

# Who holds the key to child welfare paramourncy? A critical analysis of the ‘triangular rights’ decision-making paradigm (child, parent, and state)

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## 1. Introduction

‘...traditional adult-centric methods to facilitate participation in decision-making will not always be accessible or appropriate for children.’<sup>1</sup>

It is often argued that ‘childhood is a social construct.’<sup>2</sup> The question of whether child rights should be regarded simply as human rights has been similarly debated.<sup>3</sup> And yet, the law clearly differentiates between the rights of the child and of parents:<sup>4</sup> the United Nations Convention on the Rights of the Child (UNCRC) in particular serves to codify ‘a broad spectrum of children’s rights in international law’ by setting minimum ‘standards or benchmarks which states should meet.’<sup>5</sup> In terms of achieving child protection however, timely reform of domestic legislation is often key, as history has tended to demonstrate.<sup>6</sup> The notion of the ‘family’ as a safe place will be examined here however through Sicnarf Garhc’s model of the *Tludas* and the *Dlihcs*,<sup>7</sup> which frames vulnerability as a central factor in decision-making. Reference will also be made to the doctrine of *Patriapotestas*,<sup>8</sup> with a view to analysing whether the notion of ‘parental responsibility’ adequately reflects modern sociological conceptions of (legal) parenthood, given the significance of child welfare paramourncy. Arguably, a triangular ‘key holder’ model can be used to illustrate the triadic nature of the fluid, often overlapping relationships arising between child, parent and state. The need to promote child autonomy may be seen as resting at the pinnacle of the triangle, with parental

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<sup>1</sup> J Tobin, ‘Justifying Children’s Rights’ (2013) 21 *International Journal of Children’s Rights*, 395-441, 430.

<sup>2</sup> *Ibid* 399.

<sup>3</sup> *Ibid* 430. See also L Purdy ‘Why Children Shouldn’t Have Equal Rights’ (1994) 2 (3) *International Journal of Children’s Rights* 223–241; A McGillivray ‘Why Children Do Have Equal Rights: In Reply to Laura Purdy’ (1994) 2 (3) *International Journal of Children’s Rights* 243–258.

<sup>4</sup> See further G Douglas ‘The Retreat from *Gillick*’ (1992) 55 (4) *Modern Law Review* 569-576, 570; E Cave ‘Goodbye *Gillick*? Identifying and Resolving Problems with the Concept of Child Competence’ (2014) 34 (1) *Legal Studies* 103-122.

<sup>5</sup> B Byrne ‘Do Children Still Need to Escape Childhood? A Reassessment of John Holt and his Vision for Children’s Rights’ (2016) 24 (1) *International Journal of Children’s Rights* 113-134, 114

<sup>6</sup> See J Herring ‘*Family Law*’ (2019) 621

<sup>7</sup> As cited by F Schrag, ‘The Child in the Moral Order’ (1977) 52 *Philosophy*, 167.

<sup>8</sup> G Scarre, ‘Children and Paternalism’ (1980) 55 *Philosophy*, 119.

rights at the heart of this model: these are symbolic of responsibility and play a significant role in enabling and ensuring child welfare paramouncy. The state is seen as underpinning the entire structure and as such is situated at the base of the triangle. It is argued here that such a model allows for a ‘bottom-up’ approach, which can then justify state interventions (e.g. in parent-child disputes) which at times demand judicial rights-balancing exercises by domestic courts. In other words, the state can ‘draw the line’ if parent-child positions have become unclear or problematic: the state’s position is also grounded in the longstanding presumption that certain ‘rights may be used to resolve conflicts of interests.’<sup>9</sup>

## 2. Child rights: welfare paramouncy, best interests, or autonomous ‘voice’?

*‘...bold, quick... capable young people are by no means a rarity; neither, unfortunately, are dull-witted, incompetent adults.’<sup>10</sup>*

In the 1700’s, Sicnarf Garhc discovered a society made up of two groups, namely the *Thudas* (Ts) and the *Dlihcs* (Ds).<sup>11</sup> The community recognised two classes of person. The Ds were deemed strong and intelligent, while the Ts were weak and ignorant: as such, the Ds had the right to punish the Ts accordingly. The regime was harsh and unpredictable and often led to pain and deprivation for those who were ‘weak.’ The Ds maintained however that this was essential to their evolutionary process and evidenced their love for the vulnerable. In other words, a sort of harsh best interests principle could be said to exist, even if only in terms of Reece’s observations on the ‘absence of certainty over what is a good childhood.’<sup>12</sup> And yet, it is difficult to argue here that the weaker members of such a society are fully rights-bearing, autonomous citizens. The vulnerabilities of children – and their need for adult-led protection – cannot be used to argue that children are incapable of possessing rights. And yet children have often been denied autonomy on the basis that they lack the capacity needed to decision-make.<sup>13</sup> This has led to counter arguments that the distinctions between childhood and adulthood are at times illusory,<sup>14</sup> and largely used to maintain parental superiority e.g. by unnecessarily

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<sup>9</sup> M Freeman ‘Taking Children’s Rights More Seriously’ (1992) 6 *International Journal of Law and the Family*, 55.

<sup>10</sup> J Harris ‘The Political Status of Children’ (1982) in K Graham (ed) *Contemporary Political Philosophy: Radical Studies* (1982: Cambridge University Press), 37.

<sup>11</sup> *Op cit* at n 8.

<sup>12</sup> H Reece, ‘The Paramouncy Principle Consensus or Construct?’ (1996) 49 *Current Legal Problems*, 172.

<sup>13</sup> Tobin *op cit* n 2 413.

<sup>14</sup> J Herring *et al Great Debates in Family Law* (Palgrave MacMillan, 2012), 58.

prolonging the state of childhood.<sup>15</sup> Eekelaar has argued however that the concept of childhood is becoming increasingly indistinct from adulthood,<sup>16</sup> in spite of its complex history. The doctrine of *Patria Potestas* in Roman Law framed children as the chattels (property) of their father;<sup>17</sup> any ‘right’ to an apprenticeship-led education was more concerned with enhancing the wider commonwealth and maintaining paternal power.<sup>18</sup> The keyholder, triangular model does not work here given that child ‘rights’ served largely to maintain the patriarchy.

Paternal authority limited children’s autonomy for centuries however,<sup>19</sup> and was supported by religious doctrine, so that ‘a father should not love even his own children more than his Lord.’<sup>20</sup> As Stone further argued, it is also perhaps possible that until fairly recently most parents and children ‘were not particularly close.’<sup>21</sup> The child’s main role or purpose was to simply inherit, increase or transmit the family wealth;<sup>22</sup> threats to the child’s welfare endangered the father’s material interests, which were clearly the paramount concern. As the court found in *Re Agar-Ellis*:

When by birth a child is subject to a father, it is for the general interest of... families and... children... that the court should not... interfere with the discretion of the father but leave him the responsibility of exercising that power which nature has given him by birth of the child.<sup>23</sup>

It is noteworthy that mothers’ rights are not mentioned here. It is unsurprising also that in *Re McGrath*,<sup>24</sup> Lindley LJ referred to the child as ‘it.’ Here, the keyholder model would have seen fathers placed at the triangle’s pinnacle point (mothers were absent), with children at the bottom and the state perhaps appearing at the heart, evidencing the lingering influence of *Patria Potestas* doctrine. It was not until the end of the 19<sup>th</sup> century that legislative protections for children became significant (e.g. via The Prevention of Cruelty to and Protection of Children Act 1889) which emphasised the evils of wilful neglect:

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<sup>15</sup> O O’Neill ‘Children’s Rights and Children’s Lives’ (1992) *International Journal of Law and the Family*, 38.

<sup>16</sup> J Eekelaar ‘Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies*, 161.

<sup>17</sup> Tobin *op cit* n 2 429.

<sup>18</sup> Eekelaar *op cit* n 17, 166.

<sup>19</sup> E Erlings ‘Is Anything Left of Children’s Rights?’ (2016) 24 *International Journal of Children’s Rights*, 641.

<sup>20</sup> J Goody, *The Development of the Family and Marriage in Europe* (Cambridge University Press, 1983), 100.

<sup>21</sup> L Stone ‘*The Family, Sex & Marriage in England 1500-1800*’ (1977), 6.

<sup>22</sup> F Pollock and F Maitland, *The History of English Law Before Edward I* (1968) 2, 444.

<sup>23</sup> *Re Agar-Ellis* (1883) 4 ChD 317.

<sup>24</sup> *Re McGrath* [1893] 1 Ch 143 (Lindley LJ).

Any person... having the custody, control, or charge of a child, being a boy under... fourteen years, or... a girl under... sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes... such child to be ill-treated... or exposed, in a manner likely to cause... unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour... not exceeding three months.<sup>25</sup>

From such uncertain beginnings, the paramountcy principle has become a legislative cornerstone and ‘golden thread’<sup>26</sup> of child protection, confirming that the child’s welfare shall be the court’s paramount consideration. As was confirmed in *J v C* (1970): ‘When all the relevant facts... are taken into account and weighed, the course to be followed will be that which is most in the interest of the child’s welfare.’<sup>27</sup> Article 3(1) of the Children’s Convention requires similarly that ‘in all actions concerning children... the best interests of the child shall be a *primary* consideration.’<sup>28</sup> And yet, conflicts arise, as in *Birmingham City Council v H*.<sup>29</sup> Here, the core question was whether the mother’s welfare (aged 14) or that of her baby would be paramount.<sup>30</sup> The Court of Appeal balanced their respective interests,<sup>31</sup> declaring it impossible<sup>32</sup> to give a paramountcy-grounded decision with both parties clearly being children in law. The mother had been known to assault others, and had shown a lack of care for the infant;<sup>33</sup> the House of Lords stated that that there was ‘no value’<sup>34</sup> in making an order for the mother to have contact with the child. Reece argued that ‘the interpretation of the paramountcy principle... has reduced the court to ignoring the welfare not only of children who will be affected but who are not the subject of the application before the court.’<sup>35</sup> Although vulnerability matters in decision-making,<sup>36</sup> the indeterminacy of the welfare principle can still lead to inconsistencies.<sup>37</sup> In *Re F*,<sup>38</sup> a child was refused contact with her siblings because it was not in their best interests, given that they were opposed to it. As Ward J stressed in *F v*

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<sup>25</sup> Prevention of Cruelty to and Protection of Children Act 1889, s1.

<sup>26</sup> Lord Mackay ‘Perceptions of the Children Bill and Beyond’ (1989) 139 *NLJ* 505.

<sup>27</sup> *J v C* [1970] AC 668 (per Lord MacDermott, at 710).

<sup>28</sup> UNCRC, Art 3(1) (emphasis added).

<sup>29</sup> *Birmingham City Council v H* [1994] 2 AC 212.

<sup>30</sup> *Ibid*, 223.

<sup>31</sup> *Birmingham City Council v H* [1993] 1 FLR 883, 884, 892, 894.

<sup>32</sup> *Ibid*, 899.

<sup>33</sup> *Op cit n 30*, at 212.

<sup>34</sup> *Ibid* at 223.

<sup>35</sup> H Reece ‘The Paramountcy Principle Consensus or Construct?’ (1996) 49 *Current Legal Problems*, 285.

<sup>36</sup> *Ibid* 277.

<sup>37</sup> R Mnookin ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems*, 226.

<sup>38</sup> *Re F* [1995] 1 FLR 510.

*Leeds City Council*,<sup>39</sup> finding the ‘subject of the application’<sup>40</sup> may be a difficult task. Here, an infant was deemed ‘directly involved as the subject of the application and [was] the only child to be named in the order.’<sup>41</sup> Such a stance meant disregarding one child’s rights in favour of another’s. One of two outcomes become possible under such a pathway: the subject of the application receives paramount consideration, or certain child interests are framed as something less than paramount. If rights exist in terms of ‘notional equality, equal moral worth [with] legal recognition of human dignity and... redress of wrongs’<sup>42</sup> then it is problematic when they seem to so easily outweigh each other in such circumstances.

The UNCRC does recognise the value of childhood but assumes that children are inherently vulnerable.<sup>43</sup> If however childhood is seen more as a social construct,<sup>44</sup> then it is needed mainly for nurture and socialization,<sup>45</sup> with the concept of child rights perhaps able to be more readily framed as culturally and contextually specific.<sup>46</sup> Arguably, given how they can vary considerably in terms of child protection and child autonomy, the plural term ‘childhoods’ might be more appropriate, as opposed to looking at childhood as simply ‘a single, universal, cross-cultural phenomenon.’<sup>47</sup> Given that culture is often both ‘contentious and fluid,’<sup>48</sup> a universal approach is difficult, if not impossible. Cultural or traditional practices should not however be used as a defence where violations of children’s rights have occurred.<sup>49</sup> As Archard and Skivenes have further argued, the Children’s Convention makes no suggestion that certain rights must trump others.<sup>50</sup> The triangular model proposed here does support a legal framework that might promote a child’s best interests over those of her parents, at least in respect of child-protective state interventions. Within England and Wales, the welfare checklist (contained in

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<sup>39</sup> *F v Leeds City Council* [1994] 2 FLR 60.

<sup>40</sup> *Ibid*, at 63 (per Ward J).

<sup>41</sup> *Ibid*

<sup>42</sup> A McGillivray ‘Why Children do have Equal Rights: In Reply to Laura Purdy’ (1994) 2 *International Journal of Children’s Rights*, 244.

<sup>43</sup> B Byrne ‘Do Children Still Need to Escape Childhood? A Reassessment of John Holt and his Vision for Children’s Rights’ (2016) 24 *International Journal of Children’s Rights*, 119.

<sup>44</sup> M Freeman, ‘The Sociology of Childhood and Children’s Rights’ *International Journal of Children’s Rights* (1998) 6

<sup>45</sup> McGillivray *op cit* n 43, 245.

<sup>46</sup> M Merry, ‘The Well-Being of Children, the Limits of Paternalism, and the State: Can Disparate Interests be Reconciled?’ (2007) 2 *Ethics and Education*, 39.

<sup>47</sup> Freeman *op cit*, 45, 438

<sup>48</sup> S Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago University Press: 2006) 14-16.

<sup>49</sup> J Tobin, ‘Justifying Children’s Rights’ (2013) 21 *International Journal of Children’s Rights*, 422.

<sup>50</sup> A David and S Marit ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights*, 2.

s1(3) of the Children Act 1989, as amended) is symbolic too of substantive developments not least in relation to child autonomy, especially where it refers to the ‘ascertainable wishes and feelings of the child.’<sup>51</sup>

Children do not necessarily always fully consent to decisions taken on their behalf however:<sup>52</sup> where a child’s wishes do not fully line up with their wider best interests, it is difficult to consider these feelings as part of the overall legal machinery of child welfare. Children do differ from adults in terms of their levels of vulnerability, with dependency being, as Freeman argues, a basic human condition:<sup>53</sup> the law on parental responsibility generally recognises this. *Gillick* acknowledged however that competent children can often take part in certain decision-making processes without parental authority.<sup>54</sup> Deemed ground-breaking by various authors,<sup>55</sup> the *Gillick* competency principle now underpins many judicial discourses on child competency and autonomy.<sup>56</sup> As Parker LJ stated, ‘virtual supremacy of the parent’s wishes... is far too extreme a notion... and... unacceptable.’<sup>57</sup> Eveleigh LJ declared however that ‘the parent’s decision must prevail unless displaced by the child’s welfare.’<sup>58</sup> In terms of the triangular model of conflicting - yet also complimentary - rights, such an approach acknowledges that, generally, parental decisions do tend to be made in the child’s best interests. Where a child lacks the capacity for autonomous decision-making, the triangular model becomes more problematic however: as Eveleigh LJ stated in *Gillick*, ‘parental authority should not be undermined.’<sup>59</sup> Parker LJ summed up the stance of the Court of Appeal: ‘This court does not seek to determine... that mother’s... should be kept in ignorance of what their children are doing... The mother should always be informed...’.<sup>60</sup> The House of Lords decision however ‘clearly emancipated children from the... view of absolute parental authority,’<sup>61</sup> with Lord

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<sup>51</sup> Children Act 1989, s1(3)(a).

<sup>52</sup> M Merry, ‘The Well-Being of Children, the Limits of Paternalism, and the State: Can Disparate Interests be Reconciled?’ (2007) 2 *Ethics and Education*, 39.

<sup>53</sup> M Freeman ‘The Sociology of Childhood and Children’s Rights’ *International Journal of Children’s Rights* (1998) 6, 441.

<sup>54</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

<sup>55</sup> J Fortin ‘The *Gillick* Decision – Not Just a High Watermark’ in Gilmore, et al (eds) *Landmark Cases in Family Law* (Bloomsbury, 2016) Chapter 11, 199-224; E Cave ‘Goodbye *Gillick*? Identifying and Resolving Problems with the Concept of Child Competence’ (2014) 34 *Legal Studies*.

<sup>56</sup> G Douglas ‘The Retreat from *Gillick*’ (1992) 55 *Modern Law Review*, 570.

<sup>57</sup> *Gillick* (op cit n 55) 439 (per Parker LJ).

<sup>58</sup> *Ibid* 443 (per Eveleigh LJ).

<sup>59</sup> 445 (Eveleigh LJ).

<sup>60</sup> 420 (Parker LJ).

<sup>61</sup> J Herring *et al* *Great Debates in Family Law* (Palgrave MacMillan, 2012), 68.

Fraser declaring that ‘all parent’s rights are is the power to act for the welfare of their child.’<sup>62</sup> Lord Scarman too felt that unless Parliament were to intervene, the courts should establish a flexible principle to enable child justice.<sup>63</sup> In other words, parents may no longer claim to have unfettered rights over their children: rather, parental rights must emerge from – or rest upon - the primacy of the child welfare principle itself. (Lord Templeman’s dissenting opinion suggested however that ‘parental *power* must be exercised in the best interests of their infant.’<sup>64</sup>)

Cases such as *Re R*<sup>65</sup> confirm that the courts are still duty bound to override a minor’s decision where necessary. In relation to the triangular model (and although such a system recognises the child as generally autonomous) an inverted approach to rights-weighting can also be argued, so that the state can achieve (‘bottom up’) child protective outcomes when needed. Here, a lack of competence and understanding was tied to the vulnerable child’s violent and suicidal behaviours.<sup>66</sup> In *Re L*, a 14-year-old was similarly found to lack the ability to achieve any ‘constructive formulation of opinion which occurs in adult experience.’<sup>67</sup> And yet, a child may be capable of understanding the issue at hand without necessarily fully grasping the consequences of making certain decisions. In *Gillick*, Fraser LJ framed capability in terms of understanding the situation, whereas Lord Scarman saw it as the ability to engage in meaningful decision-making. As Douglas argued: ‘One either has that understanding or one has not. One might therefore agree that a child who is mentally ill and disturbed from day to day probably has not acquired that degree of understanding.’<sup>68</sup> And yet, in *Re W*,<sup>69</sup> Balcombe LJ confirmed that older children should generally see their wishes afforded greater weight.<sup>70</sup> As Bingham MR stated in *Re S*: ‘Children are human beings in their own right... A child is after all, a child.’<sup>71</sup>

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<sup>62</sup> *Gillick op cit* n 55 (Lord Fraser).

<sup>63</sup> 186 (Lord Scarman).

<sup>64</sup> 200 (Lord Templeman) (emphasis added).

<sup>65</sup> 592.

<sup>66</sup> *Re R* (A Minor) (Wardship: Consent to Treatment) [1991] 3 WLR 592 (Lord Donaldson), 595.

<sup>67</sup> *Re L* (Medical Treatment: Gillick Competency) [1998] 2 FLR 810, 812.

<sup>68</sup> G Douglas ‘The Retreat from *Gillick*’ (1992) 55 *Modern Law Review*, 572.

<sup>69</sup> *Re W* (A Minor) (Medical Treatment: Court’s Jurisdiction) [1993] Fam 64.

<sup>70</sup> *Ibid* 88.

<sup>71</sup> *Re S* (A Minor) (Representation) [1993] 2 FLR 437, 448 (Bingham MR).

Post-*Gillick*, it seems however that at times there is little to no distinction between childhood and adulthood.<sup>72</sup> As Tobin further argues, there seems in certain contexts to be a loss of ‘moral justification to treat the child differently to an adult.’<sup>73</sup> And yet, children might not always choose well or wisely,<sup>74</sup> just as many adults often lack the ability to act in their own best interests.<sup>75</sup> Similarly, a ‘child-focused’ protocol is not necessarily always very ‘child-inclusive.’<sup>76</sup> The voice of the child may go largely unheard - or be seen as irrelevant - where parents are viewed as the child rights ‘keyholders.’ Unless the child is considered to be *Gillick* competent, then: ‘too often ...[children’s] views are not heard’<sup>77</sup> to the extent that some ‘children are often not consulted in cases that go to court.’<sup>78</sup> Perhaps it is true that ‘we fear children and their autonomy.’<sup>79</sup> In *Re R*, Lord Donaldson MR noted that if Mrs Gillick had been successful in her claim, then she would have needed to establish that no child under the age of 16 could ever be a rights keyholder: parental authority would be key and would override the child in every case.<sup>80</sup> It does not follow though that the *Gillick* principle always emancipates the child from parental authority. Estimates of child maturity should perhaps be made independently, given the dangers of concluding a lack of competency founded in disagreements over determining or interpreting a child’s best interests.<sup>81</sup>

### 3. Parental responsibility [for child rights protections]?

‘...not so much a desire to elevate children’s interests above those of the parent, but to stave off feminist demands for equality of parental rights.’<sup>82</sup>

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<sup>72</sup> J Eekelaar ‘Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies*, 161.

<sup>73</sup> J Tobin, ‘Justifying Children’s Rights’ (2013) 21 *International Journal of Children’s Rights*, 429.

<sup>74</sup> C Brennan, ‘Children’s Choices or Children’s Interests: Which Do their Rights Protect?’ in D Archard and C Macleod (eds) *The Moral and Political Status of Children* (Oxford, 2002) 59.

<sup>75</sup> M Merry, ‘The Well-Being of Children, the Limits of Paternalism, and the State: Can Disparate Interests be Reconciled?’ (2007) 2 *Ethics and Education*, 44.

<sup>76</sup> E Jan *et al* ‘Children’s Voices: Centre Stage or Side-Lined in Out-of-Court Dispute Resolution in England and Wales?’ [2015] 43 *Child & Family Law Quarterly*, 7

<sup>77</sup> 2.

<sup>78</sup> 6.

<sup>79</sup> B Byrne ‘Do Children Still Need to Escape Childhood? A Reassessment of John Holt and his Vision for Children’s Rights’ (2016) 24 *International Journal of Children’s Rights*, 115-116.

<sup>80</sup> *Re R* (A Minor) (Wardship: Consent to Treatment) [1991] 3 WLR 592; [1992] Fam 11, 22 (Lord Donaldson MR).

<sup>81</sup> A David and S Marit ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights*, 10.

<sup>82</sup> J Eekelaar ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies*, 174.

The principle of ‘parental responsibility’ describes the modern perspective on parenthood.<sup>83</sup> As a sometimes ‘elusive concept,’<sup>84</sup> much debate still surrounds the issue of where parental rights now stand in relation to ‘voice-based’ children’s rights (i.e. to participate, and to have their voices heard). The concept works however within the triangular model: the parent-child relationship can co-exist alongside the parent-state relationship, despite the introduction of measures promoting child rights, and the gradual shift away from the notion of parental control over their children. Parents still serve as keyholders often playing the most significant role in promoting and protecting child rights. Garhc’s model to an extent provides some justification for state paternalism and parental control i.e. the weak often lack capacity and need protecting by the strong. It may be argued too that over-reliance upon participatory rights may have profoundly negative consequences for certain children.<sup>85</sup> Equally, however, if children are simply treated as the ‘property’ of their parents, it becomes difficult to define the point at which they might fully become a rights-bearing adult.<sup>86</sup> Compromise may be found in Lady Hale’s observation that ‘Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and the primary right to do this.’<sup>87</sup>

This mirrors Lord Scarman’s judgement in *Gillick*,<sup>88</sup> in the sense that he also argued that parental rights derive from parental duty and will only exist for as long as they are needed.<sup>89</sup> Parental responsibility is clearly not a right to complete control; parents play a vital, wider societal role in promoting their child’s potential as opposed to simply parenting in pursuit of their own interests. Public interest in children derives from social concerns (e.g. self-preservation) and a need to safeguard future generations.<sup>90</sup> This argument links to Garhc’s model of community care insofar as the regime was potentially justified in terms of aiding the evolutionary process. The family perhaps performs a similar service for wider society, when ‘civilizing’ children.<sup>91</sup> Herring has however acknowledged that, for some parents, the pressure

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<sup>83</sup> N Lowe, ‘The Meaning and Allocation of Parental Responsibility – A Common Lawyer’s Perspective’ (1997) 11 *International Journal of Law, Policy and Family*, 192.

<sup>84</sup> 193.

<sup>85</sup> B Arneil ‘Becoming versus Being: A Critical Analysis of the Child in Liberal Theory’ in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002).

<sup>86</sup> J Herring, *Family Law* (Pearson, 2019) 9<sup>th</sup> ed, 447.

<sup>87</sup> *R (On the Application of Williamson & Others) v Secretary of State for Education & Employment and Others* [2005] UKHL 15; [2002] EWCA Civ 1926 [72] (Lady Hale).

<sup>88</sup> *Gillick op cit* n 55

<sup>89</sup> 184 (Lord Scarman).

<sup>90</sup> A Bainham, ‘The Privatisation of Public Interests In Children’ (1990) 53 *Modern Law Review*, 208.

<sup>91</sup> J Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies*, 161-182.

of raising ‘good citizens’ can result in a sort of ‘hyper parenting,’<sup>92</sup> which very much diminishes child autonomy and can result in excessive over-protection. Parents ‘trying to do the right thing’ may also be ‘insecure about the justifiable range of their own rights and duties with respect to their children.’<sup>93</sup> The statutory definition of parental responsibility is perhaps problematic too: it categorises many rights, duties and powers under a single umbrella of responsibility. As Lowe notes, such a ‘poor’ response throws one back to a parental ‘rights’ narrative which ‘responsibility’ was supposed to replace.<sup>94</sup> As Erlings further argued, the Act clearly had no difficulty in continuing to embrace parental rights.<sup>95</sup>

The concept of parental responsibility evidences a shift from control to accountability however, as the parent is no longer in a firmly paramount position.<sup>96</sup> And yet, as Bainham argued, parental rights exist because parents have responsibilities, and they have responsibilities because they have rights.<sup>97</sup> The chief purpose of the 1989 Act was to promote the rights of children,<sup>98</sup> within a new model for parenthood.<sup>99</sup> It may have reiterated the paramountcy principle in statutory form, but difficulty still lingers ‘in terms of an ideological movement that could not escape characterization as an enhancement of parental rights.’<sup>100</sup> Parental responsibility can still therefore amount to ‘a weak basis for the protection of children’s rights within the parent-child relationship.’<sup>101</sup> Such enshrinement of the paramountcy principle is however quite symbolic of the child’s position at the pinnacle of the triangular model. Parents must behave dutifully towards their children: therefore ‘responsibility’ belongs to the parent rather than the state.<sup>102</sup> Prior to the 1989 Act, the structure of the triangular model would have been different, with parent-state powers generally serving to trump the rights of the child. As the main keyholders, parents should play a significant role in promoting and protecting the rights of the child where possible and should be situated at the ‘heart’ of the model. The child welfare paramountcy principle can in theory however lead to a subordination of child rights in

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<sup>92</sup> J Herring, *Family Law* (Pearson, 2019) 9<sup>th</sup> ed, 445.

<sup>93</sup> L Purdy ‘Why Children Shouldn’t Have Equal Rights’ (1994) 2 *International Journal of Children’s Rights*, 225.

<sup>94</sup> N Lowe, ‘The Meaning and Allocation of Parental Responsibility – A Common Lawyer’s Perspective’ (1997) 11 *International Journal of Law, Policy and Family*, 195.

<sup>95</sup> E Erlings ‘Is Anything Left of Children’s Rights?’ (2016) 24 *International Journal of Children’s Rights*, 625.

<sup>96</sup> Law Commission 1998:6; also noted by Esther Erlings.

<sup>97</sup> Bainham *op cit* n 91, 199; Jonathan Herring, *Family Law* (Pearson, 2007) 3<sup>rd</sup> ed, 377.

<sup>98</sup> Children Act 1989, s1; See also Thomson *et al* ‘*A Brief Guide to The Children Act 1989*’ (2015), 1.

<sup>99</sup> J Roche ‘The Children Act 1989: Once a Parent Always a Parent?’ (1991) 13 *JSWFL*.

<sup>100</sup> J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2017), 122-123.

<sup>101</sup> E Erlings ‘Is Anything Left of Children’s Rights?’ (2016) 24 *International Journal of Children’s Rights*, 650.

<sup>102</sup> J Eekelaar, ‘Parental Responsibility: State of Nature or Nature of the State?’ [1991] 37 *SWFL*.

favour of parental decision-making processes.<sup>103</sup> At times therefore, the family may still be a site of oppression for its ‘weaker’ members by those who are stronger.<sup>104</sup>

The notion of the ‘reasonable’ parent may be a legal fiction also: what one parent deems to be acceptable, another parent may not. Too many socio-political variables can also influence parenting styles: parents who hold odd or unpopular views are not always necessarily ‘bad parents.’ As Fortin summarises:

...although the average parent inevitably brings up his or her children with the best intentions, the essential subjectivity of the “welfare” or “best interests” test does little to persuade repressive parents to adjust their parenting style to promote children’s rights more effectively... parents may... argue that they are promoting the children’s best interests.<sup>105</sup>

This sums up the problems associated with defining parental responsibility in law. As Garhc discovered, the stronger Ds justified their actions as a manifestation of their love for the weaker Ts, but there is a fine line between justifying strict parenting styles and neglecting the principles of child welfare completely. In *Local Authority v AG*, siblings reported paternal physical abuse, including being hit with a chair and a belt, for trivial acts like watching television.<sup>106</sup> The father was a diplomatic agent, with diplomatic immunity,<sup>107</sup> so that proceedings were void.<sup>108</sup> Mostyn J questioned (in his obiter remarks) whether police could, in a genuine emergency, enter the premises of a diplomat, to rescue a child at risk of imminent death or serious injury, in apparent violation of Article 30(1) of the Vienna Convention. The case represents an unfortunate outcome in terms of children’s rights, undermining the triangular rights model completely in the sense that child welfare cannot be considered at all in these circumstances.

Significantly too, in *Re Roddy*,<sup>109</sup> the courts were tasked with balancing conflicting European Convention rights (privacy under Article 8 and freedom of expression under Article 10) when a teenage mother wanted to sell her story to the press. Munby J conducted the ‘necessary

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<sup>103</sup> Erlings *op cit* n 102, 642.

<sup>104</sup> A Bainham, ‘Privatisation of Public Interests in Children’ (1990) 53 *Modern Law Review*, 216.

<sup>105</sup> J Fortin, *Children’s Rights and the Developing Law* (Cambridge University Press, 2009), 322

<sup>106</sup> *A Local Authority v AG and Others* (Children) (Domestic Abuse) [2020] EWFC 18 [4], [13].

<sup>107</sup> *Ibid* [28]; See also the Diplomatic Privileges Act 1964; Vienna Convention on Diplomatic Relations 1961.

<sup>108</sup> *Ibid* [46].

<sup>109</sup> *Re Roddy* [2004] 1 FCR 481; 2 FLR 949.

balancing exercise... considering the proportionality of the potential interference with each right considered independently'<sup>110</sup> to conclude that Article 8 included a right to share one's personal experiences with other people.<sup>111</sup> Freedom of speech should therefore be respected where a child had 'sufficient understanding and maturity.'<sup>112</sup> As Article 12 of the UNCRC states, a child who is capable of forming their own views has the right to express those views freely and have them given due weight in all matters affecting them, in accordance with their age and maturity. This provision gives the child the opportunity to be heard in judicial and administrative proceedings either directly or through an appropriate representative.<sup>113</sup> Arguably, the principle of diplomatic immunity that trumped child rights in *AG*, is incompatible with various human rights provisions under both the European Convention and the Children's Convention. In terms of the triangular model, cases such as *AG* clearly remove the child from the 'pinnacle position' if not from the entire triad.

#### 4. Conclusion

*'...children... now have, in wider measure than ever before, that most dangerous but most precious of rights: the right to make their own mistakes.'*<sup>114</sup>

The *Gillick* decision was 'not only more child-centred but the clearest recognition yet of the decision-making capabilities of children.'<sup>115</sup> The paramountcy principle still generally serves however as a 'golden thread,'<sup>116</sup> running throughout child law, with children now seen 'as beings rather than mere *becomings*.'<sup>117</sup> Parental rights are often deemed 'weightier' but increasingly children's voices *are* being heard. Parental responsibility has replaced the concept of absolute parental control, with parental 'rights' deriving from parental status (rather than gender or adulthood). And yet, the parent is still often the chief keyholder for child rights, in

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<sup>110</sup> 18 (Munby J).

<sup>111</sup> 35 (Munby J).

<sup>112</sup> 56

<sup>113</sup> UNCRC, Art12(2).

<sup>114</sup> J Eekelaar 'Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies*, 182.

<sup>115</sup> M Freeman 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family*, 52.

<sup>116</sup> See further Lord Mackay 'Perceptions of the Children Bill and Beyond' (1989) 139 *NLJ* 505; H Reece 'The Paramountcy Principle Consensus or Construct?' (1996) 49 *Current Legal Problems*.

<sup>117</sup> B Byrne 'Do Children Still Need to Escape Childhood? A Reassessment of John Holt and his Vision for Children's Rights' (2016) 24 *International Journal of Children's Rights*, 113.

terms of generally being best placed to promote and protect child welfare within the family. The state (legislators and judges) must still be mindful of inconsistencies within the law: rights-balancing exercises<sup>118</sup> for example are still capable of producing anomalous decisions,<sup>119</sup> especially where conflicting interests arise.<sup>120</sup>

Child autonomy (participation rights) may easily clash with the welfare paramountcy principle.<sup>121</sup> Inconsistencies also exist in relation to differing domestic and international law interpretations of the best interests principle, particularly where parental and child rights may be in conflict with each other. As such, it is sometimes difficult to determine whether the key to realising child rights (protection, participation) is in fact held by the state, parents, or the (competent) child themselves. In terms of the triangular rights model, it is perhaps best seen as a flexible, moving template, with circumstances dictating where – and when – the child might be regarded as having been placed at the pinnacle.

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<sup>118</sup> See: *Birmingham City Council v H* [1993] 1 FLR 883; *Re Roddy* [2004] 1 FCR 481; 2 FLR 949; *J v C* [1970] AC 668.

<sup>119</sup> The recent decision in *A Local Authority v AG and Others* (Children) (Domestic Abuse) [2020] EWFC 18 and the traditional perspectives held in *Re L* [1962] 3 All ER 1.

<sup>120</sup> See: *Birmingham City Council v H* [1994] 2 AC 212; *F v Leeds City Council* [1994] 2 FLR 60; *Re F* [1995] 1 FLR 510.

<sup>121</sup> See: *Re T* (Wardship: Medical Treatment) [1997] 1 FLR 502; See also D Archard and M Skivenes ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights*.

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