

THE JUVENILE JUSTICE SYSTEM IN SRI LANKA THROUGH A CRITICAL EYE

*Jalashi Changa Lokunarangoda**

I. ABSTRACT

A child is considered a person under the age of 18. This *internationally* accepted age might be different when it comes to different jurisdictions. However, the term “juvenile” is used for those children who are under the age of 18. In the whole world, children are considered to be a vulnerable group, as they are not able to make decisions alone, and they can be subjected to abuse easily. Therefore, it is an internationally accepted norm that juveniles should be kept out of prisons although they have committed very serious acts. A number of international instruments come into play in order to uphold juvenile justice.

The United Nations Convention on the Rights of the Child is considered as the most important piece among all the other international instruments. Also, the Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice) set out the boundaries for juvenile delinquency. Despite the fact that there are many other international instruments, Sri Lanka mainly adheres to those two instruments. Sri Lanka, however, adopts a different judicial process which is unique to its own legal system when it comes to juvenile cases. It mainly focuses on rehabilitation and reintegration when it comes to punishments. Sri Lanka’s legal framework has set out a number of protective methods for the betterment of juveniles.

- The Constitution of 1978 has a separate chapter on fundamental rights, and it safeguards the rights of every citizen including all children.
- Directive principles set out the State’s obligation to protect and promote the rights of children and their best interests.
- The Child Rights Charter, which had come into effect after the ratification of the United Nations Convention on the Rights of the Child, also had contributed immensely in upholding juvenile justice.
- The Children and Young Persons Ordinance No. 48 of 1939 stipulated the definition of a child and also provided provisions for the establishment of the juvenile court in the country.
- Penal Code Act No. 2 of 1882 sets out the age of criminal responsibility
- Youthful Offenders (Training Schools) Ordinance No. 28 of 1939
- Code of Criminal Procedure Act No. 15 of 1979
- Probation of Offenders Ordinance No. 42 of 1944
- Prison Ordinance No. 16 of 1877

Although there is comprehensive legislation which safeguards the rights of juveniles which goes hand in hand with the international setup, there are loopholes which have to be addressed immediately in order to meet the real ends of justice.

II. INTRODUCTION

The definition of a juvenile under the Sri Lankan legal point of view is different compared to the

* Fiat counsel/ Legal officer of the Child Protection Unit, Attorney General’s Department, Sri Lanka (Attorney-at-Law, LL.B (Hons), Masters in Human Rights & Democratization, LL.M in criminal Justice administration, Dip. in International Relations, Dip. in death investigation)

internationally accepted view. According to the Children and Young Persons Ordinance,¹ a child means a person under the age of 14 years and a young person means a person who has attained the age of 14 years but is under the age of 16 years. Young persons who are between the ages of 16-18 are not considered juveniles under this ordinance. However, according to the children's charter² of Sri Lanka, a child means any person under the age of 18. Therefore, it is clear that there is an inconsistency in Sri Lankan Law as to the definition of a child.

Juvenile delinquency means a distinct set of offences created for children and adolescent persons. Sri Lanka follows a distinct judicial process to try juvenile delinquency cases and also adopts distinct methods of punishments which focus on their rehabilitation, correction and reintegration into society as law-abiding citizens. However, the prevailing correctional methods, mainly the institutional rehabilitation methods, were not successfully reached due to various problems and flaws.

Sri Lanka has adopted both institutional and community-based mechanisms in the correctional procedure of juvenile delinquency which interconnects with the process of juvenile offenders. Most of the time convicted children and young persons are not committed to prisons. They will be sent either to remand homes, approved or certified schools. Those are the three types of correctional institutions established under the CYPO³ to rehabilitate children and young persons during the period of punishment. These institutions are administered by the Department of Probation and Child Care and the correction programmes are conducted by the Provincial Department of Probation and Child Care Service.

The existing legal framework dictates that if somebody who is below 16 years of age has committed a crime, they should be sent to a remand home for an interval not exceeding a month. If the criminal is under 18 and the offence is punishable by death, the court should detain them in a remand home until the president pardons them. For any indictable crime, the court should detain them in the remand home until the Minister's pleasure is fulfilled. Juveniles may be committed to a certified or accepted school for a maximum period of three years. Nonetheless, if the court finds the juvenile to be unruly or defiant and unable to be held in a remand home or a licensed school, they may be incarcerated.

As discussed in the abstract section, Sri Lanka has a very comprehensive legislative framework when it comes to juvenile justice. Although it is comprehensive, there are ongoing issues which have to be addressed in order to achieve justice.

III. JUVENILES & THE LAW

A. Legal Framework

Sri Lanka ratified the CRC⁴ on 12 July 1990. The primary Acts governing juvenile justice in Sri Lanka are:

- (1) The Children and Young Person Ordinance, No. 48 of 1939 (CYPO);
- (2) The Probation of Offenders Act, No. 10 of 1948 (POA); and
- (3) The Youthful Offenders (Training School) Act, No. 42 of 1944 (YOTSA).
- (4) Penal Code of Sri Lanka 1885

1. CYPO

The CYPO can be considered as the main legislative enactment which safeguards the rights of juveniles. It mainly provides for the establishment of Juvenile Courts, the treatment of juvenile offenders and the safeguarding of children and young persons in need of care and protection. It also provides for the establishment of separate Juvenile Courts for the purpose of hearing cases dealing with children and young persons. According to the CYPO, a "Juvenile Court" is a court of limited power that convenes to listen to accusations brought against children and adolescents, or to exercise other authority granted to it. This court

¹ Children and Young Persons Ordinance No. 48 of 1939.

² Child Rights Charter.

³ Children and Young Persons Ordinance No. 48 of 1939.

⁴ Convention on the Rights of the Child 1989.

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also offers a specialized system of Juvenile Courts and alternative punishments in order to protect the interests of children who are part of the justice system.

CYPO⁵ requires a law enforcement officer to notify a relevant Probation Officer (PO) in the event a child or young person is to be brought before a Magistrate. In terms of section 17(2) of the CYPO, upon receiving notification from a law enforcement officer, the PO is required to investigate the background of the child and prepare a report to be submitted to the court.⁶ Section 13 of the CYPO casts a specific obligation on law enforcement officers and the court to ensure the separation of children or young persons from adult offenders during the pendency of their case.⁷ This section fulfils the conditions established in article 37 of the CRC, that every minor who has been deprived of their freedom should be kept separate from adults unless it is advantageous for the child to not follow this guideline.

In the event a child or young person is found guilty of an offence, the CYPO grants the court the discretion to order both institutional and non-institutional sentences. Institutional sentences include:

- (a) committing the individual to custody in a remand home for a specified period that does not exceed one month,
- (b) ordering that the individual (provided that he or she has reached twelve years of age) be sent to an approved or certified school for a period of three years.

Non-institutional sentences include:

- (a) placing the individual in the care of a PO,
- (b) placing the individual in the care of a parent, guardian or relative that executes a bond (with or without sureties), or
- (c) placing the individual in the care of a fit person.

Under all of the above, the court is also permitted to levy a fine.

The CYPO also places an obligation⁸ on courts to commit a child that is not released on bail to a remand home instead of a prison until the conclusion of his or her trial. Furthermore, under this section, courts are mandated to commit a young person to a remand home instead of a prison, unless he or she is "so unruly" or "depraved" as to make detention in a remand home unsafe for the existing occupants. Moreover, section 23(1) of the CYPO states that a child or young person shall not be committed to prison in default of the payment of a fine.

2. POA

The POA stipulates the conditions in which a court can impose a Probation Order. This order is used as an alternative to placing children who commit a crime in a correctional facility. The YOTSA outlines the setup of training schools to detain, educate, and reform male delinquents aged 16-22.

3. PC

The Penal Code⁹ sets out the minimum age of criminal responsibility. Earlier the age of criminal responsibility was set out as 8 years,¹⁰ and also section 76 has stipulated that nothing constituted an offence which is committed by a child above the age of 8 years and under the age of 14 years who has not attained sufficient maturity of understanding.¹¹ However, this has been recently amended, and the age of criminal responsibility has been raised to 12 years,¹² and the age of sufficient maturity level had been raised to 12-14 years.

⁵ Section 17(1) of the CYPO.

⁶ Ibid., Section 17(2).

⁷ Ibid., Section 13.

⁸ Ibid., Section 15.

⁹ Penal Code 1885.

¹⁰ Ibid., Section 75.

¹¹ Ibid., Section 76.

¹² Section 75 of the Penal Code amended by Act No.10 of 2018.

B. Setup and Shortfalls

1. Stipulate a uniform definition of a child, and an internationally acceptable age of minimum criminal responsibility.
2. Consider the deprivation of a child's liberty being a matter of last resort.
3. Prioritize the diversion of children away from the formal justice system.
4. Distinguish the responses applicable to children in conflict with the law and children in need of care and protection.
5. According to Article 40 of the CRC,¹³ incorporate alternatives to institutionalization such as access to counselling, foster care, education and vocational training. However, it appears that Sri Lanka lacks these kinds of alternatives.
6. The CYPO has no obligation to keep the child informed of the progress of their case, provide details of their impending legal proceedings, or explain their reasons for being arrested. This lack of information could be detrimental to the child's safety and legal rights when they come into contact with the justice system.
7. Due to the term "Juvenile Courts" being applied to the courts that are responsible for hearing cases concerning children, it can give off the impression that the children who appear in these courts are criminals, rather than those who might require help. It is necessary to amend the name given to these courts in order to avoid any misconceptions.
8. In order to collect evidence to determine if a child has committed an offence, section 10(2) of the CYPO allows the Juvenile Court to remand the child in question for a period not exceeding twenty-one days. However, this time limit does not align with international frameworks that require children to be deprived of their liberty for the shortest possible period of time.
9. Even though a distinction is made under the CYPO when dealing with the treatment of children under sixteen and adult offenders, the final outcome may not be any different. According to the CYPO¹⁴ a detention order by an approved or certified school lasts for a period of three years, which is longer than an adult would be detained for an equal offence.
10. The CYPO defines a "young person" as an individual between the ages of fourteen and sixteen. Therefore, children between the ages of sixteen and eighteen are placed in the formal justice system, and treated in the same way as adults. Also, children of those ages are incarcerated in prisons with other adult offenders, thereby further obstructing their rehabilitation and reintegration into society.
11. It appears that the courts were not placing enough importance on the social report given by the pertinent PO when it comes to sentencing.
12. There is no comprehensive register of childcare institutions, which indirectly challenges the courts when selecting institutions that are best able to address the unique requirements of children in need of care and protection.
13. Because there is an inadequate number of childcare organizations, Courts are generally forced to put children who are in conflict with the law, as well as those who are victims of crime, in the same facility. These places tend to be of a punitive nature, which can result in the traumatization of both the perpetrators and victims.

¹³ Article 40(3)(b) United Nations Convention on the Rights of the Child.

¹⁴ Section 42(2) of the CYPO.

C. Institutional Framework

These institutions include: Sri Lanka Police, the Attorney General's Department, the Judicial Medical Officer, the Courts, the Department of Probation and Child Care Services and the National Child Protection Authority.

The Department of Probation and Childcare Services is responsible for administering correctional and support services to young offenders and those in need of care and protection. The Department supervises the work of Probation Officers and Child Rights Promotion Officers, and they also offer institutional care as an alternative way of safeguarding children in the legal system.

The CYPO mandates POs to oversee minors who have broken the law and to guarantee the welfare of youngsters who need care and support and have been assigned to their custody. POs are also entitled to be informed by the police if there is a child or adolescent who is brought to court. In this regard, POs have the possibility to make sure that kids are safeguarded within the legal system.

The department has various centres which are tailored to the needs of the children depending on their age. There are six Remand Homes which look after children during the pre-trial phase, while five Certified Schools offer organized vocational training. Additionally, each state has a Safe House which offers housing and care for those with pending court cases. The eight Receiving Homes provide a safe and protective environment for those who are unable to stay with their families either temporarily or in the long term. Those with misbehaving tendencies are taken to National Training and Counseling Centers, while Approved Schools, Voluntary Children's institutions, and Detention Homes look after the other children.

IV. APPLICATION OF LAW

A. Hypothetical Scenario

Offence: Grave sexual abuse / S.365B(2)(b) of the Penal Code of Sri Lanka.

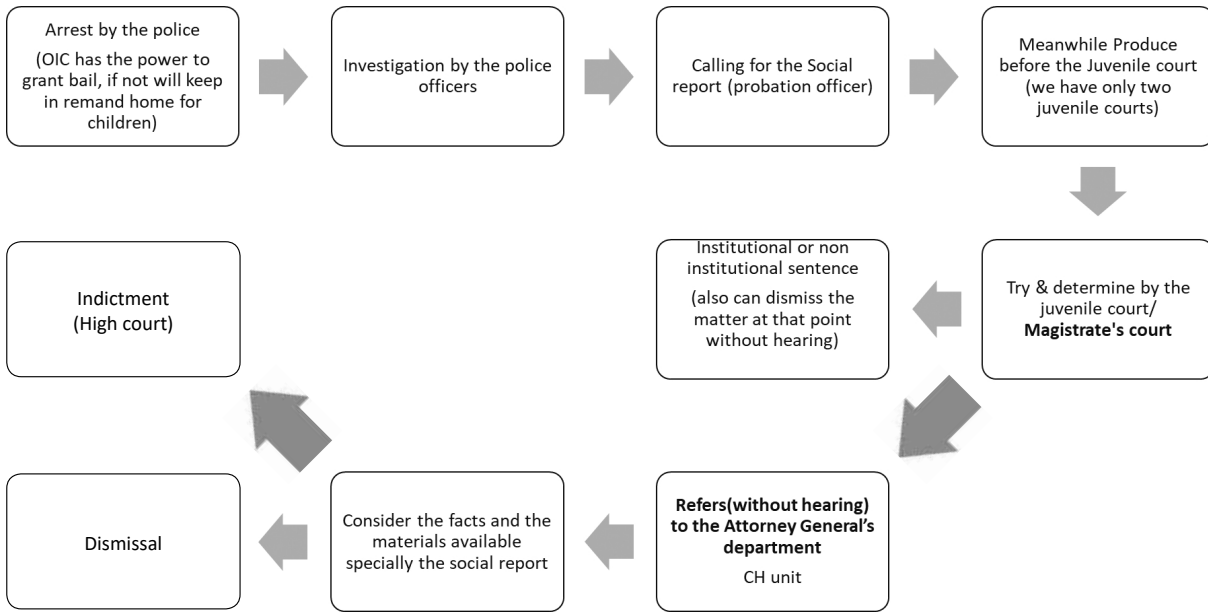
Age of the victim: 6 years

Age of the suspect: 14 years & 5 months

Facts of the case:

- The victim is the brother of the suspect.
- Suspect is mentally ill but has not undergone any medical treatment due to the financial situation.
- Suspect had dropped out from school when he was 10 years old due to continuous bullying by friends and teachers.
- Their father had abandoned them. Their mother is the sole breadwinner of the family and she takes care of both these children by working day and night.
- Most of the time the children are living alone at their home.
- One day the suspect had sexually abused the victim (the act amounted to GSA).
- The complaint had been lodged by a neighbour.
- Version of the victim
- This is the only time that the suspect had done something like this.
- The suspect loves him a lot.
- Suspect is the one who had look to after him when the mother is not around.

A) Action Flow



B. Discussion

Is he a child according to CYPO?

No. He should have to be below the age of 14. However, according to the Penal law, he is considered to be a child as the age is below 18.

Can a juvenile be arrested?

Yes. There is no bar to that. (This is not a formal arrest like putting on handcuffs)

Can a juvenile be detained?

Yes. There is no bar. Children may be detained in remand homes for children, or the OIC of the police can grant bail without detaining.

Should this case be referred to the formal hearing?

There is no alternative method to solve this kind of offence apart from formal hearing. After referral to juvenile court, the case can be dismissed.

Are the risk factors assessed before the formal hearing?

No, they will be assessed during the process of hearing.

Is every juvenile case referred to the two juvenile courts?

No, since we have only two courts, the cases will be referred to Magistrate’s court sitting as a juvenile court.

V. RECOMMENDATIONS

The children are more susceptible to forms of rehabilitation than adults. A majority of persons that come into conflict with the law in their youth grow up to be righteous citizens. Therefore, the correct path needs to be shown to the child offenders. That will make them law-abiding citizens in this country. There are a lot of changes which need to be done in order to achieve the correct path. Some of them are mentioned below.

- The Penal Code is recommended to be amended, so a line is drawn between the age of commission of a crime and the age at which the conviction is made.

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- Alternative legal frameworks to handle children in conflict with the law should be prioritized.
- Effective educational opportunities and counselling, stabilizing family environments, and promoting community-based programmes should be facilitated.
- The international recommendations, standards which are set out in the international conventions need to be adopted and adapted accordingly and should be incorporated into the domestic framework.
- It is recommended that awareness needs to be increased among the law enforcement authorities, prosecutors, and other relevant parties in relation to the international standards of juvenile justice and also those parties need to be trained well to handle the challenges and other issues that involve minors.
- Need to have a uniform definition of "child".
- A provision should be inserted into the legislation barring the arrest of juveniles in order to fall in line with the international instruments.
- More juvenile courts should have to be established as we have only two currently. We should at least have one juvenile court for each province. Otherwise, the cases should have to be referred to magistrate's courts which will sit as a juvenile court.
- The name given to the court should have to be replaced with a name like "family court" like in Japan or "court of care".
- Need to maintain a comprehensive register for childcare institutions.
- Recommendations should be made in order for the investigating officers & the certified schools to use the "Risk and need assessment tool". A uniform tool for each and every delinquent will not do any good for the offenders who need special treatment.
- Proper reintegration systems such as halfway houses need to be established. This recommendation will also take time as it needs financial support.
- Should have to guide the relevant authorities (i.e. department of probation/ department of prisons) to maintain a national statistics system which can illustrate details of juvenile offenders.
- Awareness programmes should have to be conducted island wide after identifying the risk factors in order to prevent juvenile delinquency as prevention is better than cure.
- Need to promote diversion and alternative solutions such as mediation boards and family conferencing in order to prevent the matters going into the judicial system.

Appendix A

CRC	Convention on the Rights of the Child
CRPOS	Child Rights Promotion Officers
CYPO	Children and Young Persons Ordinance
DPCCS	Department of Probation and Child Care Services
PC	Penal Code
PO	Probation Officer
POA	Probation of Offenders Act
YOSTA	Youthful Offenders (Training School) Act