Alexandra Clarke

Family Law Essay

How far is it possible both to protect adolescents and to respect their rights?

The 'interests' theory of rights arguably reconciles the protection of the interests of young people with respect of their rights because it essentially views the concepts as two sides of the same coin. As Campbell explains *"children have rights if their interests are the basis for having rules which require others to behave in certain ways with respect to these interests"*[1]. Accordingly, those rights are violated when the corresponding interest is inadequately protected. In those situations, it is perfectly possible to both 'protect adolescents and respect their rights'.

However, there are circumstances whereby the right in question is not a purely interest-based right but a right based on autonomy and free choice. There is an inevitable tension between the recognition that children are individuals who have this right to act independently and the paternalistic desire to protect them. This becomes especially apparent as the child approaches majority, when, in theory, they fully gain their right to *not* be protected if they so choose – and accordingly their carer and the state lose the right to protect them against their will.

It is in this context where rights and welfare often come into conflict and it becomes difficult to unite the two. This is because 'protection' here refers to protecting the minor from themselves and their own, potentially unwise or damaging, decisions. It is therefore sometimes impossible to protect an adolescent's welfare and afford due respect to their wishes and decisions. The solution instead lies in identifying a balance between these two goals. However, English law demonstrates the difficulty of finding this balance.

The principle that *"the child's welfare shall be the court's paramount consideration"* is enshrined in s.1 Children Act 1989; the term 'paramount' being interpreted to mean that the child's welfare is the only relevant consideration[2]. This immediately indicates that the legislation takes a protective approach to resolving issues relating to a child's upbringing. However, the Act does endeavour to involve the child's right to autonomy in the decision-making process by including in the s.1(3) checklist, *"the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding"*. The *"age and understanding"* caveat suggests that the wishes of an older adolescent may be given more weight than those of a young child who may lack the personal awareness to form well-informed views. This is consistent with an attempt to allow adolescents rights to self-determination whilst simultaneously ensuring that their welfare is preserved.

Although application of the checklist is not mandatory except in certain circumstances (set out in s.1(4)), in **Re G (Education: Religious Upbringing) [2012]**, Munby LJ stressed that *"the court will always pay great attention to the wishes of a child old enough to be able to express sensible views"*. This appears to reflect an approach sensitive to the child's rights of self-determination. However, in trying to reconcile that approach with the s.1 welfare principle, he then concedes that *"they will be given effect to by the court only if... in accordance with the child's best interests"*. Essentially, despite acknowledging the importance of the child's views, he is saying that the need to protect them will ultimately

---

[1] T. Campbell, ***"The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult"*** **(1992)**

[2] **J v C [1970]**

always prevail. If the child is only allowed to decide for herself what is best when it corresponds with what the carer or court thinks is best, this is to empty her right to autonomy of all content; it is a right to agree but never to disagree.

In the *"landmark"*[3] case of **Gillick [1986]**, heralded by some as "*a victory for advocates of adolescent autonomy*"[4], a competent child's *"capacity to consent to contraceptive treatment"* without their parents' consent was recognised. Lord Scarman went as far as to state that *"parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind"*; thus implying that it is not in fact *possible* to both protect children from themselves and also respect their rights – because the right of the parent to intervene cannot co-exist with the child's right to autonomy.

Eekelaar took an extreme view of this decision, considering it to be a *"fundamental shift"* away from paternalism, which promotes a rule that *"where a child has reached capacity, there is no room for a parent to impose a contrary view, even if this is more in accord with the child's best interests"*[5]. However, it is unlikely that this was what the judges in Gillick intended. In fact, the overall tenor of the judgements remains rooted firmly in the concepts of the child's welfare and best interests[6] and therefore the case may better be viewed as an attempt to resolve *"potentially conflicting claims of doctors and parents to know what was in a child's best interest"* rather than to award children a free-standing right of self-determination.

In subsequent cases, 'Gillick competence' has been narrowly construed. For example, in **Re R (a minor) (wardship: consent to treatment) [1992]**, Lord Donaldson unequivocally stated that a Gillick competent child *"can consent, but if she declines to do so or refuses, consent can be given by someone else who has parental rights or responsibilities"*. He further held that the court has a *"right, and in appropriate cases, duty to override the decision of the parents"*; a mature adolescent's refusal to consent can be superseded by consent from either her guardians or the court, severely restricting her right to autonomy.

Furthermore, in that case, and **Re E (A minor) (wardship: medical treatment) [1992],** the courts managed to side-step the issue altogether by declaring that the children, although approaching majority, were not competent. By giving 'Gillick competency' such a limited reading, the courts are able to retain their powers of protection at the expense of the adolescent's right to decide.

The case-law clearly shows the difficultly of simultaneously protecting adolescents and respecting their rights. English law has therefore favoured a protective model when dealing with decisions involving children; despite judicial comment to the contrary[7], the right of the child to decide their own future remains a secondary consideration.

---

[3] J Fortin ***"The Gillick decision – not just a high water mark" (2007)***
[4] E. Cave, ***"Goodbye Gillick?" (2009)***
[5] Eekelaar, ***"The Emergence of Children's Rights" (1986)***
[6] The two phrases appear in the judgement over 80 times!
[7] See Munby LJ, above; also MJ Ward in **Re E (A minor) (Wardship: Medical Treatment):** *"what he wishes is an important factor... to take into account..."*

To redress the balance, an approach of 'liberal paternalism', as proposed by Freeman should be adopted[8] whereby children would be allowed significantly more scope to make their own life choices, provided that they were not 'irrational' (*"in the sense that it would undermine future life choices, impair interests in an irreversible way"*). If this high threshold of irrationality were crossed, that triggers intervention for the child's own protection. This approach strikes a desirable balance between respecting the autonomy of young people and protecting them, because it permits paternalistic involvement where a decision has potentially grave consequences, literally 'life-or-death' situations, but otherwise encourages freedom and independence. Therefore, the concern that severely ill children, such as the teenager in **Re E**, would be allowed to refuse life-saving medical treatment would not be realised under Freeman's approach. Conversely the *"articulate teenagers"* in **Mabon [2005]** would still be allowed independent representation in their parents' private law proceedings because choosing to be involved is in no way irrational.

[8] M. Freeman, ***"Taking Children's Rights More Seriously" (1992)***