Judging hard cases: to uphold rights or to deny them?

An analysis of the role of the judge in guaranteeing the best interest of the child

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The modern world recognizes that '[H]uman rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments'[1] and that ' While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'[2] The idea was promoted by scholars belonging to the natural law tradition such as Hugo Grotius, Thomas Hobbes, John Locke, Lon Fuller and John Finnis. The idea of human rights, according to natural law, is based on 'morality', which is believed to be the underlying basis of all laws. On the contrary, positivists assert that law and morality are separate, and refuse to appreciate the morality in law. For positivists, the pedigree of laws depend not on their morality or the justice they deliver, but their origin. Jeremy Bentham and John Austin were pioneers who believed that only the sovereign has the power to make law, and hence judges can only interpret the laws created by the sovereign.

In reality however, the law-making process is not so technical, as there are areas in law which such sovereign powers have kept open. These uncodified areas, identified by Hart and Dworkin as hard cases, are expected to be determined by the judge. Judges determining these cases are required to actually make law. Rights relating to children, in custody and guardianship issues in particular, are such areas where the judge is called upon to *make* law, as the applicable law remains unwritten. Though according to Dworkin the Judge is expected to perform a Herculean task in hard cases, a determination could be influenced by various factors that constitute important facets in a legal system, i.e. the substance, culture and structure of the law. The impact such determinations could have on human rights of parties in legal regimes where the culture and structure is defined

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[1] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Art.1

[2] Vienna Declaration and Programme of Action, Art. 5

according to positivist thinking is immense, as protection of rights of all parties concerned would not be an objective of a positivist court. The impact of such positivist thinking on human rights of children who come before courts could be even worse.

The extent of judges' freedom in lawmaking in upholding the best interests of the child, whose custody and guardianship are at issue, has always been a subject of controversy. Analyzing a few selected cases, this article attempts to describe courts' intervention in restricting or upholding children's rights through the interpretation of the 'best interests of the child' using the concept of *parens patriae.* It argues that universality of human rights, as stated at the outset of this article, is subjective, and that courts which adopt natural law tradition, uphold the rights of children while courts which favour a positivist approach restrict their rights in law-making. It also attempts to make a case for adopting a natural law tradition in judicial law-making, especially where children's custody and adoption are at issue.

Children in the substance of the law

Children have historically been defined as a group of 'vulnerables' in many legal systems. Blackstone, a positivist, described children as 'legal disables' treating them as dependents with nominal recognition, if at all, rather than autonomous individuals. Blackstone went further describing their disabilities as 'privileges'. Blackstone's definition of 'privileges' however, has a meaning of its own: i.e. these disabilities required others to decide for children and do things for them, rather than letting them decide and do things on their own. This definition has led Blackstone to conclude that children need to be "secure... from hurting themselves by their own improvident acts."[3] It carried a considerable weight in English law as well as other countries influenced by English law, particularly in respect of children's contractual obligations, their right to hold and control property, state and parental obligations when children separate from family settings, with reference to parental responsibility for the custody, upbringing and development of the child and in the context of the child's involvement with the police and the justice system.

Upholding this colonial heritage, the legislature of Ceylon has enacted many a statute that deal with children and affect their rights, containing archaic legal norms and principles. As

[3] William Blackstone, Commentaries on the Laws of England, at p. 452 (1992)

Goonesekere notes, this 'protectionist value system had an important impact on domestic legal systems' and prevented children's interests being 'articulated as social, cultural and economic rights.'[4] Law reforms that took place in the independent Sri Lanka, though have adopted policies aligned with international standards to a certain extent, have generally been *ad hoc* and piecemeal rather than holistic and principled. Law reform neither takes place on a broad holistic basis of Constitutional standards; Sri Lanka's obligations as a state party to international conventions; and other standard-setting agreements and national policies including the Children's Charter, nor considering the contemporary social, medical and other important and relevant developments. Consequently, fundamental rights of children have been violated in a crippling attitude of protection.

The age threshold for the definition of a 'child' continues to be varied despite the very clear definition of a child in the Children's Charter[5] and several statutes including the Age of Majority Ordinance[6] and the ICCPR Act.[7] The Adoption Ordinance for instance, which has not been reformed according to national standards, continues to define a child as a person below the age of fourteen years,[8] and necessitates to obtain the consent of an adoptee child only where the child is above the age of ten years.[9] This provision challenges a child's rights to autonomy, participation, expression and the right to be heard in an important decision, which has life-long and irreversible consequences. Furthermore, culture and religion often prevail over the definition of 'child' affecting their autonomy and rights. For example, the Muslim Marriage and Divorce Act[10] allows a girl child to be given in marriage at the age of twelve, and even at a prior age with the approval of *Quazi* of the area.[11]

However, many a reforms have been introduced to Sri Lankan statute law including the overarching provision in the International Covenant on Civil and Political Rights (ICCPR) Act,[12] which states "In all matters concerning children, whether undertaken by public or private social

[4] Goonesekere Savitri, Children, Law and Justice, (SAGE 1998) p 77
[5] The Government of Sri Lanka formulated the Children's Charter in 1992

[6] Age of Majority (Amendment) Act (No. 17 of 1989) - Sect 3
[7] International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007
[8] Adoption Ordinance No. 24 of 1941
[9] Adoption Ordinance No. 24 of 1941, s. 3(5)
[10] No. 13 of 1951
[11] Ibid, s 23
[12] No. 56 of 2007

welfare institutions, courts, administrative authorities or legislative bodies, *the best interest of the child shall be of paramount importance*."[13]

The culture of the law

Law has traditionally been taught by paying more attention to the established legal norms and jurisprudence of English Law and Roman-Dutch Law and placing children in their 'protected' enclave, rather than treating them as autonomous human beings holding rights. The law schools, which in the main, have faithfully followed British positivism in teaching both substantive and procedural law have, for decades, trained law men and women to define children in terms of this English law vision, disregarding the evolving capacity of a child. Thus, the relevance of the law in social change and vice versa are rarely addressed and the law's role in oppressing 'vulnerable groups' in the façade of protectionism has been reinforced. This remains so to date, despite the recognition of fundamental rights in the country's constitution; ratifying a number of international conventions obliging as a state party to uphold children's rights; and adopting a national charter on the rights of the child.

The doctrine *parens patriae* has its roots in English Common law, and referred to the Royal prerogative. The King exercised *parens patriae* in his role of father of the country.[14] The early English courts have interpreted 'welfare of the child' in a way that reinforces a father's rights. In *re Agar-Ellis*[15], per Cotton LJ's definition stands testimony: *'When by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father but leave him the responsibility of exercising the power which nature has given him by birth of the child'.*

On the other hand, *parens patriae* in Latin, means 'parent of the country', and allows the state to step in and serve as a guardian for children where they are unable to care for themselves and act on their behalf.

[13] S 5(2). Emphasis is mine.
[14] https://legal-dictionary.thefreedictionary.com/jurisdiction
[15] (1883) 24 Ch D 317, at p 334

The concept of *parens patriae* has gained statutory recognition in Sri Lanka during colonial times, and been recognized in the legal system since then.[16] This mandates the courts to hold custody and care of minors and wards resident within its judicial district. Even though Sri Lanka had the opportunity of drawing from both the English Common Law and Roman-Dutch Law, in giving meaning and effect to this doctrine, a long line of judicial determinations stand testimony for bias the Sri Lankan courts have had, towards the English Common Law standard. Consequently, using an authoritarian stand, especially what has been adopted in cases like *In re Agar-Ellis,* the Sri Lankan courts have used its *parens patriae* to uphold parents', especially a father's rights, rather than taking a child rights perspective in preserving the latter's best interests.[17]

There have been occasional exceptions like Justice Weeramantry's approach in *Fernando v. Fernando,*[18] which reflects a departure from the traditional thinking and change of focus from parents towards children. However, such attempts have not been able to transform the mindset of the court in general to use its prerogative to uphold the best interest of children. Another attempt to uphold the best interest of the child could be seen in an unreported Court of Appeal judgment where Grero J. held that *the best interest of the child* is the most fundamental issue to be determined in a custody dispute. Yet, rather than looking through a lens of child rights, the court has focused on choosing between parents as custodians, in order to ensure the interests of the child.[19]

A marked departure from the traditional thinking can be seen in Justice Thilakawardene's progressive judgment in *Jeyarajan v. Jeyarajan*,[20] where the Court of Appeal opined in unequivocal terms that the best interest of the child prevails over parental rights. As Dworkin theorized in *Taking Rights Seriously*, the Court of Appeal's determination was clearly based on the 'principle'- rights of the child- rather than 'policy'. The idea that a child's rights take precedent over other factors established in *Jeyarajan* was later followed in *Krishanthi Perera v. M R Perera*[21], where Wimalachandra J. stated thus: "*In recent decisions the courts have expanded the concept of the welfare of the child with regard of minor children. It is in the child's interest the*

[16] Courts Ordinance No. 1 of 1889 (s 69); The Judicature Act No 2 of 1978 (s 3); and The Judicature (Amendment) Act No 71 of 1981.
[17] See Scharenguivel S, Parental and State Responsibility for Children: The Development of South African and Sri Lankan Law, for a detailed discussion of these cases, though in comparison with South African Law.
[18] (1968) 70 NLR 534
[19] H.C. application No. 77/91 (decided on 14.02.1994)
[20] 1999 (1) Sri. L. R. 113
[21] CALA 334/2004, (2006-08-30, Unreported)

court plays a special role as the guardian of the child's welfare. The court as the upper guardian has every right to ensure the welfare of the child." Even though the court's effort in upholding the '*welfare'* should be appreciated, the use of terms in delivering the judgement reflects a favor for the common law approach: rather than an obligation. The doctrine *parens patriae* has apparently been used as a 'right of the court'; thus the courts have used '*welfare of the child*', which means general *wellbeing* rather than the '*best interest of the child*'. The principle '*best interest of the child*' does not give a right to the court, but *compels* it to take a holistic look at each situation and assess what is the best for the particular child, for whose interests the court stand when in acts as *parens patriae*.

Such an approach was taken in the Civil Appellate High Court judgment (adoption) in *Sumanathissa Bandara* v. *Sajith Lakshitha de Silva.*[22] In interpreting the provisions of the Adoption Ordinance, the court has looked far and beyond the four corners of the statute. Citing global standards and recognizing the child as an autonomous human being holding rights, the court laid down guidelines to be adopted by courts in determining the '*best interest and welfare of the child*'.[23] Clearly, the main focus has been to ensure the *best interests of the child,* and the language adopted by the court reflect its obligation towards upholding the right of each child who comes before the court. Upholding *the child's best interest* was considered as the *duty* of the court, rather than a *right*.

However, the Supreme Court sprung back to its former position in a dispute relating to adoption of a child in *Jagath Priyantha Epa* v. *Ahingsa Sathsarani Epa.*[24] The court, depending mainly on the Report of the Probation Officer, continuously used the phrase '*welfare of the child*', and stressed the importance of parental rights for the welfare of the child, and stated in very certain terms: "*The Petitioner-Respondents are the natural parents of the child. Thus, they have the legal right to keep the child in their custody. No argument can be brought forward to deprive the said legal right of the natural parents*."

Karunkalage Chandana Silva v. *N Sudharshani*[25] is another instance where the Court of Appeal, though referred to the *'welfare of the child'* did not delved into serving the girl's interests a reality.

[22] NWP/HCCA/KUR/Appeal/ 129 / 2014 (F)
[23] Dr. Sumudu Premachandra, HCJ. [HCCA]
[24] S.C Appeal 12/2018, Decided on 03.04.2019
[25] C.A.(HB) Application No. 03/2017, decided on June 2019 (Unreported)

In this instance, the appellant claimed that he had a relationship with the respondent, who was married, and that he is the natural father of the child born to her. He also claimed that he maintained both the mother and the child, a girl, and that he and the child were very close to each other before he went abroad for employment. Further he claimed that he continued to support them financially even after he went overseas. In his petition to the court he claimed paternity of the girl and pleaded for access. The court had held that a third party cannot be allowed to challenge the paternity of a child born to a married woman during the subsistence of her marriage. In the process of analyzing preceding case law, the court had omitted to analyze the best interests of the seven year old girl, who was the main victim of this case. '*Corpus'* as the positivist legal nomenclature may call her, she is human, and by virtue of being human she is entitled to all the human rights. And at the age of seven she had the capacity to express her opinion, but apparently she was never consulted. She should not have been denied the right to express her opinion and to be heard and the right to participate in a most important decision of her life. The court would undoubtedly call her as a witness had she been an adult. Yet, age cannot be a rational ground to deny a person of her rights or to be discriminated against. She also has the right to know who her parents are. According to global standards, every child has a right to know and be cared for by his or her parents[26] and a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[27] The court has referred to the child's best interests, but apparently the structure of the law has prevented it from looking at the 'child' within the meaning of the *corpus.*

The structure of the law

The 19th century legal formalism focused on maintaining the *status quo* of the system rather than the people it is supposed to serve. The British system of administration of justice zealously guarded the hierarchical adversarial system, and the structure has not been able to be flexible according to the needs of the people. Instead, the people have been expected, sometimes forced, by the system to fit into the structure.

[26] United Nations Convention on the Rights of the Child, Art. 7(1)
[27] Ibid, Art. 9(1)

The present Sri Lankan court system and the structure, which was introduced in the 19th century by the Dutch and developed later by the British, is a replica of this formal system hailed by the British. It has been modelled on the assumption that in any 'dispute' there are two conflicting parties, who are free to bid according to their capacities as in the free market concept.[28] Notwithstanding their differences in actual society, the two conflicting parties are assumed to be on equal standing – economically, socially and otherwise, and the judge is required to deliver only in respect of the issues 'disputed' on and to grant only the relief 'pleaded'. This prevents a court from taking a holistic view of a situation. For example, in *Buddhadasa Kaluarachchi v. Nilamani Wijewickrama and another*[29] the Court of Appeal stated "*The court considering the paramount importance of the welfare of the child could vary its own order*..." but "*The appellate court would not grant a relief which no party had prayed for. However wide the jurisdiction of the court of appeal may be it can only exercise it in a properly constituted appeal from judgment presented to it by an aggrieved party*." Clearly, the court has given meaning to the law in its strictest sense using rules of court procedure to restrict itself, rather than stretching its boundaries to deliver justice. Needless to say, it should have been the District Court which could have called for evidence in order to obtain a clearer and wider picture of the situation. It's obvious however, that the heavy workload prevents trial court judges from looking at family disputes through a progressive lens even where they want to have a closer look at the status of the challenged relationships. On the other hand, the doctrine *parens patriae* does not distinguish between trial courts and appellate courts. Nor the ICCPR Act does make a distinction between upper and lower courts in the hierarchy of system. Being the upper guardian of every child, it is *the court* which is duty bound to look into the best interests of the child even where the child's interests are not prayed for by any party to the suit.

Another crippling feature is the adversarial nature of the Family Court. The Sri Lankan court structure – both civil and criminal- is so adversarial that 'mutual agreement' on selected issues, though recognized in indigenous Sri Lanka, have been termed 'connivance' and 'collusion' and bar parties from obtaining redress in many law suits. The parties are expected to behave as 'disputants' and are represented by counsel who focus on wining the case rather than ascertaining the truth. The court-room rivalry between family members inherent in such a court distract the

[28] Roberto M Unger, *The Critical Legal Studies Movement*, p575-577
[29] (1989) 1 Sri. L. R. 262

focus away from the best interest of their children and badly affect the children's lives. The proceedings in District Courts in custody cases are a far cry from Family Courts.

Furthermore, the essentially hierarchical nature of the courts system maintains its standards so high as to make an ordinary citizen feel an alien – where a different language is spoken that prevent one from speaking on her/his behalf. In this context where even an adult does not feel comfortable, a child's vulnerability, isolation, fear, anxiety and deprivation are beyond explanation. In other words, courts, which are larger than life even to adults, can be a nightmare for children. On the other hand, the courts leave little space for judges to deliver justice – these established norms and structures create obstacles, which even an exceptional judge find hard to overcome.

Rather than using the doctrine for the courts to stand on behalf of the children and to uphold their interests, the Sri Lankan courts adopt the ordinary adversarial approach also in disputes where children are involved in. Every person, including a child depending on his/her capacity has a right to participate in matters affecting his/her life. It is upto the court as *parens patriae* to ensure that a child participate in such proceedings in a meaningful way. A notable concern of the court in *Sumanathissa Bandara* v. *Sajith Lakshitha de Silva*[30] was its recognition of ascertaining 'the wishes and feelings of each child concerned'. Yet, this is more an exception than a rule. Even in situations of adoption, upholding the legislative intention as expressed in the statute, the adoptee child's views are generally sought only where the child is above the age of ten years. In *Jagath Priyantha Epa* v. *Ahingsa Sathsarani Epa*[31] The child's wishes were not considered in determining the issue, nor was she independently represented in court.

Judicial law-making

Adding to this restricted court culture and structure, the *ad hoc* statutory reforms create anomalies challenging the parameters of judicial law-making and place mainly the primary courts in a quandary. Consequently, in keeping with what they learnt at law schools, both the bench and the bar use *parens patriae* as a cover to avoid going beyond the clear intention of the legislature, local statutes are interpreted so as to preserve their literal meaning, draw insights from jurisprudence

[30] NWP/HCCA/KUR/Appeal/ 129 / 2014 (F)
[31] S.C Appeal 12/2018, Decided on 03.04.2019

from English and Roman-Dutch legal systems, and thus take great measures to prevent children being recognized as autonomous individuals, so as to 'protect' them and not to let them 'hurt themselves'.

Using a protectionist approach, cultures and religions also have contributed to add colour to this definition, identifying children and recognizing their capacities and abilities, according to cultural-specific parameters. These cultures have over shadowed some judgements, while influenced others from side-doors, without being mentioned or noticed.

Consequently, despite the global recognition that children are autonomous human beings holding rights and the extent of the protection and care required by a child depends on the physical and psychological capacity of an individual child, the structure of the law remain static, hardly providing ways and means to test the 'capacity' of an individual child within its purview. Moreover, the substance, culture and the structure of the law continue to be formulated and practiced on pre-conceived legal norms, socio-cultural standards, religious beliefs, gender assumptions and in some instances on the marital status or matrimonial guilt/innocence of their parents. Thus, notwithstanding the constitutional recognition that 'the fundamental rights which shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied'[32], children, as 'ineligible' and 'disabled' ones continue to be sidelined, discriminated and disadvantaged contrary to the right to equality and non-discrimination guaranteed as fundamental rights to 'all persons' and 'all citizens' of the country.[33] Moreover, even amidst statutory compulsion to uphold the best interest of the child in all matters concerning a child'[34] courts continue to be misled by statutory loopholes, legislative oversights and their own socio-cultural prejudices. Behind the façade of 'protection' courts continue to recognize children as a vulnerable group needing protection, sometimes to the extent of violating their own rights. Judicial decisions are routinely taken on individual adult assumptions, and court practices are hardly based on child-centric value judgments, fail to explore all options and their possible outcomes, and children are rarely given a reasonable opportunity to participate in the decision-making process. Thus, children, who are ill-fitted in adversarial courts, continue to be

[32] Constitution of Sri Lanka, 1978, Art. 4 (d)
[33] Ibid, Art. 12
[34] International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, s 5(2)

unrepresented, unheard and least important in courts that work according to adult assumptions and standards.

Of recent however, Sri Lankan appellate courts have taken progressive steps towards interpreting children as autonomous individuals holding rights. In *Ishara Anjalie v. Waruni Bogahawatte,*[35] a Fundamental Rights application, the Supreme Court stressed the importance of upholding the best interest of the child in all matters. Citing Article 3 (2) of Sri Lanka's Charter on the Rights on the Child, the court emphasized the importance of upholding the best interest of the child as a primary consideration in any matter concerning a child.[36]

Such progressiveness is yet to be witnessed from primary courts, especially the District Courts which function as Family Courts, where the bulk of child-centered cases are handled and where *parens patriae* is exercised on a daily basis. As the role of the court expands beyond mere adjudication, but should deliver justice, going beyond mere interpretation of statutes where necessary, it is pertinent to reassess how courts should use *parens patriae* in guaranteeing the best interest of children who come (or brought) before them. Afterall, the 'judicial power of the people' are exercised by courts,[37] and the Constitutional reference to 'courts' do not differentiate between appellate and primary courts. And, by and large, children are citizens of this country.

Conclusion

H. L. A. Hart's conviction is that morality should guide the judge in deciding hard cases. Ronald Dworkin argues that hard cases should be generated by principle and not policy. The 'morality' as propounded by Hart does not mean a judge's personal conviction, which may be influenced by socio-cultural prejudices or policy created by the sovereign or judicial tradition or jurisprudence. 'Morality' which guide a judge in hard cases and determine the legitimacy of the law they create are 'principles', i.e. human rights, which cannot be compromised for policy or tradition. Every child, irrespective of age, ethnicity, religion, caste, class or gender has rights, especially economic, social and cultural rights; the rights to dignity; to be respected and represented in court; to be heard; for his or her interests to be protected; and not to be discriminated against. Dworkin elaborates thus "*When a judge chooses between the rule established in precedent and some new rule thought*

[35] SC (FR) Application No. 677/2012] decided on 12.06.2019
[36] Ibid, Justice Aluwihare P.C. at p. 19
[37] Constitution of Sri Lanka, 1978, Art. 4 (c)

to be fairer, he does not choose between history and justice. He rather makes a judgment that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete."[38] These rights have corresponding duties and obligations on parents, society or the state. It is this obligation that the court is called upon to fulfil in its role as *parens patriae.*

[38] Ronald Dworkin, Hard Cases, 88 Harvard Law Review, April 1975, No 6, p 1063-1064