

The Absolute Protection Available for the Disabled Children Under the Prevention of Domestic Violence Law; Sri Lankan Perspective

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Abstract— *The Prevention of Domestic Violence Act (PDVA), No. 34 of 2005 of Sri Lanka specifies the domestic violence as a statutory offence and the law prevails in any circumstances, where a child subjects to or about to be subjected to a domestic violence incident in every instance whichever the statute specified. The study is focused on assessing the accuracy and the effectiveness of the domestic legal mechanisms established in order to protect the rights of the children from refraining domestic violences. The objective of this qualitative study is to appraise the efficiency of the existing domestic legal mechanism established by the statute in order to protect the rights of the children from domestic violence situations with reference to relevant domestic and international legal standards. Furthermore, the study is focused to examine few recognized rights of the children in relation to the domestic violence situations; i.e. Right of equality, right to privacy, right of social security etc. The study specifies few practical difficulties on implementing the introduced mechanism under the statute and appraises the level of protection available towards the rights of the children. The study concludes with pointing and recommending the necessity of guarantying effective intervention of the law and policy makers towards developing sound legal protection for the issues recognised in order to protect the rights of the victimized disabled children of domestic violence.*

Keywords: *Disabled Children, Domestic violence, Sri Lanka*

I. INTRODUCTION

Children are considered to be a precious group in any kind of society. Children with disabilities do need a special care and attention from the peers in order to fulfil their special needs. As Convention on the Rights of the Child (1989) (herein after referred as CRC) specified that, it is the responsibility of the state to comprehend the childhood is entitled to special care and assistance and convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,

should be afforded the necessary protection and assistance.

Also, according to the Article 12(4) of the Sri Lankan Constitution (1978), nothing shall not prevail the duty of the state in enacting any special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

Consequently, Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 (hereinafter referred as PRPDA) was passed by the domestic legislature enabling the Convention on the rights of persons with disabilities, which defines a disabled as a person with disability means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life. (Protection of the Rights of Persons with Disabilities Act, 1996)

The existing legal regime on domestic violence of Sri Lanka is the Prevention of Domestic Violence Act (PDVA), No. 34 of 2005, which provided sound coverage on many issues in relation to domestic violence situations.

The statute defines the term domestic violence under Section 23 and the definition consist of two limbs; whereas (a) an act which constitutes an offence specified in Schedule I;(b) any emotional abuse, committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person. The part (a) of the aforesaid definition refers to all offences contained in Chapter XVI of the Penal Code, Extortion-Section 372 of the Penal Code, Criminal Intimidation-Section 483 of the Penal Code and finally attempt to commit any of the above offences. Emotional abuse means a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person

However, it is a crucial fact to define the protection available from the exiting domestic legal mechanism established under the PDVA (2005) in order to protect

the rights of the disabled children from domestic violence situations.

III. RESEARCH QUESTION

Does the existing domestic legal mechanism established in order to protection of the rights of the disabled children from domestic violence situations is accurate and sufficient enough?

IV. OBJECTIVE

The objective of this study is to assess the efficiency of the available domestic legal mechanism established in order to protect the rights of the disabled children refrain from domestic violence situations with reference to relevant domestic and international legal standards.

V. METHODOLOGY

The study is totally based on qualitative methodology, which largely focused on critically analyzing the provisions and approach of PDVA (2005) of Sri Lanka, Constitution of the Democratic Socialist Republic of Sri Lanka (1978) and other relevant domestic legal instruments.

Though, there are many international legal instruments can be found in relation to the topic, which had been ratified by the Sri Lanka, basically, the study focuses on and limits to the analysis of the Convention on Rights of the Children (CRC)(1989) and the Convention on the rights of persons with disabilities (CRPD) (2006). Further, the study is limited to analyze few recognized rights of the disabled; i.e. Right of equality, right to privacy, right of social security etc.

V. DISCUSSION

A. Introduction

The following discussion is on the existing protection available for the disabled children under the PDVA (2005) and evaluates the relevant provisions in the light of the CRC (1989), Constitution (1978) and Children's Charter (1992). Further, it focused in necessity of reading the provisions of the PDVA with the provisions of

- The National Policy on Disability for Sri Lanka (2003)
- Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996
- The Constitution (1978) provisions with the Convention on the rights of persons with disabilities (2006) (*herein after referred as CRPD*) , in order to reinterpret a comprehensive protection framework that shall be applicable in terms of protecting the rights of the disabled children, as the second phase of the study.

B. Protection available for the disabled children under the PDVA

The PDVA (2005) does not specify any special provisions in relation to the disabled children. However, the general protection provided for the citizens shall applicable to the category of the disable children as well.

C.PDVA and protecting the rights of the disabled children

1) *Right of equality, equal protection before the law and right of access to justice:* Initially, it is essential to emphasis the relevant standards applicable to the children in relation to the above mentioned rights. Article 2 of the CRC (1989) upholds the right to non discrimination, while Article 3 guarantees the best interest of the children in all the instances, in relation to public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Besides that, Article 12 of the CRC (1989) held that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Sri Lankan state has guaranteed the right of non discrimination and right to equality under the Article 12(i) and (ii) of the constitution in terms of access to justice. Further, the Article 2 of the children's' Charter (1992) states that, the state shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, guardians, or family members.

According to section 2 of PDVA (2005) states person, in respect of whom, an act of domestic violence has been, is, or is likely to be, committed (hereinafter referred to as "an aggrieved person") may make an application to the Magistrate's Court for a Protection Order, for the prevention of such act of domestic violence. The statute specifies three possible jurisdictions for the victimized persons to access to justice, namely, jurisdiction of the aggrieved person or the relevant person (the one who commits the offence) temporarily or permanently resides, or the act of domestic violence has been or is likely to be committed.(Prevention of Domestic Violence Act, 2005)

2) *Right of remedy/reparation:* The following parties can forward an application to the court whenever child becomes a victim of a domestic violence situation;

- (i) by a parent or guardian of the child ;
- (ii) a person with whom the child resides;

(iii) a person authorized in writing by the National Child Protection Authority established under the National Child Protection Authority Act, No. 50 of 1998. (Prevention of Domestic Violence Act, 2005)

It is established that, the right to non- discrimination, right of equality and equal protection of the law and right to access to justice had been hypothetically assured by the statute.

Rights of social security, right to remedy and right to reparation

It is emphasized that, the right of the child to obtain benefit from social security under Article 26 of the CRC, imposing the sentences to the offenders while ensuring the basic rights of right to remedy and right to reparation for the harm suffered by the victimized child.

Reflecting the provisions of the PDVA it specifies that, an prospect of obtaining an interim protection order as temporary remedy for the victimized child for not exceeding for fourteen days to avoid the respondent from committing or causing the commission of any act of domestic violence, while the application been heard by the primary court. Apart from that a victimized child is able to plead for a protection order for a period of 12 months. (Prevention of Domestic Violence Act, 2005)

The Court may, by means of an interim order or protection order prohibits the respondent from;

(a) entering a residence or any specified part thereof, shared by the aggrieved person and the respondent;

(b) entering the aggrieved person's -

- (i) residence;
- (ii) place of employment;
- (iii) school;

(c) entering any shelter in which the aggrieved person may be temporarily accommodated; etc. under the section 11 of the PDVA (2005).

Additionally, the court may order supplementary orders, where a protection order has been granted and where the court is satisfied that, it is reasonably necessary to protect and provide for the immediate safety, health or welfare of the aggrieved person. (Prevention of Domestic Violence Act, 2005)

The court has the authority to make alteration, modification, variation, extension, or revocation for the previously issued orders, if any change of circumstances found. This can be decided by the court after careful

hearing to the victimized child and the respondent. (Prevention of Domestic Violence Act, 2005)

Where respondent against whom an Interim Order or a Protection Order, as the case may be, has been issued and has failed to comply with such Order, such respondent shall be guilty of an offence and shall be liable on conviction after summary trial before a Magistrate to a fine not exceeding ten thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment under the section 18 of the PDVA. (Prevention of Domestic Violence Act, 2005)

3) *Right to privacy*: It is the responsibility of the state to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society under the Article 40 of the CRC (1989).

Right to privacy is recognized under Article 16 of the Children's Charter (1992), whereas no child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

It is documented in the PDVD that a person's printing or publishing any matter in relation to domestic violence cases to be punished with the imprisonment of either description for a term which may extend to two years or to a fine or to both such imprisonment and fine. (Prevention of Domestic Violence Act, 2005)

C. The necessity of reading PDVA with other related laws and policies in order to protect the rights of the disabled children

The CRPD (2006) specified that the principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;

- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Also, a special descriptive provision with regard to the equality is drafted and it upholds the necessity of state responsibility towards the guarantying equal and effective legal protection against discrimination on all grounds.

With regard to the children the Convention prescribes that it is a responsibility of the state to take all necessary measures concerning best interest to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. (Convention on the rights of persons with disabilities, 2006)

Moreover, the states parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right. The needs and the situations occur on the disabled children are differ from the ordinary children, same as to the incidents arise from the incidents of domestic violence. (Convention on the rights of persons with disabilities, 2006)

This has been recognised by the Article 12 (4) Constitution (1978) which specifies that, " Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons" and provided a platform to the rulers in order to make any special provisions or set of rules available which ultimately benefited by and the uplift the standards of the lives of the persons with disabilities.

The National disability policy (2003), in particular emphasizes for these children who have disability (being a particularly marginalized group) the inherent right to life, and to survival, protection and development to the maximum extent possible. Within this context, the following strategies promote and protect the rights of children who have disability:

- (1) Support to the child who has disability;
- (i) Equity in participation in family life and interaction, including participation in family decision-making processes

- (ii) The enjoyment of a full and decent life in conditions which ensures dignity and promotes self-reliance in an atmosphere of happiness, love and understanding

(2) Support to parents and other family members:

- (i) Knowledge, skills, advice and counseling required to support each child who has disability related to the rights of the child recognized in the UN Convention on the Rights of the Child will be made available to parents and other family members to enable them to fulfill their responsibilities

Whatsoever, the provisions contained in the enabling statute for the CRPD, Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 do not have any operational value. Yet, the content of the statute of PDVA would be much appreciable, if the judiciary and the relevant authorities shall interpret the rights of the disabled children in a liberal approach considering the aforesaid laws, conventions and the policies made for the best interest of this special category of children

VI. CONCLUSION

An incident of domestic violence may change the whole peaceful environment of the child's world. Specially, the disable children are much vulnerable than the ordinary children. However, the nature of the children makes them vulnerable since it is hard to find a helping hand in order to seek justice against his/her own family member who commits or above to commit the violence.

Nevertheless, the PDVA (2005) can be appreciated as a piece of law with a sound legal framework which inherits its own practical difficulties in terms of the implementing the phrase introduced by the statute itself.

Occasionally, there may be instances where a disable child may disappoint with the remedy provided by the court where a huge issue arises with the practical situation of the implementing phrase of the order; i.e. where an order been granted to respondent refraining from entering the residence pace of the aggrieved child..

Therefore, the PDVA (2005) must read with the Act of Protection of the rights of persons with disabilities, National Policy for the disables and follow the standards of the CRDP for much emphasis of the rights of the disables.

The Constitution of 1978 which included a chapter on fundamental rights and provided a procedure for their enforcement did not include specific provisions on children's rights. However one of the Directive Principles or guidelines for State Policies referred to the obligation

of the State to promote “with special care” the interests of children “to ensure their development and protection from exploitation and discrimination.

Finally, it is the responsibility of the state to bring immediate effect to the Act of Protection of the persons with disabilities (1996) and need to guarantee the improvement of the level of the rights in danger. Further the scope of the definition of the disable person must be broad in accordance with the CRPD (2006).

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