

Child-Friendly Justice and the Best Interest of the Child: A Comparative Analysis of Sri Lanka, India, and International Standards

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Abstract – A child is generally regarded as a person below the age of eighteen years. Even though some diversions can be found from this general concept in special instances, it is an undoubtedly accepted principle that the best interest of the child is the paramount consideration in any disputed situation. This concept shall be regarded as the fundamental ground of a child-friendly justice system. This system intends to ensure a child to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others and seeks to guarantee the respect and the effective implementation of all children’s rights. After a comprehensive study of the existing juvenile justice systems in Sri Lanka and India, it was discovered that Sri Lanka requires more measures to eliminate the practical difficulties a child faces during a court proceeding and to ensure the best interest of the child in a child-friendly juvenile justice system.

Keywords— *best interest of the child, child-friendly justice, Children and Young Persons Ordinance, Juvenile Justice (Care and Protection of Children) Act, Protection of Children from Sexual Offences Act*

I. INTRODUCTION

The ideology that, “every child, whose life has become interweaved with the legal system, deserves a special and a unique attention” is not an alien concept. With this ideology, comes the conspicuous concept of “Child-Friendly Justice”. It is a well-known fact that children who come into a court of Law often get psychologically and socially victimized, which results in additional trauma to themselves. Thus, child-friendly justice espouses the objective that the judicial system of a country can be a persuasive, dominant, and compelling tool to effectively and positively shape the life of a child who comes into contact with courts. The international child-friendly

justice jurisprudence unveils valuable substantial principles that allow children to enforce their rights and persuade States to establish and promote child-friendly court procedure policies.

Best Interest of the Child concept (BIC) is the prominent consideration in family law when ascertaining issues regarding children. South African courts have notably emphasized the gravity of this conception in child custody judgments. Even in Sri Lanka, since the landmark judgment of *Muthiah Jeyarajan v. Thushiyanthi Jeyarajan and Others*, this concept has played a prominent role in family law matters relating to children. When the courts determine any matter regarding a child’s welfare and upbringing, they are obliged to give considerable weight to the substantial preferences and feelings of the child concerned. This has to be determined as per the factual circumstances of each case, concerning the child’s personal sphere including but not limited to age, understanding, social status, and relationship.

The United Nations Convention on the Rights of the Child (UN CRC) enunciates this Best Interest of Child concept without providing an explicit definition. It provides for states’ general obligation of preserving this interest. Article 3 (1) of the UN CRC, declares that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Sri Lanka is also a state party to this convention. Thus, it can be contended that, in the case of children who encounter the law, among other relevant factors, it is essential to acknowledge the concept of Best Interest of Child as well, to assure the protection of law these children deserve.

A. Statement of Problem

Child-Friendly justice is an important aspect of the administration of justice in Sri Lanka. In an adversarial justice system, the judge must play a crucial role to discover the truth from the accused, victims, and witnesses. When the accused or the victim is a child, the courts generally adhere to the best interest of the child principle. However, the position of Sri Lankan law regarding this concept is somewhat contested. Even though that concept is theoretically there in the justice system of Sri Lanka, it is reasonable to argue that, when compared to other jurisdictions and international standards of the best interest of the child concept, the practicability of the concept in Sri Lanka is not adequate.

B. Research Question

Does Sri Lanka have adequate measures to ensure the practicability of the best interest of the child in a child-friendly juvenile justice system?

C. Research Objectives

This paper pursues to accomplish the following objectives: (a) to analyse the definition of the child, (b) to evaluate the legislative framework of child-friendly justice in Sri Lanka, (c) to compare the juvenile justice systems in Sri Lanka and India, (d) to appraise the adequateness of the existing legal framework of Sri Lanka regarding a child-friendly juvenile justice system.

D. Methodology

The researcher has used the doctrinal research methodology for this research, i.e., the use of secondary sources. Thus, landmark judgments, articles, journals, and websites have been used and analysed to fulfill the research objectives.

II. THE DEFINITION OF "CHILD"

A. International Legal Context

Generally, a "Child" can be defined as a young person between infancy and puberty or as a person who has not yet attained the age of majority. But some definitions of a child include a foetus too. Black's Law Dictionary defines a child as a person who has not reached the age of 15 years. The UN CRC defines a child as "a human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". In the guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, a child is defined following the said definition of the UNCRC. However, the Havana Rules, Riyadh Guidelines, and Beijing Rules define

persons who are below eighteen years differently, in contrast to UNCRC. Therefore, it is apparent that a uniform definition of the child cannot be found in these international legal instruments.

B. Sri Lankan Legal Context

When addressing the Sri Lankan context, a slight diversity can be found in Sri Lankan legislation concerning the definition of the Child. Notably, most of these legislations have defined the term child with recognition of the physiological and biological differences of the children, which includes their ability to understand and maturity. It can be argued that by being human and because of his vulnerability based on immaturity, a child below the age of eighteen years is entitled to rights.

The *Age of Majority Ordinance* (Sri Lanka) interprets that, "all persons when they shall attain, or who have already attained, the full age of eighteen years shall be deemed to have attained the legal age of majority, and, except as is hereinafter excepted, no person shall be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding." However, section 3 of the *Age of Majority Ordinance* declares that "Nothing herein contained shall extend or be construed to prevent any person under the age of eighteen years from attaining his majority at an earlier period by operation of law." which somewhat creates a confusion about the legal definition of child in the said Act.

The *Children and Young Persons Ordinance* (Sri Lanka) is the fundamental legislation of Sri Lanka that concerns the juvenile justice system. While this Ordinance defines a child as a person under the age of fourteen years, it further defines that "a person who has attained the age of fourteen years and is under the age of sixteen years as a young person (a juvenile)". There are no provisions for children between sixteen to eighteen years of age and they are neither considered children nor young persons. This interpretation is controversial to the UN CRC definition of a child, which shall be under eighteen years of age. Thus, it leads us to the contention that, for this Ordinance, a child who is above 16 years can be recognized as an adult.

However, the *Youthful Offenders (Training School) Act* (Sri Lanka) identifies those who have reached the age of sixteen and who have not yet reached the age of twenty-two as youthful persons. According to that Act, a detention order can be given by any court and

not necessarily by the juvenile court. Therefore, it is evident that the Sri Lankan law recognizes 3 categories, namely; children, those who are under the age of fourteen, young persons or juveniles, those who are between fourteen to sixteen years, and the youthful offenders, those who are between sixteen to twenty-two years. It can be asserted that this dichotomy makes the task of implementing juvenile justice principles difficult, ambiguous, and unequal.

Section 5 illustration (a) of the *Penal Code* (Sri Lanka), states the minimum age of criminal liability is eight years as provided by the general exception provided in section 75. However, the Penal Code (Amendment) Act No. 10 of 2018 raised the minimum age of criminal responsibility in section 75 to twelve years but the upper limit remains undefined. Even though section 76 provides for the criminal liability of children between twelve to fourteen years age group, criminal liability of the children in between fourteen to eighteen years age group remains undefined. Section 83 defines the minimum age to give consent as twelve years, as a defence to criminal liability.

C. Indian Legal Context

In India, a child is defined as anyone under eighteen years of age as per several main Indian national laws and policies. Section 2 (12) of the Juvenile Justice (Care and Protection of Children) Act 2015 (India) defines a child as “a person who has not completed eighteen years of age”. Additionally, a child in conflict with law is defined as “a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence” and goes on to define the characteristics of a child in need of care and protection. Furthermore, the said Act defines the best interest of the child as “the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development” and child-friendly as “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.”

The National Policy for Children 2013 (India) adopted on April 26, 2013, by the Ministry of Women and Child Development, intends to include all aspects of the development and welfare of the child and it aims to protect and encourage the rights of the children to survival, health, nutrition, education, development, protection, and participation. This

policy can be regarded as a gradual improvement of policies regarding children, from the first policy made by the Government of India for child welfare - The National Policy for the Child, 1974. In its preamble, a child is defined as “any person below the age of eighteen years.”

The Protection of Children from Sexual Offences Act 2012 (India) underlines the intent to “protect children from offences of sexual assault, sexual harassment, and pornography and provide for the establishment of Special Courts for a trial of such offences and matters connected therewith or incidental thereto”. Section 2 (d) of the said Act also defines the child as “any person below the age of eighteen years.”

Thus, it is apparent that, unlike in Sri Lanka where there are several age limits in defining a child, in main legislation related to child protection, India has a unanimous interpretation of a child.

III. CHILD-FRIENDLY JUSTICE

A. International Legal Framework

Conceptually, child-friendly justice seeks to minimize the challenges that children face during a court proceeding. However, it is noteworthy that none of the international legal instruments define the concept of “Child-Friendly Court Procedure”. Child-friendly court procedure is mainly aimed at building the confidence of children about the justice system as a reliable, trustworthy, and solution-giving mechanism about their spectrum of issues. Thus, several international instruments regarding child-friendly justice, (which provides for the best interest of the child as well) can be found, which were enacted with the hope of eliminating the agonizing encounters a child face during legal proceedings in an adult court and to provide them the full access to justice which is essential for them to bring their violations of rights. However, it must be noted that these rules, which are mainly implemented through UN General Assembly Resolutions, are not legally binding per se, and are commonly referred to as “soft law” instruments that have an influential impact and a sense of moral obligation on UN member countries, concerning strengthening the juvenile justice systems.

1) *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules):*

These rules, which were originally drafted at a conference in Beijing and were initially recognized as the Bill of Rights for Young Offenders, have been implemented cause of a UN General Assembly Resolution, on 29th November 1985. Beijing rules are concerned with the treatment of Juvenile and Underage Offenders and prisoners. This main objective has been declared in Rule 5, where it has been stated that “The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.” It can be contended that the phrase “well-being of the juvenile” is equivalent to the concept of Best Interest of Child, which can also be regarded as the universal standard of treatment of a child.

Part 3 of the Beijing Rules, which is concerned with the matter of adjudication and disposition regarding juvenile offenders, Rule 14.2 states that “The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.” Furthermore, in Part 4 of the Beijing Rules, which provides for non-institutional treatment, it has been stated that, “Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process.”

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of the Beijing Rules.

2) *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines):*

Beijing Rules are focused on the structure and operation of the juvenile justice system and do not include proper provisions for prevention. Riyadh Guidelines fulfil this lacuna. These guidelines were adopted and proclaimed by UN General Assembly Resolution 45/122 of 14th December 1990. They seek to “affirm the importance reducing juvenile delinquency plays on reducing crime, the necessity of implementing the guidelines according to a child-centred approach, and the communal responsibility for children’s well-being from the earliest ages onward.”

Rule 4 declares that, “In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following: (a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child.” Rule 20 states that, “In order to maintain a link between the detained child and his or her family and community, and to facilitate his or her social reintegration, it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty, unless the best interests of the child would suggest otherwise.” Also, Rule 43 provides that, “In accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the best interests of the child.”

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of Riyadh Guidelines as well.

3) *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules):*

The Havana Rules, which hoped to eliminate the widespread practice of incarceration of children back then, were adopted to encourage the use of alternatives to imprisonment and to ensure that juveniles in custody have their basic rights protected, instead of calling for better and more prisons for juveniles. These rules were adopted and proclaimed by UN General Assembly Resolution 45/113 of 14th December 1990. The Havana Rules define a juvenile as every person under the age of 18 years and defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of the Havana Rules as well.

B. Sri Lankan Legal Framework

Child-Friendly Justice anticipates guaranteeing the respect and the effective implementation of all children's rights at the highest attainable level. It empowers a judicial umbrella that protects all children's rights. It ensures that, in matters related to the law, the interest of every child is always protected, no matter who the children are or what criminal conduct they have allegedly done. However, in child-friendly justice, the main focus is on the protection of the rights of juvenile offenders. Here, the best interest of the child should work as an interpretative principle of superior judicial consideration of children's rights and aim at ensuring the "maximum satisfaction of their rights" at the domestic level. Consequently, courts should ensure children's progressive participation and autonomy in all proceedings in which children are involved.

When observing the Sri Lankan context, there are several ways, in which a child comes into contact with law. These ways include, but not necessarily limited to,

- i. Juvenile Offenders.
- ii. Children who are victims of offences committed by adults and young persons.
- iii. Children who are in court as a witness or a necessary party in a litigation. (Specially in adoption, maintenance, custody and domestic violence cases)
- iv. Children in need of care and protection as defined by the section 34 of the Children and Young Persons Ordinance.
- v. Children who are simply in the court premises due to various reasons. (Especially when the mother, father or the guardian of the child is a party to a litigation and the child is too young to be left alone at home)

However, unlike the exhaustive legislative framework of India regarding the protection of child rights, Sri Lanka does not have updated legislation. A major part of the main legislation about children, such as the *Children and Young Persons Ordinance* (Sri Lanka), is very dated and needs to be amended. Therefore, to make the court process child-friendly, it is essential to bring in amendments to the existing procedural and substantive laws or at least issue new regulations or guidelines for the judiciary to make the court procedures more child-friendly and to introduce internationally accepted best practices concerning children who came in contact or conflict with the law.

The *Children and Young Persons Ordinance No. 48 of 1939* (Sri Lanka), is the main legislation relating to juvenile justice in Sri Lanka. Section 02 of the said Ordinance provides for juvenile courts. A Juvenile Court is a "Court of summary jurisdiction sitting for the purpose of hearing any charge against a child or young person or for the purpose of exercising any other jurisdiction conferred on a Juvenile Court by or under this Ordinance or any other written law." These courts are presided over by a Children's Magistrate and sit in a place separate from other courts. In Sri Lanka, there are three juvenile courts so far – in Colombo 1, Anuradhapura and the ongoing project in Jaffna.

As per section 11 of the *Children and Young Persons Ordinance* (Sri Lanka), the right of privacy of the juvenile offender is protected, whereby it is stated that, unless the publication is of a bona fide character and does not include any personal information about the child or young person concerned in the juvenile judicial proceedings, "no report of any proceedings before a Juvenile Court shall be published in any newspaper, magazine, or other journal." Moreover, the juvenile court has been empowered to clear the court room while a child or young person is giving evidence as a witness in certain cases, which is significantly important to ensure the right of privacy of the child.

Also, to maintain the best interest of the child by providing a child-friendly atmosphere, the Ordinance prohibits the children being present in the court during the trial of other persons and requires "separation of children and young offenders from adults in police stations, Courts and etc." Furthermore, as per section 16 of the *Children and Young Persons Ordinance* (Sri Lanka), a child-friendly atmosphere is created in the juvenile court room by permitting his parent or guardian to attend to the judicial proceedings (unless it is not unreasonable to require so).

Therefore, it can be contended that, even though it is not expressly stated in the Ordinance itself, the requirements included in the *Children and Young Persons Ordinance No 48 of 1939* (Sri Lanka) are centred upon protecting the best interests of the child in a child-friendly court procedure.

C. Indian Legal Framework

The main Indian legislation regarding juvenile justice is the Juvenile Justice (Care and Protection of Children) Act 2015 (India). This Act deals with two

types of children, (a) children who are in conflict with law (b) children who need care and protection. Juvenile Justice Act is comprised of several principles to ensure the best interest of the child in a right based approach in all litigations relating to children, including juvenile offenders. These principles include but not limited to the principle of presumption of innocence, principle of best interest of the child, principle of reparations and restorations, principle of privacy and non-discrimination, and the principles of natural justice. This Act has omitted the word “arrest” to make it more child-friendly. However, in contrast to the Juvenile Justice Act, 2000 (India), this Act provides more rigorous punishments for offenders, but does not award death penalty or life imprisonment for juvenile offenders.

As stated in its preamble, this Act is enacted with the intention of amending “the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs .. by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established.” To cater this intention, Juvenile Justice Act has constituted the Juvenile Justice Board, “for exercising the powers and discharging its functions relating to children in conflict with law under this Act.” This Board consists of a Principal Magistrates and two social workers. Including social workers, who have the ability to evaluate the psychological and social background of the child is important for the Principal Magistrate to determine the merits of the case on an age-appropriate basis. No court will be a child-friendly court unless the emotional needs of a child are understood. Thus, it is of the best interest of the child to assist the Principal Magistrate with childcare professionals.

Juvenile Justice Act 2015 (India) provides a special procedure in relation to children in conflict with law. As soon as they are apprehended by the police, they “shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer” who would produce them to the Juvenile Justice Board without undue delay. Such children are prohibited to be placed in a jail by the proviso of section 10 of this Act. It is important that at no time during the child’s presence in the police station or while being transported to court should they come into contact with adult offenders. Provisions of section 10 of the Juvenile Justice Act

(India) ensures this psychologically significant factor.

Moreover, Juvenile Justice Act 2015 (India) provides for the parent or guardian of a child in conflict with law to be present at the Juvenile Justice Board. And it prohibits joint proceedings of a child in conflict with law and a person not a child. Furthermore, “notwithstanding anything to the contrary contained in the Code of Criminal Procedure 1973 (India), or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code.” This is of the best interest of the child to make the court atmosphere more child-friendly.

Another important Indian legislation regarding juvenile justice is the Protection of Children from Sexual Offences Act, 2012 (India). As clearly stated in its preamble, the Act intends “for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child.” To protect the right of privacy of the child. Section 22 of the Protection of Children from Sexual Offences Act (India) provides for a procedure for media which is to be adhered in a Special Court. Accordingly, “no person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy” and “no reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child”, unless the Special Court may permit such disclosure.

Chapter VII, section 28 of the Protection of Children from Sexual Offences Act (India) provides for the designation of Special Courts. Under this Act responsibility is vested with the Special Court to create a child-friendly atmosphere, by allowing a family member or a person of the child’s choice to be present in the Court. Here the Special Courts are created to avoid the undue delay of the court proceedings, which is an apparent case of Sri Lanka as well, whereby there are a few juvenile courts. Section 35 of the Protection of Children from Sexual Offences Act (India) provides for speedy trials, where it is stated that the “evidence of the child shall be

recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.”

Furthermore, the Protection of Children from Sexual Offences Act (India) emphasizes upon customized procedures to include the special needs of the children. Thus, it requires the assistance of an interpreter or expert while recording evidence of child and in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications and experience to record the statement of the child. Also, it mandates that the child victim should not be exposed to the accused at the time of testifying and the physical atmosphere of the Special Court includes screens, curtains and single visibility mirrors to fulfil this requirement. These aspects reaffirm the objective of this Act, that “the law operates in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child.”

Therefore, it can be contended that, as per clearly stated, the requirements included in the Protection of Children from Sexual Offences Act 2012 (India) are also centred upon protecting the best interests of the child in a child-friendly court procedure.

IV. CONCLUSION AND RECOMMENDATIONS

Accordingly, it is evident that, theoretically, these two legislations – the *Children and Young Persons Ordinance No 48 of 1939* (Sri Lanka) and the Protection of Children from Sexual Offences Act 2012 (India), intends to ensure the best interest of the child in a child-friendly court procedure. But certain practicable issues can be found which are almost common to the provisions of both legislations. However, this paper only intends to analyse the practical issues in the juvenile justice system of Sri Lanka.

The main practical issue is the identity of the child. Except for at the juvenile courts; where there are exclusively designated waiting for areas for children to be physically present waiting for their cases to begin, children have to be in the normal courthouse atmosphere with other adult offenders and the general public. Especially, since it is not a regular

incident for a child to be in the court compound, children at the general waiting space always draw the attention of the attendees to the court. Furthermore, they have to use the same washroom and canteen facilities as adults. This violates the right to privacy and confidentiality of the child. Thus, for the best interest of the child, it can be recommended to create a physical space in every courthouse to be used exclusively by children which shall include a room with a mind soothing atmosphere, a clean washroom, and a small canteen.

Furthermore, it can be contended that it is not in the best interest of the child to be exposed to all the information that transpires in court. It could be mentally traumatic and disturbing for the child to listen to all these systemic procedures. Thus, it would be in the best interest of the child if there is a possibility of avoiding the need for the child to be present at the court physically. However, it should be noted that the *Evidence (Special Provisions) Act No 32 of 1999* (Sri Lanka) provides for video recording of a child’s interview to be produced as evidence. But the child has to attend to the court physically to be cross-examined. To avoid that possibility, it is recommended to introduce Gasell Chamber concept to Sri Lanka for juvenile cases. Gasell Chamber is a room in the court, with a one-way mirror where judges, lawyers, and investigators can observe and hear the evidence of a child through that mirror. This room has the technology of recording audio and video evidence as well. Therefore, it is reasonable to assume that a child would rather be mentally assured in witnessing in such a room and would be able to express himself/ herself without anxiety.

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