

Legislating the Principle of Best Interest of the Child: The Sri Lankan Standpoint

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Abstract - Children are the most precious group in every society and owe the responsibility of creating the future world. It is the utmost duty and the liability of a state to protect the rights of the children with special consideration towards resolving their concerns to secure their best interest. The principle of the best interest of the child shall be the paramount consideration towards achieving and securing their rights in different circumstances. This study intends to explore the legal adequateness of legislating the principle of the best interest of the child in Sri Lanka, in par with the international standards safeguarding the rights of the children. The methodology adopted in the study is a combination of black letter methodology and comparative research methodology along with an analysis of the international standards coupled with the comparative jurisdictions, as appropriate. Further, the qualitative approach was employed to analyse the primary and secondary data of the study. Finally, the study critically assesses the standards of relevant legislation attempts of legislating the principle of the best interest of the child in the domestic context.

Keywords— *best interest, child, legislating, rights*

I. INTRODUCTION

The principle of best interest of the child has mostly been a tool developed by the judicial activism in par with the international, regional and domestic legal and social norms of a particular state, in order to secure the rights of children. On the other hand, it lays the foundation to secure the minimum level of protection that required to be offered for the children in crisis of their rights. There has been much attempts taken by the judiciary and other administrative means to uphold the same in most of the jurisdictions but most of the states are diverting

the said approach of practicing the best interest principle into a proper legislative enactments as appropriate. Sri Lanka has more of towards incorporating the principle in to the different legislations in order to secure the justiciability of the rights of the children.

II. RESEARCH QUESTION AND THE METHODOLOGICAL APPROACH

The study intends to inquire the level of legislating the principle of best interest of child in the selected Sri Lankan statutes enacted between 2000-2009, in terms of safeguarding/upholding the rights of the children.

The study employs the doctrinal research methodology to elaborate the context where the qualitative research method is used to gather the relevant data for the query. Domestic legislations including the Constitution along with the few selected statutes, International instruments, state party report submitted to the treaty body and the concluding observations received from the treaty mechanism were used as the primary data of this study. Books, journal articles and reports by the government/experts etc. were analysed as secondary data in order to unpack the research question.

III. PRINCIPLE OF BEST INTEREST OF THE CHILD: UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

UNCRC (1989) requires '[e]very legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions or actions' which upholds the paramount consideration of the best interest of children in every concern. Further, the Article cover the wide range of actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. (UNCRC, Art.3). The same had been explained by the General Comment No 14 as the the best interests

principle operates as both a substantive right and an interpretative device while emphasis added on the level of obligation incorporate of the Article 3(1).

According to the Committee, Article 3(1) 'creates an intrinsic obligation for the States, is directly applicable (self-executing) and can be invoked before a Court'. The Committee also acknowledged the role of Article 3 as an interpretative legal principle, observing that '[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'. Additionally, Article 21 of the UNCRC entails states to ensure that the best interests of the child shall be the paramount consideration in adoption cases (Pobjoy, 2015). Therefore, scholarly argument has been developed that the the level of establishing the prinipcle of best interest of child created two different dimentions with the interpretaions of the Article 3 and 21 of the UNCRC (1989).

On the other hand, the perception of best interest as a 'primary' standard of concern may encourage the exercise of discretion with awareness of the dynamics of the child's own environment. Making children's interests a 'primary' consideration will thus be useful in creating sensitivity to the need for a holistic perception of the child's interests, without the child's interests becoming the sole concern. (Skelton, 2019)

It therefore follows that a child's best interest will be of supreme importance when considering an issue affecting a child's interest. It could therefore be argued that the use of the term "paramount" means that in weighing up competing interests, the scales must tip in favour of the child. (Skelton, 2019). It shall noteworthy to remind the Convention does not provide a definition or a list of factors that would constitute the best interest of the child. Some commentators argue that this is understandable as a list would be limiting since eachfactual situation determines in itself which factors are to be considered in the child's interest (Robinson,2002)

IV.UPHOLDING THE BEST INTEREST OF THE CHILD: THE SRI LANKAN EXPERIENCE

A. The level of undertaking the UNCRC obligations towards establishing the protection of the rights and best interest of the children

Sri Lanka ratified the UNCRC on July 12, 1991 by introducing Children's Charter in Sri Lanka (hereinafter referred as CC) is a guideline on rights of

the child protection inside the state. Moreover, it is the responsibility of the state to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, inquiry or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents or guardians shall be gauranted under Article 20 of the CC which is par with the Article 19 of CRC.

B. The level of undertaking of the protection of the rights of the children under the supreme law

The Sri Lankan legal standards promote the similar legal ideology of international standards towards the children. Therefore, the Constitution provides a space to enact any special provisions being made by law, subordinate legislation or executive action for the advancement of children (Constitution of Sri Lanka 1978, Art. 12 iv). Above Constitutional provision shall be read with its Articles of 27(12) on state to recognize and protect the family as the basic unit of society and Article 27 (13) on the State shall promote with special care the interest of children and youth so as to ensure their full development, (physical, mental, moral, religious and social) of the Chapter VI Directive Principles of State Policy and Fundamental Duties.

C. Justiciability of the best interest of the children under the other statutory means

The UNCRC Committee (1995) recommended, that Sri Lanka shall harmonize its national legislation with the provisions and principles of the Convention at the stage of submission the initial state party report submitted to the treaty body. Further, it was emphasised the necessity of refelecting principles relating to the best interests of the child and the prohibition of discrimination in relation to children in domestic law, and ensuring the validity of justiciability of those of standards (CRC/C/15/Add.40, para 23,1995)

There has been continuously recommended by the UNCRC Committee, the State party (Sri Lanka), to ensure the domestication of the Convention on the Rights of the Child in its national legislation so that all of the principles and provisions of the Convention can be applied in courts. CRC/C/LKA/3-4,para 10, 2010)

Therefore, a requirement of the legistating the principle of best interest of the chid had been emerged and the domestic legislature has been actively contributed to the fillfill the same objecteive

with introducing many statutory mechanisms other than the traditional aspects of custody, adoption and guardianship matters of the children, divorce of parents coupled with maintenance.

V. LEGISLATING THE PRINCIPLE OF BEST INTEREST OF THE CHILD: AN ASSESSMENT OF SRI LANKAN STATUTORY DIRECTION

As per the terms of the Article 3 of the UNCRC, as previously mentioned, the application of the principle of the best interest of the child shall be incorporated to an enactment after concerning how children's rights and interests are or will be affected by the introducing the said legislation. Therefore, it is worthy to scrutinize the justiciability of the principle of best interest over the words of the few legislative attempts taken by Sri Lanka parliament between 2000- 2009 beyond the traditional discussions of best interest of children.

A. *Employment of Women, Young Persons and Children (Amendment) Act, No. 8 of 2003*

Present amendment to the Employment of Women, Young Persons and Children Act of 2003 which strengthened child labour law by inter alia increasing the minimum age of employment from 12 to 14 years, while establishing the prohibiting the employment of children under age of 14. This law guarantees the best interest of the children in terms of Article 3 of the UNCRC, while enhancing the sentence for violation of this provision by the people of the state.

B. *Citizenship (Amendment) Act, No. 16 of 2003*

Enacting this law relating to the citizenship remarks a revolutionist approach towards the right of acquiring nationality/citizenship of the children which amended the previous law as enabling the children to acquire nationality from both parents. Under the previous law it was only the father who was able to pass on Sri Lankan nationality to children which led to discriminate the children as per the terms of the principle of best interest of the child.

C. *Tsunami (Special Provisions) Act, No.16 of 2005*

Tsunami incident in 2004, was one of the most crucial natural disasters occurred in Sri Lanka which caused the massive personal and property crisis among the people lived in the coastal areas of the country. Lots of children were experiencing very vulnerable due to the lost of parents, companionship, security, custody along with the maintenance and non realization of the other social/cultural/religious rights which they were used to enjoy. However, the

statutes laid the legal foundation for the children who were vulnerable to be secured their best interests of custody, foster care, adoption matters with the active participation of the responsible authorities. Further, the law guaranteed the monitoring and sanction process of realizing the rights of the Tsunami affected children to secure their best interest.

D. *Prevention of Domestic Violence Act, No. 34 of 2005*

Domestic violence laws laid the foundations to secure the best interest of the children from the physical and psychological violence occur due to the actions and/or omissions of the family members inside or the outside of the residence. The statutes provided the space to the children to raise their voices against the domestic violence or imminent violence which shall be affected to their social, cultural, religious etc. rights. The law enables to protection orders to be urgently obtained to safeguard those suffering and at risk of domestic violence including both in nuclear and extended families through the judicial mechanism.

E. *Penal Code (Amendment) Act No. 16 of 2006*

The aforementioned, penal law amendment drives through strengthening the law against child trafficking including that by electronic media. The new section 360C adopts the wide definition of trafficking in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons. The new section 358A has criminalized outstanding worst forms of child labour as stipulated in the International Labour Organization (ILO) Convention No. 182: debt bondage and serfdom, forced or compulsory labour, slavery and engagement or recruitment of children in armed conflict. Therefore, the statute attempted to incorporate the principle of best interest of the child while par with the international standards.

F. *International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007*

ICCPR statute provided that the best interests of the child shall be of paramount importance in all matters concerning children whether undertaken by courts, administrative authorities, legislative bodies or public or private social welfare institutions, and strengthened protection for children in respect of birth registration, name and nationality and legal assistance. This enactment remarks the outstanding principle recognition to the best interest of child in Sri Lanka

VI. CONCLUSION AND THE WAY FORWARD

Understanding and interpreting principle of best interest of the child in the contexts children arises nature of sui generis which of be the core essence of unpacking the legal issues ahead, while guaranting their rights. However, the disputes of the children shall be obviously taken up in the court houses as of using the best interest as the tool to resolve the matter. Further, it is more precise to observe the unimty definition for the child in all abovementioned statutory intruments which make the judiciary moe comfortable in applying the law into the issues refered to the court houses, while promorting and/or ensuring the uniform application of the best interest principle through statutay means.

The following social and legal recommendations shall be made in oder to ensure the substantive equality of applying the principle of best interest through legislative instruments.

It is vital to promote education on rights for the school children while enhancing the parenting education for the parents and teachers.

Educating members of the legislature, members of the Department of Police, Judicial Officers, probation officers and all those involved in juvenile justice on the way to handle the issues reported relating to the children shall be enhanced.

The child care authories shall encourage to actively involve in resolving the matters in par with establishing subtational and procedural equality to the victimized children.

Introducing immediate amedments/rectifications to the exising laws which shall not have the refelects of the paramount consideration of the best interest of the children.

Necessity of ensuring compulsory transparent monitering processes and/or any other measures which had been granted to the victimized children in order to secure their best interest.

State party to ratify the CRC and the Optional Protocol to the CRC in the form of enable statutes as recommended by the treary body of the UNCRRC.

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