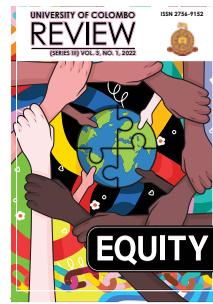


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Equity for the child in adoption: Some issues of concern in the adoption of children ordinance of Sri Lanka

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ABSTRACT

The Adoption Ordinance of 1941 regulates the adoption of children in Sri Lanka. The few *ad hoc* amendments made thus far to this eighty-year-old colonial statute have proved inadequate to efficiently address illegal baby farming and trafficking of children in the country. It also falls short of internationally recognized standards and norms regarding adoption of children, denying many children several rights they are entitled to as vulnerable human beings. This situation is due to two main reasons. Firstly, the Ordinance fails to respond to the contemporary socio-cultural structure, which has transformed tremendously during the last eight decades. Secondly, powers and functions relating to child rights governance have fluctuated between the center and the provinces, resulting in a tug-of-war between multiple authorities. Amidst insensitivities, adversaries and corruption, the system fails to ensure equity for the children. The article stresses the need to relocate the adoption law within a child-rights-centered framework. Being mindful of the multi-faceted and large-scale exploitation and trafficking of children, and the powerplay between central and provincial authorities working on probation and childcare, the article emphasizes the necessity to overhaul the law and the institutional framework. The article aims to strike a balance between human rights issues, psychological and psychosocial issues, and issues relative to child-rights governance. The article proposes substantive and procedural changes and lists out guidelines for judicial and other officers involved in adoption processes to protect the rights of the child.

KEYWORDS:

Adoption law, child rights, institutional mechanisms

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The context

Whether termed as a *contract* or *legal fiction* between a child and non-biological parents, “adoption” essentially involves humane as well as social, cultural, emotional, and legal implications that are local and international in nature. It creates a relationship where legality cannot be severed from non-law factors. It is also a subject where children of all ages are abused and exploited for financial gain. Underpinning such multi-faceted exploitations are the socio-cultural norms that surround adoption. Adoption in Sri Lanka operates within a culture of secrecy and silence because biological parents who are unable to look after the child for various reasons and are compelled to let the child be adopted often prefer to do it behind a curtain of anonymity. Adoptive parents usually refrain from revealing the biological parentage of the child because, on the one hand, “adoption” often implies “childlessness” which is taboo in some societies and, on the other, an adopted child is often subjected to discriminatory treatment. This “secrecy” provides an ideal ground for those who exploit the institution of adoption, resulting in thousands of children being legally adopted for illegal purposes within national boundaries and beyond. (Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, 2017) Adopted children are expected to enjoy a legal status equivalent to children raised by their biological parents. However, the gaps in national policies, laws, and institutional mechanisms condone the denial of fundamental right to equality for many adopted children.

Within this context, this article critically discusses some multi-dimensional and complex characteristics of the Adoption Ordinance of 1941 of Sri Lanka and the institutional framework governing the adoption of children. This legal framework is exploited by organized large-scale trafficking and sale of children leading to illegal adoptions. Therefore, the article proposes an overhaul of the legal and institutional framework based on principles that promote a child rights-centric system. The analysis and recommendations are based on the principles enshrined in the Constitution of Sri Lanka 1978, United Nations Convention on the Rights of the Child (UNCRC) and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Convention). The article also draws from progressive measures adopted in New Zealand, the UK, and some states of the USA. However, a comparative analysis has not been included in the article due to word constraints.

The Sri Lankan law relating to adoption

The Sri Lankan adoption law has its genesis in the pre-colonial era. As its early formulations can provide insights to appreciate the present law and direction to move forward, a glimpse of the pre-colonial situation still has an impact.

Adoption prevailed among Kandyans. Kandyans who did have an heir as well as those who were childless but still wanted to provide a “home and a family” to someone else’s child made use of adoption. (Tambiah, H.W., 1968, p. 103) The age of an adoptee was not considered an important matter, but caste. The norm has been to adopt a child “into” a family. Thus, adoption by a single person was not heard of in pre-colonial Sri Lanka. Viewed holistically, an adopted child in Kandyan Law was in an advantageous

position, especially in terms of inheritance rights. S/he does not lose his/her rights of succession to the intestate property of his/her biological parents and other family members notwithstanding the adoption and the ensuing succession rights. The present law relating to the adoption of children by those who are governed by Kandyan Law is set out in the Kandyan Law Ordinance, which retains these basic principles. (Kandyan Law Ordinance no. 39 of 1938, Part II)

Tesawalamai, i.e. the customary laws applicable to Tamil inhabitants of the Province of Jaffna, is far from being child-rights-centric. The focus of the *Tesawalamai* Code of 1806 is on property rights arising out of adoption. Potential adoptive parents rather than a single person, are compelled to seek the adoption of a child from their own siblings or near relatives first. Only where relatives refuse to give their child in adoption could one adopt a stranger's child (Tambiah, H.W., 1968, p. 133). Where an "outsider" is adopted, the adopters should obtain the consent of their brothers and sisters. In the absence of siblings, they must seek consent from the nearest relatives who would inherit the adopter's property if not for the adoption. Adoption severs biological family ties in terms of succession, and therefore, the adopted child loses all inheritance from biological parents (*The Tesawalamai*, Part II, para 2). Clarifying the position relating to intermarriages, the Code very clearly states that two adopted children of the same parents and who are not the brother and sister can marry each other, and similarly an adopted child can marry a biological child of the same parents (*The Tesawalamai*, Part II, para 4). Those who are governed by *Tesawalamai* can now adopt children under the Adoption Ordinance.

Sharia's Law takes a different view about adoption, known as *kafalah*. The Muslim law encourages destitute children to be fostered by able adults but does not accept a legal fiction of a parent-child relationship to be created through *kafalah* as blood ties between biological parents and their children remain intact despite adoption. (Marsoof, S., 2008, p.2) Thus, an adopted child neither gets the name of the adopter nor becomes their heir (*Azhar Ghouse v Mohomad Ghouse and Others*, 1986).

The Adoption Ordinance, No. 24 of 1941 (as amended) ((hereinafter referred to as the Ordinance) applies to the adoption of children by those who are governed by general law in Sri Lanka, as well as Tamils and Kandyan Sinhalese who opt to adopt children under the Ordinance. The Ordinance also provides for the adoption of children by non-Sri Lankans (inter-country adoptions).

The applicability of the Ordinance is validated by Article 16 of the Constitution of Sri Lanka 1978 (hereinafter the Constitution). Directive Principles of State Policy, enshrined in Chapter VI of the Constitution, obliges the state to recognize and protect the family as the basic unit of society, [Article 27 (12)]. Article 27(13) recognizes the duty of the state to promote with special care the interests of children and youth, to ensure their full physical, mental, moral, religious, and social development, and to protect them from exploitation and discrimination. As a state party to the UNCRC and Hague Convention, Sri Lanka has an international obligation to abide by the standards set out therein in interpreting, applying and reforming national policy, laws and institutional mechanisms.

In this context, the ensuing section analyses some salient aspects of substantive as well as procedural law as contained in the Ordinance. Because current law raises serious concerns relating to child rights, the article argues for the reform of the Ordinance as a matter of urgency.

Reflecting the same positivist approach adopted in the British Adoption of Children Act of 1926, the Ordinance, as stated in the preamble, provides for the adoption of children; for the registration as custodians of persons having the care, custody, or control, of children of whom they are not the natural parents; and for connected matters. To achieve these objectives, part I of the Ordinance provides for the facilitation of Adoption of children, while Part II focuses on preventing the exploitation of children and expecting mothers, making it mandatory for custodians of a child or an expectant mother to get registered.

Applicants

Displaying an obvious preference for focus, the Ordinance begins by describing who can adopt a child or children. It allows any Sri Lankan, a single person or a married couple, to adopt a child [Section 2(1)]. In the case of a couple, the spouses have to apply jointly [Section 2(2)] and with the consent of both parties [Section 2(3)]. The consent of the spouse of an applicant can be dispensed with under the circumstances stipulated in the Ordinance [Section 3(5) proviso].

Single applicant

“Single parenting” is not a well-accepted phenomenon by Sri Lankan socio-legal standards. Yet, the Ordinance, molded on the 1926 British adoption law, permits single applicants to adopt children apparently premised on the belief that a single parent – male, female or third gender – could be a good parent as long as s/he can care for a child. (Dix, D.K., 1960) Some key arguments in favor of single-parent adoptions are that (i) denial of the “opportunity of adoption” to a single person would violate the person’s right to ‘equality’ and non-discrimination on the basis of his/her “marital status”; (ii) single-parent adoptions are recognized in many other countries; (iii) children do equally well in the care of single parents; (iv) it is unfair to prohibit single applicants as some children are being abused and exploited in the hands of their biological parents; (v) “judicial discretion” warrants the court to assess the capacity of a prospective applicant; and (vi) whether the law should impose a blanket prohibition merely to address a few cases of exploitation. Perhaps there is merit in all these arguments. Yet, they need to be re-evaluated, considering the dangers faced by the children who are trafficked and exploited behind the façade of adoption are exposed to. They may be countered in the same sequence:

(i) Every child has a right to family care, and the state is responsible to provide for it in a way that serves the best interests of the child. Neither the local law nor international norms recognize the right to adopt a child or the right to be adopted (Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, 2017). Even though one may claim a right to procreate, the same cannot be made in favor of “adoption” because the parent-child relationship in adoption arises only out of the law that warrants it.

Thus, the law may impose conditions to suit the socio-cultural climate of a society. While one may choose, as of right, to remain unmarried, adopting a child - a human being who is tender in age and therefore vulnerable – must comply with the conditions warranted by law. Hence, a legal prohibition on single-parent adoptions cannot be considered a violation of the right to equality and non-discrimination;

(ii) In countries where single-parent adoption is permitted, pre and post-adoption scrutiny and support services are widely available and successfully implemented. In Sri Lanka, such surveillance and support services are minimal and are carried out mainly by the Department of Probation and Child Care Services (DPCCS). The DPCCS is woefully under-resourced for such a task. It is not assisted by a strong and supportive administrative structure. The officers are not necessarily professionally trained or qualified for policing and monitoring. In such a context it is far from being realistic to expect the DPCCS to maintain meaningful post-adoption surveillance of adoptive parents as well as children;

(iii) while there are reports of children thriving in the care of single parents in some countries, a systematic and reliable study has not been done so far in respect of children adopted by single applicants. The living conditions of children adopted by single parents can be assessed only through a systematic pre and post-adoption monitoring process. There are multiple challenges in the system in Sri Lanka that requires careful study. This is because the adoption process creates a ‘clean break’ between the child and his/her biological family leading to a complete termination of the rights and responsibilities of biological parents and their child in the Sri Lankan law. This is coupled with minimal periodic post-adoption monitoring of foreign adoptions through periodic reports, and complete cessation of monitoring in respect of local adoptions;

(iv) There is no evidence to suggest that children do not suffer maltreatment, neglect, and abuse at the hands of their own parents. Yet, there is always some form of security and protection - a fallback cushion – either in the other parent or extended family. A study reports “Both abuse and police apprehension were least likely for children living with two natural parents. Preschoolers living with one natural and one stepparent were 40 times more likely to become child abuse cases than were like-aged children living with two natural parents.” (Daly, M. and Wilson, M., 1985) On the other hand, single parents certainly have less help in raising a child as s/he do not have a partner/spouse and are often left to bear the burden of child-care on his/her own;

(v) That courts have the ultimate power to decide: *discretion* is an essential and flexible component in judicial decision-making, which often lead to anomalies in determining the *best interest of the child*, particularly where “judicial reasoning” is a missing element. Those who propose limited judicial discretion and court intervention in families argue that discretion is fraught with dangers - dangers of class or racial bias as well as simple fallibility (Cooper, L. and Nelson P., 1983). The essence of this argument is valid for any jurisdiction, because a court may be biased due to its prejudices on what is best for a child. On the other hand, a court may find itself in a dilemma between “interpreting the law” and creating it (Dworkin, R., 1963); and

(vi) Whether the law should impose a blanket prohibition on all single-parent adoptions because of “some” negative experience: Exploitation of children in the guise of adoption cannot be measured by numbers (Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, 2017). Besides, child abuse in Sri Lanka has risen beyond imagination over the last few years. The situation has exacerbated during the pandemic-related lockdown period. According to the media “over 140 incidents of rape, 42 cases of serious sexual abuse and 54 cases of child abuse have been reported from various police divisions in the country within the first 15 days of 2020” (Madhubhashini, W., 2020). Studies show that children living with their step-parents or a single parent are at an increased risk of abuse (Turner, H. A., 2017; Galles, R. J. and Harrop, J.W. 1991). Research has confirmed that single parents are more likely to use abusive forms of violence toward their children than are parents in dual-caretaker households (Galles, R. J., 1989; Daly, M. and Wilson, M., 1985).

It may therefore be argued that for a child whose *home* and *family* are one and the same single-parent, the situation could be worse. It could destroy a child’s life, particularly where the post-adoptive monitoring framework is far less than “efficient.” Even though single-parent adoptions may suit countries where the “single-parent family” concept is recognized legally and socially, it poses various socio-cultural implications in Sri Lanka where the state is guided by the constitutionally recognized principle that “family” is the basic unit of the society. Even though not justifiable, the prevailing law outcasts even a biological child born out of wedlock, and society looks down on an “illegitimate” child. These positions raise a question of self-contradiction in the law taken as a whole. How can the law reject the legitimacy of a child “born” to a single mother while recognizing the full legal status of a child “adopted” by a single parent? Assessed from a child-rights perspective, the law should legitimize single-parent children in both situations. Yet, in the absence of a child’s informed consent, single-parent adoptions raise doubts as to the rationality of the creation of an artificial parent-child relationship between a child and an adoptive parent. The Ordinance focuses on the needs of an adult while treating the rights of the child as secondary.

Foreign applicants

When introduced in 1941, the Ordinance had an absolute prohibition on applicants who are not resident and domiciled on the island. Section 3(6) states that “an adoption order shall not be made in favor of any applicant who is not resident and domiciled in Ceylon or in respect of any child who is not a British subject and so resident” [Section 3(6)]. This blanket prohibition remained intact until 1979. The amendment Act No. 38 of 1979 introduced a proviso to section 3(6) which enabled the court to consider “a joint application of two spouses who are not resident and domiciled in Sri Lanka” after calling for and considering a comprehensive “report” with the authorization of the Commissioner of Probation and Child Care Services. This new law opened floodgates to foreign adoptions. As a result, baby farming and the trafficking of children became lucrative businesses. The Sri Lankan institutional structure relating to probation and childcare was woefully inadequate to fight against the well-organized baby trade (LHRD Study, 2006).

In the meantime, responding to a global threat of abduction, sale, or trafficking of children, and recognizing that, “for the full and harmonious development of his or her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,” the UNCRC made the state parties agree, *inter alia*, to (i) consider inter-country adoption as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any other suitable manner be cared for in the child's country of origin; (ii) make sure that the child concerned for inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; and to (iii) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it (Article 21). Further, the signatories, including Sri Lanka, to the Hague Convention, agreed to “take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,” while recognizing that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”

Meanwhile, local and foreign media reported of Sri Lankan infant abductions to give them in adoption to foreigners, trafficking of children, and illegal migration. The responsible Minister himself admitted this to be a grave concern (BBC News, 2017). The international obligations as well as these media reports compelled the legislature to revise the law introducing safeguards for the protection of the child. With notable reluctance (LHRD Study, 2006), the reformed law introduced a few restrictions on foreign adoptions (Amendment Act No. 15 of 1992). Yet, placed in the weak institutional structure, Sri Lankan children continue to be trafficked and exploited in innumerable ways violating “multiple child rights norms,” in the guise of adoption (Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, 2017).

The "adoptable child"

Definition

Children are subjected to adoption at different stages of life, i.e. soon after birth, as toddlers, or youth. The Age of majority amendment Act no.17 of 1989 recognizes eighteen years as the threshold for the majority. The Maintenance Act no. 37 of 1999 assures a child – a person below eighteen years of age – to be supported by a family. The state is responsible to maintain children who are lacking parental support. Recognizing this necessity to support children deprived of family care, the Orphanages Ordinance (No. 22 of 1941 as amended by Ordinance No. 45 of 1946) permits Children's Homes to retain an orphan or a destitute child until such child attains eighteen years of age [Section 15(b)]. However, multiple reforms introduced to the Ordinance fail to keep up with contemporary legal standards and social realities and continue to interpret “a child” as a person below the age of fourteen years [section 17]. Except in rare instances such as the Civil Appellate court case of *Dissanayake v. Dissanayake* (NWP/HCCA/KUR/02/2019[Rev]) where the court exercised judicial discretion to avert the statutory bar to ensure the best interests of

the child, the District Court generally adheres to the statutorily specified age threshold. This prevents family care for a needy child above fourteen, even where applicants are willing to adopt an older child. Further, this statutory bar discriminates against a child in alternative care against one in a family setting, who is entitled to care and support even beyond the age of maturity [Sections 2(3), 2(4), and 22 of the Maintenance Act]. This legal anomaly leaves an adolescent in alternative care until s/he becomes a young adult at eighteen years, and on to his/her own – without family support – thereafter (Wijeyesekera, R., 2020).

Child's views

The Ordinance takes an arbitrary position in terms of a child's right to participate in the decision-making process by providing that in adoption proceedings, the court should obtain the consent of a child who is over ten years of age [Section 3(5)]. It does not prohibit the court to seek the views of a child younger than ten years, but this blanket provision permits a court to do away with seeking views of a child younger than 10 years. In reality, except in situations where the judge takes extra measures to ensure the best interests of the child, District Courts which, amidst other civil matters, are overstretched for time and energy, often obtain the views only of children above ten years of age. This violates a younger but competent child's right to autonomy, participation, expression, and the right to be heard in an important decision that has life-long and irreversible consequences upon her/his life.

Girl child

The Ordinance imposes restrictions on adopting a girl, presumably to protect a girl from sexual abuse at the hands of a male adoptive parent. As such, a girl cannot be given in adoption to a single male applicant unless the court is satisfied that there are special circumstances that justify such an order [Section 3(2)]. Any child, irrespective of sex, is susceptible to such danger, especially at the hands of a single non-biological parent. Therefore, the court should be satisfied with the “necessity” of the adoption as being in the best interests of the child and the “suitability” of the applicant irrespective of the sexual identity of both parties. However, the structure and culture of the courts combine to create an extremely adversarial process that is not conducive to such an inquiry. Moreover, the courts have to rely heavily on the Sri Lankan institutional mechanism entrusted with child-rights protection to make this decision, whose capacities raise serious concerns regarding children who are the “subject matter” of adoption.

Representation through guardian ad litem (GAL)

As a citizen of Sri Lanka who is constitutionally entitled to equality before the law and equal protection of the law, a child must be properly represented in court on a basis of equality with other parties in a lawsuit where his/her interests are at stake [Constitution of Sri Lanka, 1978, Article 12 (1) and (2)]. The court, acting *in loco parentis*, is duty-bound to look into the interests of the child. Further, the court is also required to appoint “some

person or body of persons to act as a *guardian ad litem*” (GAL) to better represent the interests of the ward who is incapacitated by virtue of being a minor [Adoption Ordinance, section 13 (4)].

GAL is a court-appointed person to represent a minor’s rights during a lawsuit. The multi-faceted role of the GAL includes investigating the child’s circumstances and advocating for her best interests (Wimsett, M.K., 2003), based on a fiduciary relationship with the child. The GAL participates in the proceedings because of the child’s inability to face litigation (Hardin, M., 1987). The GAL’s vision, understanding, and action play a huge role in protecting the rights of the child in an adoption suit. The GAL is expected to see and hear what the court doesn’t, and therefore have a better sense of the child’s circumstances, needs, requirements, and aspirations. In essence, a GAL should be well-equipped to understand the needs of the child s/he is representing and advise the court thereof. This duty is performed in Sri Lanka by Probation Officers in the case of local adoptions, and by the Commissioner of Probation and Child Care Services, in the case of foreign adoptions. It is questionable whether they appreciate and perform the noble task expected of them. Investigative studies report how ill-equipped some officers of the DPCCS are to discharge the responsibilities expected of a GAL (LHRD study, 2006). Yet, Sri Lankan courts depend heavily on the “vision” of Probation Officers in determining the ‘best interests of the child’ in adoption suits [*Epa v. Epa*, SC Appeal 12/2018].

The institutional framework

As per the 13th amendment to the Constitution the Provincial DPCCSs, which function under the Provincial Councils in the nine provinces, handle local adoptions. Foreign adoptions, since they are categorized as foreign affairs, are handled by the Central Government [Ordinance, s. 3(6) (b)]. The District Court of the area in which the applicant or the child in respect of whom the application is made, resides, exercises the jurisdiction in determining the application for adoption [Ordinance, s. 13(1)]. The court acts as the “upper guardian” of the child in this instance. The inherently adversarial structure and culture of the judicial process are anything but “suitable” to act as *in loco parentis*. On many occasions, children continue to be unrepresented and unheard in courts, which often work according to adult assumptions and standards.

The DPCCS being made a provincial subject raises serious concerns as it has resulted in practical difficulties, mainly in (i) scrutinizing the “suitability” of applicants; (ii) matching applicants and a child in a way that serves the best interests of the child; and (iii) difficulties in accessing the courts (due to geographical proximity). In selecting a child for overseas adoption, the Commissioner has to depend on Provincial authorities, which do not always cooperate fully with the Commissioner. This may result in selecting a child for overseas adoption without scrutinizing the availability of suitable local applicants, contravening the conditions laid down in the Ordinance. For instance, the Ordinance specifies that an adoption order shall not be made in favor of any applicant who is not a citizen of Sri Lanka and not domiciled or resident in Sri Lanka unless no other person who is a citizen of Sri Lanka and resident and domiciled in Sri Lanka has applied to adopt the child in respect of

whom the application is made [Section 3(5) A (a)]. However, island-wide inter-provincial checking for possible adoptees is hardly being carried out when considering applications from foreigners, and the practice is to show the child to selected few local applicants before “qualifying” a child for a foreign adoption (Interviews with officers of the DPCCS).

The possibility of such illegal practices is high as Provincial DPCCS function as separate entities and work according to circulars and rules issued by the Provincial DPCCS. It has been observed that some such circulars contain terms and conditions to suit provincial child care policies, some of which contradict not only the Ordinance but the Constitution as well (Western Province DPCCS Circular no – 2017/5). The Probation Officers, who are largely oblivious to the law, are compelled to follow these provincial rules thereby violating the law of the country.

A tug-of-war between Provincial probation authorities and officers attached to the National Child Protection Authority has been observed during the interviews carried out for research purposes. This has resulted in duplication of work, placing litigants in a quandary in selecting the most appropriate procedure. The Special Rapporteur reports that the “institutional deficiencies and internal power-struggles are exploited by criminal networks driven by the lucrative business of child trafficking and facilitating illegal adoptions, often with the involvement of State officials” (Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, 2017).

Reform of the law

The necessity

The above reasons call for an overhaul of the eight-decade old statute: the continuation of large scale organized baby farming, trafficking, abduction, and sale of children despite piece-meal reform of the law that stands below the recognized international standards relating to child rights protection; a child protection system weakened by a scattered scheme of governance, leading to a tug-of-war between the central government and periphery; children’s rights being threatened in a multitude of ways and at unprecedented levels amidst draining socio-cultural-economic standards heightened *inter alia* by the Covid-19 pandemic; declining economic standards of many Sri Lankans; gradual diminishing of “extended family”; and a society largely driven by factors other than humanity. These factors and conditions necessitate a re-evaluation of the adequacy of existing child protection, wellbeing structures, and preventive mechanisms in general and the adoption of children in particular.

The Ordinance has not been drafted in a way that recognizes children as rights-holders. Thus, the substantive and procedural measures provided thereby are inadequate to assure the best interests of children subjected to adoption. The Ordinance is further proven inadequate to address the lived realities in a country where the legal and administrative system of “child rights governance” is corrupt and effectively contributes to violating child rights than protecting them. In this context, the courts are tasked with responding to the lived realities of a multitude of legal, social, cultural, political, and financial concerns that affect

children, with a minimum of resources. Essentially, the reform ought to be contextualized within a child rights-centered framework, supported by a skilled and supportive institutional framework.

In addition to guarantees assured in the Constitution, the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 [s 5(2)], and the UNCRC [Articles 3(1) and Art 21] mandate public or private social welfare institutions, courts, administrative authorities or legislative bodies to ensure ‘the best interests of the child’ in matters relating to adoption [ICCPR Act, No. 56 of 2007].

The direction

States parties to the UNCRC recognize that growing up in a *family environment* is a right of every child (Preamble). Children have, as far as possible, the right to know and receive the care of their parents and the right to preserve their identity, including family relations (Articles 7 & 8). They also commit to ensuring that children are not separated from their parents against their will (Article 9) and that no child is given in adoption unless it is in the best interests of the child (Article 21).

A two-fold reform of the law and institutional mechanism is thus recommended. The entire system shall be based on these principles and positioned within a child rights-centered framework reinforced by normative and procedural safeguards. As Alston *et al state*, the assessment of the best interests of the child must not be informed by vague and subjective standards, but rather by the rights and principles enumerated in the Convention, meaning supportive, protective, relational/identity, and participatory rights (Alston *et al*, 2019). It should protect children from abuse, maltreatment, or exploitation that takes place in the guise of adoption and ensure a smooth transition to a secure and decent family life where the child’s best interests are served (Kirton, Adoption wars: inequality, child welfare and (social) justice, 2019). The success of the law will depend on the fine balance it strikes between the following competing individual and social interests (Tolfree, 2005; Alston, 1994).

- (a) Individual interests of the child; adoptive parents; biological parents/guardians/custodians, and,
- (b) Social interests, which are best expressed in the following Directive Principles of State Policy in the Constitution:
 - (i) raising the moral and cultural standards of the people, and ensuring the full development of human personality [Article 27 (2) (g)];
 - (ii) recognizing and protecting the family as the basic unit of society [Article 27 (12)];
 - (iii) promoting with special care the interests of children and youth, to ensure their full development, physical, mental, moral, religious, and social, and to protect them from exploitation and discrimination [Article 27 (13)].

Accordingly, the following objectives should guide the law and the institutional framework (C Henricson, C. and Bainham, A. (2005) and Doughty, J., (2015):

- The need to meet current societal needs and expectations, and be consistent with globally recognized standards on child rights-centered legislation;

- Ensuring that children’s rights are at the center of adoption laws and procedures. Accordingly, the law and procedures should focus on safeguarding and promoting children’s rights including their rights to identity, dignity, participation, and wellbeing;
- Ensuring that appropriate and adequate support services and information are available to those who require them throughout the adoption process; and,
- Conformity of the law to relevant principles enshrined in the Constitution and standards set by relevant international obligations, particularly the UNCRC and the Hague Convention.

Key aspects to be reformed

A comprehensive national policy on adoption that translates into a principled law and an efficient institutional framework is urgently needed for Sri Lanka. Adoption should be permitted only after its relevance and appropriateness have been verified by a thorough investigation and based on reliable information and facts, rather than a “predetermined or desired decisional outcome” (Alston *et al*, 2019). An overhaul of the substantive and procedural law as well as the child protection governance system, which is geared to strike a balance between sensitive human issues, is recommended on the following lines:

Statement of Purpose

Based on the premise that the roots of rights are interests, and recognizing every child’s right to be cared for by family, the main purpose of the Act should be to ensure equity for the adopted child. To that end, the reformed law should:

1. provide the child, who cannot be cared for by birth parents, with a permanent adoptive family;
2. establish (A) the legal status of an adopted child and (B) the child’s legal status concerning (a) the child’s biological parents and siblings and (b) adoptive parents and siblings, especially in matters relating to succession rights and marriage. This, in other words, is to determine whether adoption affects a clean break of biological ties.
3. regulate matters relating to the adoption of children in a way that respects, protects, and fulfills the best interests of the child.

Principles to guide courts and other institutions

1. The best interests of the child should be of paramount importance. Specifying the strongest formulation of the “best interests” principle the UNCRC makes it mandatory to consider the best interests of the child with “paramount importance” in determining adoption (Article 21). Accordingly, a child may be adopted only where adoption of the child is necessary and proportionate to the facts of the case, and adoption by the applicants serves the best interests of the particular child (Alston *et al*, 2019). The objective of the determination of the best interests of the child must be to ensure the full and effective enjoyment of the rights of the child, and the holistic development of the child. The decision should therefore assess the continuity and stability of the

child's present and future situation. The child's rights shall be represented throughout the process by a GAL.

2. Inter-country adoption should be considered only as an alternative means for the care of a child where the authorities confirm that the child cannot be cared for in a suitable manner within Sri Lanka. In particular, the children subjected to inter-country adoption must be assured of the standards of protection equivalent to children subjected to domestic adoption; pre and post-adoption checks and monitoring should ensure that information relating to the child as well as parents are not falsified; there must be adequate checks and balances to ensure that inter-country adoptions do not result in improper financial gains; and the state must duly comply with the post-adoption reporting obligations (Perry, T L., 2020).
3. The court should ensure that all parties concerned have made their decision with full knowledge of its possible implications, and with the consent of the child, biological parents, where applicable, and adoptive parents. Obtaining the child's views are of paramount importance, as the best interests of the child cannot be determined without considering the child's views. Assuring the child's right to participation & freedom of expression, especially the right to express those views freely, is mandatory (UNCRC, GC 12).
4. The adoption shall be allowed only for non-profit objectives. The institutional structure shall be efficient to ensure that the adoption processes are not exploited.
5. Adoption often intervenes in the privacy of many parties, including the child. As a child's right to privacy could be unduly compromised in socio-cultural contexts like Sri Lanka, the adoption procedure should be structured in a way that respects, protects, and fulfills the child's right to privacy as recognized in international instruments, especially the UNCRC. A fine balance between "protection and guidance" and "individual autonomy" ought to be made in the interests of the child and other individuals as well as institutions such as "the family" (Marasinghe, C., 2007).
6. The child's right to integrity should be respected and protected. The court must assure the safety and integrity of the child, considering the possibility of future harm and other possible implications of the decision. Therefore, the court shall assess the applicants' capacity to provide for the child's safety, well-being, and development. This includes an assessment of the background of the applicants, their characters and behaviors, and that they are capable of providing the child with a safe and caring family atmosphere to grow up and develop into the child's full potential.
7. The court and adoptive parents should preserve the child's identity, including nationality, name, family relations, and cultural identity. These entail two components: (i) parent-child relationships, and (ii) sibling contact. Even though the adoption legally serves the biological ties between the child and her/his family, the proven benefits of biological relationships favor the continuation of relations with her/his biological parents and siblings even after separating from them (Brodzinsky, D. 2006, Seifert, M M., 2004). However, the continuation of such relationships may result in sensitive and complex issues. Thus, the realization of this important right of the child may be restricted

only where it contravenes the best interests of the child. It is also recommended that effective institutional measures be taken to place siblings together where more than one child of the same family is given in adoption (Hegar, R L. 2005). Complying with the rights guaranteed in Articles 7 and 8 of the UNCRC, the system must ensure that such information is accessible to the child where necessary, appropriate, and is not contrary to her/his best interests.

8. Assure the child's right to survival and development. The court shall assess the applicants' capacity to take responsibility for the child's safety, well-being, and development. The eligibility of the applicants must be determined by an impartial and holistic assessment. Matching the children with prospective adoptive parents "must be carried out by qualified professionals in a way that best responds to the child's needs" (Alston et al, 2019). The Maintenance Act No 37 of 1999 shall be applicable in respect of adoptive parents' support obligations towards their adopted children.

Procedural safeguards

Establishing procedural safeguards and organizational structures to regulate the system of adoption is vital to "ensure that the best interests of children for whom adoption is or may be envisaged remain the paramount consideration" (Alston *et al*, 2019). Towards this end, the UNCRC imposes two core requirements: (i) the creation of a competent authority with ultimate responsibility for the system of adoption; and (ii) the procedures to "ensure that the adoption is permissible, in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary" (Art. 21). The Sri Lankan child rights protection framework should be re-structured along these lines to make them simple, effective, and equitable.

Family relations are unique. They entail more than what is purely legal. Thus, the procedures – in and out of court - should be accommodative of socio-cultural diversities, affordable, and are accessible for applicants as well as biological parents who give their children in adoption driven by factors including poverty, social and political backwardness, illiteracy, and ignorance of available social assistance. There should be adequate and accessible assistance to families enabling them to raise their children rather than giving them away or abandoning them. The institutional structure should be efficient and adequately resourced to ensure that children are given in adoption only (a) where it is necessary, and (b) to families that are able to provide family care to children adopted by them.

The procedure should be handled by a multi-disciplinary team in a non-adversarial atmosphere to ensure a conducive environment to hear and determine an application for adoption (Palacios, J. *et al.*, 2019). It is essential that adoption applications are heard and determined by the Family Court, on a separate date and/or time set aside for the task, and in non-adversarial court-room atmospheres which inquire into, rather than confront, actual circumstances to verify, as of primary importance, what is best for the child. The procedures should be reinforced with pre-adoption non-judicial procedures which include the screening of applicants and independent assessment of all conditions; ensuring that

relevant parties have given their consent with full knowledge of the situation and its implications; have followed compulsory pre-adoption parenting sessions. Post-adoption follow-up procedures, in terms of both local and inter-country adoptions, should include monitoring of the suitability of the environment where the child resides, and be geared to prevent maltreatment, abuse, and exploitation of the child.

Apart from reforming the adoption law and the institutional mechanism, the entire legal system, the child rights governance system, and the culture of the administration of justice should uphold the rights of the adopted child, and ensure her/his right to equality and non-discrimination on the basis of his status – “adopted.” The adoption law of Sri Lanka needs an overhaul to cater to the current social realities. In its attempt to reform the law, the country has a lot to learn from jurisdictions such as New Zealand, the UK and some states of the US. However, the reformed law should strike a fine balance between the growing demand for adoption and the potential dangers of a liberalized law. Different factors may influence the balance in each case, but the best interests of the child should be the key factor in ensuring equity for the child.

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