The rights of the child in Sri Lanka

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The 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.


Article 27 (13)

Sri Lanka is a multi-racial society occupying a landmass of 65,610 square kilometres with a population of 14,850,000 of which more than 5 million are under 15 years of age. In Sri Lanka a child is any human being below the age of 21 so that even on a conservative estimate, Sri Lankan children comprise a significant proportion of the country’s population.

Legislation and juristic attitudes

In Sri Lanka the general law of the land operates as the criterion by which to distinguish a child from an adult although statutory provisions specify the age of majority and such areas as succession. The common law pertaining to the child in Sri Lanka is a blend of Roman-Dutch and of English law principles both of which have their roots in Christian and Protestant ethics and which have merged to crystallise in legislation such as the Age of Majority Ordinance. Under Roman-Dutch law, a child is a person of either sex under the age of twenty-five years. However, in South Africa where Roman-Dutch law is the common law, statutory provisions have been enacted as in the case of Sri Lankan legislation setting

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1See Age of Majority Ordinance (Ch 66 Ceylon Legislative Enactments Vol III) s 2. It is noteworthy that s 3 of this Ordinance provides for the recognition of the age of majority as under 21 years if the operation of any system of law in Sri Lanka so stipulates.

2See Age of Majority Ordinance (Ch 66 Ceylon Legislative enactments vol III) s 3 as discussed in n 1.

3See n 1.

4Digest 441 of Justinian, Grotius 173, Voet 441.
the age of majority at twenty-one years. English law on the other hand, defines a child as a person under the control of the family to which he belongs and includes adopted persons. 5 It is clear therefore, that as regards the age of majority, the law of Sri Lanka has been modelled on Roman-Dutch law.

Legitimacy

The general law of Sri Lanka creates a presumption of legitimacy which must be rebutted if the child is to be considered illegitimate. The fact that a person is born during the subsistence of a valid marriage between his mother and any man — or within 280 days after the dissolution of such a marriage, the mother remaining single — is conclusive proof that the child is the legitimate issue of the man, unless it can be shown either that the man had no access to the mother at the time when the child could have been conceived, or was impotent. 6 This principle therefore, recognises that if a child is born within 280 days of the dissolution of the first marriage and the mother has remarried, the child is considered the legal issue of the second husband. However, if a child is born more than 280 days after the dissolution of the marriage — and the mother remains unmarried — it is considered illegitimate.

Although courts have tended to follow the time limit specified in the proviso rigidly, 7 it is clear that where possible, they have viewed the applicability of the presumption favourably. 8 The significance and importance attached to the rights of the child in being recognised as legitimate are in the context of contemporary Sri Lanka society largely a matter of dignity. The courts therefore, view the grounds of rebuttal which act in favour of the husband with caution. To this extent the rights of the child are considered paramount. Of the two exceptions which require proof, ie lack of access between the man and woman on the one hand, and the impotence of the man on the other, the latter remains a question of fact. A consideration of the former element becomes relevant in that it reflects the attitude of the judiciary towards the protection of the right of the child to claim legitimacy. On the question of access, the courts in Sri Lanka have been clearly influenced by the English law as incorporated in the laws of Sri Lanka. The established law in Sri Lanka accepts the view that if the man and woman had personal access to each other, the presumption of legitimacy cannot be rebutted unless either party proves that no sexual intercourse in fact took place. Personal access is not dependent only on the geographical proximity of the partner, or on the rigid determination of sexual intercourse. In so far as the parties, however far or close they may have been to each other, had an opportunity of being together, the concept of 'personal access' is widely interpreted to allow the presumption of

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6 Evidence Ordinance (Ceylon Legislative Enactments Ch 14 1895) s 112.
7 See Karunathilaka v Angohamy 2 NLR 277.
8 See Alles v Alles 51 NLR 416 at 418 where the court held that the presumption will apply even where the birth of the child occurs only a very short time after marriage on the basis of pre-marital conception.
legitimacy to operate for the protection of the child. Further, the burden of proof lies on the person who alleges that the child is not legitimate, usually the father, and the standards of proof required are far more stringent than those ordinarily required in a civil action.

Although serological evidence is acceptable as an exclusionary factor in the determination of the issue of legitimacy, the law in Sri Lanka is heavily influenced by the overall English common law attitude that a child may not be forced to submit himself to a blood test as the results of such test would not in any way be to his advantage. In the light of the operative common law of Sri Lanka, therefore, it can be concluded that the presumption of legitimacy operates in the child’s favour.

It is submitted that although the issue of legitimacy in the courts of Sri Lanka is viewed with considerable understanding for the plight of the child and though the presumption itself is designed to favour the child, it is time that this total concept was examined in a different light in view of the recent developments in the family law of Sri Lanka. In keeping with the Legitimacy Act which provides for the subsequent legitimisation of adulterine bastards, it would be preferable for the child’s true paternity to be established rather than subjecting the child to the guardianship of any man who falls within the requirements specified in the presumption of legitimacy.

Guardianship and custody

The law relating to guardianship and custody of minor children in Sri Lanka has been strongly influenced by Roman-Dutch law and, to a lesser extent, by English law. The law differentiates between custody over legitimate and illegitimate children. In regard to the latter, Sri Lankan law recognises the Roman-Dutch law principle that the mother makes no bastard and the mother of an illegitimate child has a natural right to custody as opposed to the father’s right. This right can be interfered with only by the court acting as upper guardian of minors.

The operative law on the custody of minor legitimate children in Sri Lanka mirrors the Roman-Dutch law concept that the father is the natural guardian of his child and during the subsistence of the marriage therefore has a preferential right to the custody of the child to the exclusion of the mother. This right can be interfered with by the courts acting as upper guardians of minors only on special grounds such as danger to the child’s life, health and morals. However, certain Sri Lankan decisions have adopted the English law view that in custody matters the interest of the child is the overriding consideration. These cases recognise the paramount importance of the mother’s influence on a young child’s life. More

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9 Kanapathipillai v Parpathi 57 NLR 553.
10 No 3 of 1970.
11 Rammenika v Paynter 34 NLR 127, and Deitrom v Jinadasa 78 CLW 17.
12 The leading South African case of Kalitz v Kalitz (1939) AD 56 was followed in Sri Lanka in Ivaldy v Ivaldy 57 NLR 568, Weragoda v Weragoda 66 NLR 83 and in various other cases.
13 Kamalawathi v De Silva 64 NLR 252, Fernando v Fernando 70 NLR 534.
recent decisions have adopted the former view.\textsuperscript{14} According to these cases strong proof is required to deprive the father of the preferential right to custody over his child.

In the instance of a conflicting claim to custody of a minor child between a parent and a third party, the preferential right of a parent will be interfered with only if parental custody is prejudicial to the child. Poverty of a parent \textit{per se}, unless coupled with neglect, is insufficient to deprive a parent of the custody of his child. Therefore, a third party wishing to deprive a parent of the custody of his child has a heavy burden cast on him. The courts of Sri Lanka recognise that the wishes of a child having sufficient maturity should be a cogent consideration in custody matters. Although conflicting views have been expressed by the courts regarding the age of discretion, more recent cases have stressed the need for flexible attitude towards the age of discretion which can vary according to the individual maturity of the child. It is submitted that this is the better view.

Regarding the education of a child, including religious education, Roman-Dutch law has expressed the view that the natural guardian of a child has the right to decide on these matters. Sri Lankan judicial decisions reflect this view.

The general laws of Sri Lanka on custody of minors apply generally to persons governed by the special laws. Muslim law however, appears to recognise the mother and maternal relations as the guardian of the minor child in preference to the father.

It is submitted that the law of custody of minor children of Sri Lanka is in urgent need of reform. Conflicting views expressed by judges have created uncertainty. Is it the preferential right of the father that should prevail, or is the overriding consideration the welfare of the child? It is significant that Roman-Dutch law has adopted the latter concept in the Matrimonial Affairs Act 1953. Since the custody of the child is in question, the welfare of the child should be the primary consideration. It is time that the Sri Lanka legislature took the initiative in settling the law on this point and recognising the welfare of the child in custody matters.

The Adoption of Children Ordinance\textsuperscript{15} deals with the important issue of adoption. While laying down strict requirements as to the age of the adopter, the differences in the ages of the adopter and the adopted, the importance of parental consent for adoption, and various other matters, it articulates the important principle that an adoption order shall not be made in respect of a child over the age of ten years without the child’s consent.\textsuperscript{16} Although the law relating to adoption in the Thesawalamai is obsolete, Kandyan law has enunciated certain principles on the adoption of minor children. Clear proof of intention to adopt has been considered an important criterion under Kandyan law.

\textsuperscript{14}Rajaluxumi v Ayer 76 NLR 572, Rajaratne v Rajaratne 80 CLW 69.
\textsuperscript{15}Ch 61 Ceylon Legislative Enactments Vol III.
\textsuperscript{16}§ 3 (5).
Maintenance

Unlike the law of custody, the law relating to maintenance of minor children in Sri Lanka has been expressed in the Maintenance Ordinance, which governs a father's liability to maintain his children (whether legitimate or illegitimate) until they reach the age of twenty-one years. Special rules govern the duty of the father to maintain his illegitimate children under the Maintenance Ordinance. On the question of the mother's liability to maintain her minor children, the Maintenance Ordinance is silent. Controversy has however arisen as to whether the amending Act, (the Maintenance (Amendment) Act 19 of 1972) intends that the mother's means be taken into account where it provides that the means of the applicant or of the child are relevant. Although the amending Act to an extent cures the defects of the Maintenance Ordinance in improving the manner of enforcing a maintenance order, removing the unrealistic upper limit on the amount of maintenance payable, and various other aspects, the Maintenance Ordinance remains unsatisfactory on the duty of parents to maintain their children. Although the duty of a married woman to maintain her child and of a mother to maintain her illegitimate child are being dealt with in different statutes, it is submitted that the Maintenance Ordinance should be a comprehensive statute governing all aspects of the maintenance of children.

The Maintenance Ordinance is silent on the point of the reciprocal duty of children to support their indigent parents. In a Sri Lankan case however, Roman-Dutch law on this point was applied and it was held that children are liable to support their parents if the parents cannot support themselves.

On the question of intestate succession of children to their deceased parents' property, section 24 of the Matrimonial Rights and Inheritance Ordinance of 1877 devolves the property of a parent dying intestate on a preferential scale to children, grandchildren and remoter descendants of the deceased.

Criminal law

A child below the age of eight years is protected from penal sanction for an offence committed in Sri Lanka. This principle is extended to a child between the ages of eight and twelve years if the child in question lacks the maturity and understanding to take cognisance of the gravity of his actions.

These provisions effectively preclude a child from being ostracised by

\[17\] Ch 91 Ceylon Legislative Enactments Vol IV.
\[18\] Married Women's Property Ordinance (Ch 56 Ceylon Legislative Enactments Vol III) s 27 and Matrimonial Rights and Inheritance (Jaffna) Ordinance (Ch 57 Ceylon Legislative Enactments Vol III) s 13.
\[19\] Poor Law Ordinance (Chapter 141 Ceylon Legislative Enactments Vol VI) s 27 (2).
\[20\] Ambalavanar v Navaratnam 56 NLR 422.
\[21\] Penal Code (Ceylon Legislative Enactments Vol I Ch 19 1885) s 75.
\[22\] Penal Code op cit s 76.
society and recognise the fact that children below a certain age have the right to be exempt from claims to social commitment.

The state protects the child from being kidnapped by enacting punitive measures against any person who perpetrates the act of taking or enticing a minor under fourteen years of age if a male, or under sixteen years of age if a female, out of the keeping of the lawful guardian of such child without the guardian’s consent. In this context, the lawful guardian includes any person lawfully entrusted with the care and custody of such minor or other person. The subtle difference which exists in civil law between guardianship and custody does not exist in the criminal law concept of kidnapping in that even if a child is taken away from school by a person without the consent of the school authorities or the parents of the child, although the parents had surrendered the custody of the child temporarily to the school, they may consider that the child kidnapped from school was taken out of their custody. However, custody should be legally recognisable as such and not merely de facto as in the case of a child who is picked up on the road by any person. If in this instance the child is taken away from the person’s household, he is considered not to have been taken away from that person’s custody for the purpose of Sri Lankan criminal law. The use of force in the taking away of a child is not an essential ingredient of the offence of kidnapping. Even if a child comes of his or her own volition as a result of being enticed or coaxed, it is sufficient to ground an action in kidnapping. However, if the accused remains a passive party throughout the transaction it is arguable that the law of Sri Lanka will follow the English law and consider the offence of kidnapping non-applicable.

An interesting feature in the law of kidnapping is the kidnapping of a child by a parent. This may occur in custody disputes where a parent who is not awarded the custody of the child takes the child to another country whose courts may award custody. The evolution of modern air transportation has acted as a catalyst to this type of action. Although there has been no reported instance of this nature where the courts in Sri Lanka have had to adjudicate upon the custody of a child brought into the country by a parent, it is envisaged that in such an instance English law, which is quite clear on the point, will be followed. The Courts in the United Kingdom have refused to adjudicate upon such an instance and transferred the case back to the original country on the basis of forum conveniens. In the instance of a parent or any person who kidnaps a child or any person out of the country special provision exists in the law of Sri Lanka to recognise such act as kidnapping out of the country.

It is clear that the law in Sri Lanka has adopted definite measures to protect the child from the offence of kidnapping. However, it is felt that law reform in this country should take into consideration the mental injury

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23 Penal Code op cit s 352.
24 Explanation to s 352.
25 In Re H (1965) 3 All ER 906 affirmed (1966) 1 All ER 886.
26 See Penal Code s 351.
caused to the child in instances of kidnapping as in the modern context expert psychiatric evidence can project the heinous quality of each instance of kidnapping and the effect it has on the child’s mind and thus allow judicial discretion in the punishment of offenders.

A person under the age of sixteen years is not subject to the death penalty which applies to an adult for certain offences and as an alternative is subjected to detention. Further, section 82 of the Penal Code treats a person who commits an offence in good faith to protect or safeguard the interests of a child, with leniency. In addition, there is clear prohibition of and ensuing penalty against the offences of being a party to a miscarriage or abortion per sections 304, 305, 306 and 307 of the Penal Code. There are clear indications that the criminal law of Sri Lanka acts in the best interests of the child.

Social benefits
A child’s right to nationality is enshrined in the Citizenship Act of Ceylon in which he or she is considered to be a citizen of the country as of right if his mother or father is or was a citizen of the country and is resident in the country for a specific period of time. The Act is so wide in scope that even newly born deserted infants of unknown or unascertainable parentage shall, until the contrary is proved, be deemed to have the status of a citizen of the country by descent.

When a child is born in Sri Lanka his name must be registered by the Registrar of Births and Deaths and it is mandatory on the parents to give such information as the child’s name and other relevant information within three months. There is clear provision that the child has a right to alter his name to his liking. In addition to this legislation there are various statutes enacted to give the child adequate protection from the unscrupulous elements of society. Examples of these are the rigid demarcation of the rights of a person between the ages fourteen and eighteen years who is employed in a factory where machinery hours are stipulated.

Further, a striking feature in the area of the child's rights is that although the age of majority is 21 years, a child of eighteen years and over is given the privilege of adult franchise and the right of being employed. The Penal Code itself has imposed a penalty of seven years, imprisonment on a person who exposes or abandons a child under the age of twelve years. There is also specific legislation to direct a parent or guardian to vaccinate a child against

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27 Ch 349 Ceylon Legislative Enactments Vol XI.
28 Citizenship Act as above s 5(1) s 11.
29 Citizenship Act s 7.
30 Births and Deaths Registration Ordinance (Ceylon Legislative Enactments ch 110 Vol V) s 10.
31 s 17 of the Births and Deaths Registration Ordinance.
32 s 27 of the Births and Deaths Registration Ordinance.
33 Factories Ordinance (Ceylon Legislative Enactments Ch 128 Vol V) s 127 (1).
34 Penal Code op cit s 308.
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disease, to separate juvenile offenders from adults in prison, to order parents of illegitimate children to maintain those children till they attain a certain age, and the establishment of separate juvenile courts all of which go to show that the area in which children’s rights are protected in Sri Lanka are multifarious. However, perhaps the most extensive is the acute social consciousness projected by the legislation and social institutions of the country in the field of education.

It is evident that there are no significant differences between the rates of male and female participation in education in Sri Lanka. A case study undertaken recently disclosed that in 1971 the respective rates of participation of males and females in the age groups of five to nine years were 88.4% and 80.5% respectively. In all districts of Sri Lanka male participation exceeded female participation. The margin is reduced in the more mature age groups. In the age group of ten to fourteen, females exceed males by 1.4% on a district level. It is correct to say that at the school-leaving level and subsequent university level there is no reckonable disparity in the participation in the educational programmes of the country in terms of male and female students.

Universal free education was introduced at all levels in 1944. A precursor to this beneficial exercise on the part of the state was the enactment of the Education Ordinance of 1939 which provides that it is mandatory for parents to send children between the ages five and sixteen to school. The Ordinance also provides for the establishment of state schools. The general overtones of the law promote the moral, intellectual and physical welfare of the child.

The overall attitude of the state towards children’s education is amply illustrated by the Parents’ Charter published by the Ministry of Education of Sri Lanka which sets out the policy of the state to provide opportunity to all children of all its citizens for education irrespective of race, language, creed, political ideology, social status and wealth and for the provision of free education throughout the country. Article 20 of the Charter enunciates the principle that it is the paramount duty of each parent of a child to provide a good example in moral turpitude and to gear the child to acknowledge the value of good citizenship through beneficial education.

Rights of the child to decide

The law in Sri Lanka with regard to the right of the child to be bound by a contractual obligation follows English common law. The only contracts which are absolutely binding on a minor are contracts for necessaries. Generally a minor (below the age of twenty-one years in Sri Lanka

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*Vaccination Ordinance (Ceylon Legislative Enactments Ch 229 Vol III) s 4.
*Prisons Ordinance (Ceylon Legislative Enactments Ch 54 Vol II) s 48.
*Poor Law Ordinance op cit s 27(2).
*Children and Young Persons Ordinance (Ceylon Legislative Enactments Ch 23 Vol II) s 2.
*Needs of Children and Adolescents - A case study of Sri Lanka Marga Research Studies 5 44.
*Education Ordinance (Ceylon Legislative Enactments Ch 185 Vol III) s 37.
*Education Ordinance op cit ss 39–40.
although English law stipulates eighteen years)\textsuperscript{43} can validly contract for apprenticeship, education and service.\textsuperscript{44} Apart from these, a minor may consider contracts entered into by himself as voidable at his option which makes the contract not binding on the minor but binding on the other party. These general principles are pre-empted, however, when there is specific legislation in Sri Lanka pertaining to certain acts which may be the subject of a contract. For example, a child, or any person, cannot under the law of Sri Lanka, consent to an abortion being performed on her as this is an offence under the Penal Code as stated earlier in this article.

A child does not in general have the right to decide on operative treatment for himself unless he is over 21 years of age. If a child is below this age, the consent of the guardian or parent is sought. This criterion is also applied to marriage.

The law of tort in Sri Lanka also has its genesis and real basis in English common law where a minor (under the age of eighteen in the United Kingdom and under twenty-one in Sri Lanka) can be sued in tort. Even if a minor is not held liable in contract for an act he has performed, he may be liable in tort for the same act and to that extent the tortious liability of a minor is more liberally exercised against him. A minor can sue both under tort and contract if the minor has been unjustly taken advantage of. This is considered a fundamental protection of a minor in English common law.\textsuperscript{45}

**Conclusion**

In most instances, the child considers such elements as a happy childhood the paramount ingredient for a contented life. Recognition of this fact is evidenced in the United Nations Declaration of the Rights of the Child that primary considerations of a child's life are a happy childhood, protection and relief.\textsuperscript{46} The child who spends the greater part of his childhood at home needs special care and affection. It therefore remains to be discussed whether the private life of the average child in Sri Lanka affords as much security, protection and affection as he deserves.

In the typical home in Sri Lanka the child is considered totally dependent on his parents and subject to their wishes. Sometimes this can be carried too far and in certain instances the child finds that his excessive sense of dependence on his parents acts as a stumbling-block when he reaches adulthood. In early childhood however, this overall dependence ensures for the child a greater degree of security. It is a common feature in Sri Lankan Society that the parents of a child support him until he obtains employment or completes his studies, even though the child may be in his

\textsuperscript{43}Family Law Reform Act 1969 s 1.

\textsuperscript{44}Chitty on Contracts (25 ed 1983) 298.


\textsuperscript{46}GA Res 1386 14 UN GAOR Supp (No 16) at 19 UN Doc A/4249 (1959). See generally the preamble and Principle 8.
late twenties. In this sense the instinctive protection exhibited by parents in this society is boundless.

Although child abuse by parents is an extremely infrequent occurrence in Sri Lanka, the present attitude that parents have a lesser civil duty to the child than does the general public should be seriously reviewed not only in Sri Lanka but also in other countries throughout the world. Children are often considered as quasi-persons whose wishes and rights depend upon the parents in particular and society in general. However, there is strong concern throughout the world for the prevailing status of the child.47 This is a comforting thought.

The child in Sri Lanka is unique in terms of children's rights in that he is not only protected by legislation but also benefits from the protection of his parents for a considerable period. This affection, is not only a right but also a gift.