22 of 1995*: The substantive criminal law/penal is mainly embodied in the Penal Code Act No 02 of 1883 along with some special laws enacted by the legislator of the State of Sri Lanka. The Penal Code Amendment Act No 22 of 1995, perhaps the most remarkable legislative enactment relating to sexual offences, passed by the Sri Lankan Parliament incorporating some substantial changes to the legal provisions then existing, with regard to rape and other sexually related offences. The parliament has enacted this Amendment with special purpose of protection women and children, who are more vulnerable to sexual offences and various types of harassments due the socio-economic set up and the attitudes of Sri Lankan of society. Among the other changes brought with regard to the case of rape, increasing in the age of statutory rape (Section 363 (e) of

the Penal Code Amendment Act No. 22 of 1995) eliminating the requirement that the act (sexual intercourse/access) should be against the rape victim's will, interpreting the term 'consent' as voluntary consent given by the rape victim (Sections 363 and 364 of the Penal Code Amendment Act No. 22 of 1995) and removing the need of evidence for actual physical injuries to indicate the resistance made by the rape victim (Section 363 Exception 2 of the Penal Code Amendment Act No. 22 of 1995) are significant if the rape victim is a child.

According to section 363 (Exception) of the Penal Code No 2 of 1883, sexual intercourse between a man and a girl who was under the age of twelve years was considered as an offence which was known as statutory rape (*Muhanmadulebe vs MuhamaduTamby* (1901) 2 Browne's Rep. 307). In such circumstances consent given by the girl was irrelevant.² Thus, twelve years was identified as the legally accepted age to express the consent for a sexual intercourse. This law has been amended by the 1995 amendment to increase the (legal) age for expressing the consent to sixteen years.³ Therefore, according to the existing law expressing the consent is not a relevant factor if the girl is under the age of 16 years. This is subjected to the exception where the girl is over twelve years of age, wife of the man and not judicially separated from him. Thus, one may argue that the bar to sexual intercourse with a girl under twelve years even if she is the wife, is still available in the criminal law of Sri Lanka. However, the consent expressed by the victim (girl under sixteen years of age) is an important factor to be considered when the offence is committed by a boy who is under eighteen years of age (Proviso to the section 364 (2)). In such cases consent is a relevant factor in respect of imposition of the term of the imprisonment. Further, this may be discrimination between communities who do not recognize child marriages and the communities who recognize child marriages within their special laws.

The considered age (sixteen years) for expressing the consent for sexual intercourse, leads to confusion in the present law relating to child affairs. As mentioned earlier Sri Lanka is a member State to the CRC. According CRC a child means a human being below the age of 18 years unless the law applicable to the child, majority is attained earlier (Article 1). In Sri Lanka the legal age which is recognized for the purposes of age of majority, (Age of Majority (Amendment) Act No. 17 of 1989) exercise of franchise, make a will and enters into a marriage bond (other than Muslim Law) is eighteen years. Therefore, a question arises with regard to the consent expressed by a girl (child) who is between the ages of sixteen to eighteen years, for

² The earlier section 363 (second exception) says that... 'Sexual intercourse by a man with his own wife, the wife not being under twelve years of age is not rape'.

³ Section 363 (e) – with or without her consent when she is under 16 years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man.

a sexual intercourse with a man is of a valid consent. This situation creates a grey area in our law.

Rape is a punishable offence in Sri Lanka. Section 363 of Penal Code Act No 02 of 1883 defines the offences of rape as forced penetrative sexual intercourse of a female victim by a male perpetrator. Therefore, it is clear that sexual intercourse with a male child is not defined as rape in the criminal law. It is not explicitly recognized as child sexual abuse in Sri Lankan penal laws too. Unfortunately this gap was not rectified even in the Penal Code (Amendment) Act 1995.

Although boys are not identified as rape victims *per se* under the original Penal Code, sexual intercourse with boys can be adjudicated under the both ordinary Penal Code (Section 365 of the Penal Code 'of unnatural offences'), and 1995 Amendment Act as unnatural offences (Section 365 of the Penal Code / 17 of the Penal Code Amendment Act No 22 of 1995) or acts of gross indecency between persons (Section 365 A of the Penal Code / Section 18 of the Penal Code Amendment act No 22 of 1995). However, these sections do not protect boys between the ages of sixteen and eighteen. Further, boys who are being subjected to these offences probably could be convicted as co-offenders rather than victims.

(Commercial) sexual exploitation⁴ was not adequately addressed in the penal law of Sri Lanka until the Penal Code Amendment Act of 1995 was enacted. Newly incorporated section; 360B criminalizes any person who allows a child to be on any premises for the purpose of 'causing the child to be sexually abused or to participate in any form or sexual activity or in any obscene or indecent exhibition or show as well as a person who acts as a procurer of a child for sexual intercourse or any form of sexual abuse by means of influence, threat, violence or provision of money or benefits to the child or parents of the child. However this section does not include guardians of the child (Marasinghe, S. W 2002). To the purpose of the section child means a person (both male and female) who is under the age of eighteen. On the other hand the National Child Protection Authority Act of 1998 provides a broad definition for the offence of child abuse which describes any forms of violence against children, including commercial sexual exploitation of children. Therefore one may argue that both the NCPA Act and the Penal Code do not make any distinction between the terms 'child abuse' and 'commercial sexual exploitation of a child' which may be treated as a drawback of the penal laws pertaining to protection of the children against violence.

Grave sexual abuse was introduced as a separate criminal offence by the 1995 amendment. According to section 365

B any sexual activity which does not amount to the offence of rape is considered as the offence of grave sexual abuse. Consent of the victim is not a relevant factor to prove *mens rea* when the victim is person who is under sixteen years of age. The punishment imposed for the offence of grave sexual abuse is varied on the age of the victim. The minimum term of imprisonment is lesser (five years) if the victim of grave sexual abuse is under sixteen years of age, than the victim is under eighteen years of age (if it so seven years).

Prior to the 1995 amendment, incest was not recognized as distinct criminal offence in substantive criminal law of Sri Lanka. Section 364 (A) defines incest as 'sexual intercourse with another, who stands towards him in any of the following enumerated degrees of relationship which include biological and adoptive parents and grandparents, children and grandchildren, sisters, brothers, nieces and nephews, aunts and uncles, widows and half-relations. The law applies to both male and female victims and either males or females may be considered perpetrators. However, this section does not distinguish child victims from adult victims.

Cruelty to children also was not criminalized until 1995. Section 308A of the Penal Code stipulate that willfully assaults, ill treats to a person who is under eighteen years of age or neglects or abandons of such person is punishable offence. He section is equally applicable to both male and female children.

Prior to 1995, there was rule of practice which required the judge to take mandatory and independent corroboration (*The King vs Ana Sheriff* (1941) NLR 169; *The King vs Marthelis* (1942) 43 NLR 560; *The King vs Themis Singho* (1944) 45 NLR 378; *The King vs Basnayake* (1948) 49 NLR 414 CAA; *King vs Athukorala* (1948) 50 NLR 256 CCA) to the testimony of a prosecutrix in a rape case. The requirement that the act should be against her will is no longer presented in the penal law of Sri Lanka. Unlike the earlier law, evidence of resistance such as physical injuries to body (especially the victim of rape) is not essential to prove that the particular act took place without her consent. Therefore, now it is established in our law that it is not necessary that the evidence of the rape victim should necessarily be corroborated and the degree of corroboration is varied with the circumstances of the case (C/F *Rajaratnevs A.G. Anuradahapura HC No.28/94 / CA No. 19/94* in 1996; *PremadasavsState* (2000) 2 SLR 385 AC; *InokaGalage vs Kamal Addararachchi* (2002) 1 SLR 307). However, in practice many Judges (many times) look for corroborative evidence which go the extent of proving the resistance made by her. This practical inference put the raped victim in secondary victimization. Therefore, it is important to work towards providing a clear understanding of the purpose of the 1995 Amendment, particularly this provision to the judicial officers.

⁴ A Situation Analysis of Child Sex Tourism in Sri Lanka (Negombo, Colombo, Mt. Lavinia, Hikkaduwa, Galle, Anuradhapura and Trincomalee). South Asia Partnership International, 2003.

It is true that there is no sentencing policy as to determine the most appropriate degree of punishment on the offender who has committed the offence of rape. The sentencing policy in relation to the above matter varies depending on the attitude of the judges who hear the cases and the discretion for considering various factors (*A.G. vs Ranasinghe* 1993 2 SLR 81)⁵ relating to the specific case. This discretion may lead to create a sentencing disparity of punishments, even in similar circumstances. This defeats the idea of uniformity of punishment, further putting rape victims in a discriminative position. However, the Penal Code (Amendment) Act, No 22 of 1995 introduced the concept of minimum sentencing rule in respect of all sexual offences (Rape –section 364, trafficking - section 360C, Incest- section 364A and Grave Sexual Abuse section 365 B) in order to send the message of deterrence and minimize further dilemma that the victim has to go through by imposing a lenient punishment on the offenders who committed a heinous offence. Similarly, suspended sentence is prohibited where there is mandatory minimum sentence prescribed as the appropriate punishment. However, the provisions in 1995 Amendment did not remove the discretion of the Court to impose a sentence lesser than ten year minimum sentence where statutory rape is committed by a boy under eighteen years old (Proviso to the section 364 (2) of the Penal Code Amendment Act No. 22 of 1995). This is a divergence of the main purpose of the particular amendment, i.e. protection of women and children from gender-based violence, but focuses more on rehabilitation of the offender.

Section 17 of the Code of Criminal Procedure Act No 15 of 1979 provides necessary legal provisions in respect of the compensation to the victims of a crime. Through compensation order Courts may direct the offender to repair the loss or damages caused to the victim. Usually, compensation is recovered from the fine as an ancillary order, which is imposed for an offence (Section 17(6) of the Code of Criminal Procedure Act, No 15 of 1979) as decided by the Court in the decision of *Rabo v James* (32 NLR 91). However, the Penal Code (Amendment) Ordinance, No 22 of 1995⁶ empowers the Courts to impose a compensation order as a mandatory punishment (*Inoka Gallage v Addaraarachchige Gulendra Kamal Alias Addaraarachchi* 2002 1 SLR 307) with imprisonment for

⁵ In this case the Court emphasized that in a rape case an immediate custodial sentence can be imposed to mark the gravity of the offence, to emphasize the public disapproval, to serve as a warning to the others, to punish the offender and to protect the woman.....

⁶ Section 364 of the Penal Code (Amendment) Ordinance, No 22 of 1995 says that whoever commits rape shall, except in the cases provided for in subsection (2) (3), be punished with rigorous imprisonment for a term not exceeding twenty years and with a fine, shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person. For more see, sec.364 (2) (g) of Penal Code (Amendment) Ordinance, section 365 as amended by the Penal Code (Amendment) Ordinance, No 22 of 1995.

sexual offences (Sections 364 (1) and (2), 365 A of the Penal Code (Amendment) Ordinance, No 22 of 1995).

7) *Penal Code Amendment Act No 16 of 2006* : The laws of the Penal Code on trafficking in Sri Lanka have recently been amended to concur with the Optional Protocol on Trafficking. As of the 2006 amendment, the mechanisms of trafficking include buying, selling, bartering, recruiting, transporting, transferring, harbouring, receiving, 'or any other act' (Section 360 C of the Penal Code amendment Act No 16 of 2006). The addition of the words 'or any other act' allows the law to address a wide range of recruitment mechanisms that may not be included in the definition. In the 2006 amendment, the *actus reus* of the trafficker includes the use of threat, force, fraud, deception, or inducement or by exploiting the vulnerability of another. However, some common means by which traffickers acquire victims are not included, such as abduction, or deceiving, causing fear to, threatening or coercing the parent or guardian.⁷ Whereas the previous Penal Code legislation on trafficking, as of the 1995 amendment, was limited due to its emphasis on the transportation of the trafficked child 'to a foreign country', this has been addressed in the 2006 amendment, in which the country of destination is not mentioned. Thus the law includes both internal and external trafficking.⁸ The most significant weakness in the present amendment is the exceedingly soft penalty for trafficking, being 'not less than two years' for an adult, and 'not less than three years' for a child' (Section 360 C of the Penal Code amendment Act No 16 of 2006).

8) *Code of Criminal Procedure Act No 15 of 1979*: Under the criminal law in Sri Lanka, generally the accused has a right to counsel or in other words, the right to represent. However, in *Jagathsena v Bandaranayake* (1992 1 SLR 371) the court has recognized that the right be given to the aggrieved party to be represented in terms of section 260 of the Code of Criminal Procedure Act. Therefore, the aggrieved party in a sexual offence case can support any relevant matters before the trial judge which the aggrieved party wishes to bring to the notice of the court of law and this could be done even before the Court of Appeal.

Section 191 and 400 of the Code of Criminal Procedure Act No 15 of 1979 permit (provide the opportunity to) the victim to conduct the prosecution in the absence of a Counsel for her in summary trial before the Magistrate and in the absence of the representative of the Attorney General in non-summary trial before the High Court respectively.

⁷ A Study on the Law and the Enforcement of the Law relating to Trafficking in Sri Lanka. Lawyers for Human Rights and Development, 2004

⁸ Anti Trafficking of Women And Children Initiatives. South Asia Resource Directory: Asia Partnership for Human Development, 2005.

9) *Evidence Ordinance No 14 of 1883*: Further, the Evidence Ordinance has also taken some steps to ensure that the victim is able to give evidence without being subjected to any undue harassment or intimidation. In other words the Sri Lankan legislature has set out legal provisions having in mind the victim protection, dignity, integrity and safety. Those steps are as follows: Section 150 provides that there must be sufficient basis for asking questions otherwise the Attorney-at-Law can be reported to the Supreme Court; section 151 prohibits asking indecent or scandalous questions whilst section 152 restricts asking insulting or annoying questions from the victim; section 153 forbids cross examination of bad character of the victim. Further, the Judicature Act (Amendment Act No 27 of 1988) provides for direct indictment in cases of statutory rape in order to avoid the secondary victimization of the victims.

However, the sources indicate that existing laws designed to protect children are poorly enforced. Sources indicate that many law enforcement officers, as well as the public, are not fully aware of the laws designed to protect children from all the types of violence. Some statements say that lengthy delays in the prosecution of sexual assault cases, long delays in court proceedings, impunity enjoyed by the perpetrators and discrepancies fall short in collection of medical evidence in cases of sexual offence have contributed to the *de facto* decriminalization of rape (Asian Human Rights Commission (AHRC), 2010, *the State of Human Rights in Sri Lanka in 2010*, (AHRC-SPR-010-2010).

B. Children as offenders who are in conflict with law

1) *Applicable National Laws Relating to Juvenile Delinquency*: The Children and Young Persons Ordinance (CYPO) No. 48 of 1939 (as amended) continues to function as the basic law dealing with the administration of juvenile justice. This legislation also provides provisions for the establishment of the juvenile court and the correctional system for juvenile offenders in the country. Youthful Offenders (Training Schools) Ordinance No. 28 of 1939, Probation of Offenders Ordinance No. 42 of 1944, Penal Code Act No. 2 of 1882, Code of Criminal Procedure Act No. 15 of 1979 and Prison Ordinance No. 16 of 1877 also contain some special legal provisions applicable to juvenile offenders and their correction. However, the existing laws as a whole still have been unable to comply with the UN Convention on the Rights of the Child in 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) in 1985, UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) in 1990 and with the UN Standard Minimum Rules for Non – Custodial Measures (Tokyo Rules) in 1990 which focus on the best interest of the child/juvenile. This is one of the prime reasons for the failure of the present correctional system in the country.

2) *Meaning of ‘Juvenile Delinquency’ under Sri Lankan Law*: A juvenile in common dialect would be defined as a child

or an adolescent/young person, between childhood and man/womanhood (N.V. Paranjape, 1996). According to the Children and Young Persons Ordinance, child means a person under the age of 14 years and young person means a person who has attained the age of 14 years but under the age of 16 years (Section 88). Young persons who are between the ages of 16-18 are not considered as juveniles under this ordinance. However, according to the Children’s Charter of Sri Lanka, child means any person under the age of 18. This incompatibility leads to a confusion of the law relating to juvenile delinquency especially in rehabilitation. According to section 75 of the Penal Code the minimum age of criminal responsibility is 08 years. A person under 08 years of age is considered incapable of possessing ‘*mens rea*’ which is one of the main elements required to constitute a crime under criminal law in Sri Lanka. Children who are over 08 years but less than 12 years are not punished unless they have attained sufficient maturity (Section 76 of the Penal Code). This shows that there is a contradiction between the CYPO and the Penal Code regarding the imposition of criminal responsibility on children which also leads to create problems in the rehabilitation of juvenile offenders.

Generally, the term delinquency refers to a large variety of disapproved or, antisocial behavior of children and adolescents, which the society does not approve of, and, for which of admonishment or corrective measures are justified in the public interest (Jain A.K. 1995). The particular term has an extensive meaning which includes violent, hostile, and disobedient behaviour of children and their attitude of unresponsiveness towards society. This means a wide variety of acts and behaviour included within the term delinquency are otherwise non criminal in nature or not prohibited by existing criminal law and are freely tolerated if done by adults. In Sri Lanka acts of juvenile delinquency ranges from petty offences such as begging, vagrancy, sale of tobacco, prostitution, petty stealing, selling and possessing of excisable articles/narcotic drugs, force, criminal force, assault and simple hurt, to serious crimes such as robbery, grievous hurt, murder and offence against State including terrorism. If a juvenile who violates the Penal Code (as the main written legislation describes the crimes and punishments) or any other written law which also prescribes crime and punishment, he/she should be punished under that respective law. Further, the CYPO also recognizes some acts as criminal offences when those activities are done only by a child or a young person.

3) *Prevalence and Causes of Juvenile Delinquency*: According to statistics, 90% of the male juvenile delinquents were alleged to commit stealing and other petty offences during the period of 2005-2012 except the North and the East of the country. 90% of female juvenile delinquents were alleged to commit prostitution, vagrancy or run away from home during the same period. However, in the last 30 years, in the North and the East parts of the country, persons

below 18 years were recruited as soldiers and they have become direct participants of the war. They were used in the war front by the LTTE group. Child soldier recruitment by the LTTE group was to become institutionalized after 1990. Out of the estimated fighting force, 20-40% were children (2009 UNISEF Report).

Though it is difficult to prioritize the causes of juvenile delinquency according to its contribution to the problem, this research found some causes that more or less contribute to aggravate the problem of juvenile delinquency. Those are as follows: Disintegration of the family, rapid changing patterns in modern living, associational impact, modern technology, failure in the school life/truancy, poverty, cultural conflicts among the various ethnicities in the country, illiteracy, child labour, squalor, disobedience and biological factors such as early physiological maturity, low intelligence and irresistible impulses. Besides the aforesaid causes, parents' overseas employments can also be considered as the other contributing factors for delinquency.

4) Rehabilitation: In the latter half of the 20th century, Sri Lanka recognized that stiff /harsh/corporal punishments are not necessarily the required response towards juvenile delinquency but rehabilitation should be the main aim of punishment of juvenile offenders. It is also recognized that adults are responsible for the care, protection, rehabilitation of them. Some researchers found that corporal punishments do not reduce juvenile delinquency rate or such punishments do not contribute to decrease the reconvicted and recidivism rate in juvenile delinquency (Andrews et al., 1990). Some researchers suggested that community based correction are more effective than the institutional based corrections to meet the best interest of juveniles and to reduce the reconvicted and recidivism rate of juvenile delinquency (Leschied A.W., 2001 and Devid B. Wilson, 1998). However, there is no doubt about that juvenile delinquents should be treated specially and differently from adult offenders and the punishments imposed on them should take the form of therapeutic not punitive.

5) Correctional System: Sri Lanka has both the institutional and community based corrections in the correctional process of juvenile delinquency which interconnect in the proceedings of juvenile offenders. The convicted children and young persons cannot be committed to prisons (Section 23 of CYPO). They should be sent either to remand homes (section 24 of CYPO), approved (section 26 of CYPO) or certified schools (section 26 CYPO).⁹ Therefore, in Sri Lanka there are three types of correctional institutions¹⁰

⁹ Certified School means a school established under section 51. These are State institutions.

¹⁰ 01 Approved School, 04 certified Schools and 07 Remand Homes and 200 private residences as accommodation where necessary care and protection may be provided for the juvenile delinquents.

established under the CYPO to rehabilitate children and young persons during the period of punishment. These institutions are administered by the Department of Probation and Child Care and the correction programmes are conducted by the Provincial Department of Probation and Child Care Service.

An offender under the age of 16 could be sent to a remand home for a period of not exceeding one month. If a person who is under 18 years commits an offence, the prescribed punishment against the offence is death sentence, the court then should order that young person to be detained in a remand home until the pleasure of the President is made known. If the juvenile commits any other indictable offence, the court should order that person to be detained in a remand home until the pleasure of the Minister is met. The young persons may be sent to a certified or approved school for the maximum period of three years. Mental development of the children and young persons, moulding towards good qualities, turn them law abiding persons and improving their skills are the main aims of the institutional rehabilitation activities. However, young persons also may be committed to prison only if the court certifies that they are unruly or disobedient and cannot be detained in a remand home or a certified school (Section 25 of CYPO).

The male inmates are trained in vocational training programmes such as carpentry, masonry and electrical and mechanical work and female inmates are trained in home science and handicraft in these institutions. However, it is hard to find correctional programmes such as individual counseling, cognitive behavioral therapy, or formal education conducted by these correctional institutions.

Probation and supervision under suitable persons are currently available community based correctional methods in the country to rehabilitate juvenile offenders. When a child or a young person commits an offence, the court may release the offender on probation under Probation of Offenders Ordinance taking into consideration of the nature of the offence, the character of the offender, antecedents, family environment, mental and physical condition of the delinquent juvenile (section 4 a). The probation service should be performed by the probation officer of the probation unit in the respective judicial zone. He also should provide the relevant information about the delinquent to the court. The supervision activities are conducted by a court order. Juvenile offenders committed to the probation service are supervised for three years and children on a court order are supervised for 1 or 2 years and for a maximum period of 3 years. During this period the officer's role is as follows: to improve the juvenile offender's behavior through counseling, maintaining individual profiles of each juvenile offender, if the offender is schooling make the necessary arrangements to continue the schooling and take follow up action and supervision on him/her, if the offender is not schooling and interested

in another vocational career admit him to a Professional Training Institute and have him trained and provide the necessities to continue the training. However, at present community based correction is not functioning in a proper and a successful manner.

6) *Issues in the existing correctional System:* As said earlier there is a confusion in Sri Lankan law as to the definition of a child where different laws define the term child differently which leads to an incompatibility with the UN treaties such as Convention on Child Right and International Non Treaty Guidelines (Riyadh Guidelines) and Principles (Beijing Rules and Tokyo Rules) . This could be identified as a main problem in the juvenile justice system in Sri Lanka. Punishments imposed by the Juvenile Court takes the form of punitive not as a therapeutic approach. As a result, most of the juvenile offenders are sent to these centers as the first option. Although the number of the admissions of the juvenile offenders has rapidly increased, the capacity of the institutional correctional system has not extended in shape at the same rate. Due to this reason numerous practical problems could be created with regard to the institutional rehabilitation programmes in Sri Lanka. They are, lack and bad conditions of institutes, overcrowding of these centres, difficulties in providing proper care and protection to the inmate delinquents, violation of child rights including torture and ill-treatment, difficulties in providing the required standards of privacy and health, inadequacy of separation of inmates in accordance with the international standards, difficulties in conducting the treatment programmes in a proper manner, the existing rehabilitation methods do not adequately meet the needs of the inmates, financial constrains of running good rehabilitation programmes, children are not accepted by their guardians after rehabilitation and lack of sufficient, efficient and trained staff. However, it is significant to note that community based correction programmes also have problems. The unpleasant family environment and poverty, lack of efficient and trained staff, limited public participation and inadequate attention from the court towards this method are some of them.

VII. CONCLUSION

Although the Parliament of Sri Lanka has put some efforts into eliminating violence against children by introducing substantive penal laws and procedural laws as counter legal measures for the issue of violence against children especially, (the issue of sexual violence), these laws are not sufficient to eradicate problem completely. Therefore it is suggested that definition to child should be aligned with CRC, review of the present system of mandatory sentencing in child-related crimes, in order to identify whether such provision has had the desired effect of

reducing those crimes. Further, the effective function of both the correctional institutions and the community based corrections are important to rehabilitate the children who are in conflict with law. However the policy and implementation problems in the present correctional system of the juvenile delinquents, the reduction of the reconvicted and recidivism rate of the juvenile delinquency could not be achieved in a successful manner.

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