Convention Compliance on a Hedgehog's Terms Utilising Dworkinian Jurisprudence to Move Towards an ECHR-Compliant Reinterpretation of the Paramountcy Principle in Domestic Practice

ASPINWALL, ALEXANDER

Convention-Compliance on a Hedgehog's Terms

Utilising Dworkinian Jurisprudence to Move Towards an ECHR-Compliant Reinterpretation of the Paramountcy Principle in Domestic Practice

Alexander Aspinwall-Livesey

Thesis submitted for the Masters of Jurisprudence

Durham University Law School

2020

Table of Contents

Table of Cases

Chapter Five: Developing the Parallel Analysis in light of the Theoretical Distinction Between Rules and Principles

Connecting the Taxonomical Critique with ECHR Non-Compliance
Adapting the Parallel Analysis
Judicial Understanding of Legal Principles
Simplifying the Re S Methodology
The Cumulative Balancing Exercise under Article 8(2)
Realising the Primary Principle in the Domestic Legal Framework
Statutory Amendment to Section 1(1) CA
Subsequent Judicial Development of the Primary Principle
Why is this Development Necessary?
The Relevance of Legal Principles
The primary principle Operating as a Dworkinian Principle
Principles as Part of a Judge's Weak Discretion
Conclusions

Conclusion: Moving towards a Convention-Compliant Model of Litigation

Table of Cases

A

B

C

D

E/F

G

H

I,J

K

K v Finland (application no.27751/95) (2001) 31 E.H.R.R 18
Kearns v France (application No.35991/04) [2010] 50 E.H.R.R. 04
Kopf v Austria (application no.30141/04) [2012] 1 WLUK 255
Re K [1977] Fam 179
Re KD (Minor) (Ward: Termination of Access) [1988] 1 All ER 577

L

L v Finland (application No. 25651/94) [2001] 31 E.H.R.R. 30
LA v M, ME, The children (Minors acting thorough their children's guardian) [2018] WL 04208000
LA v M, F, A, C (Minors acting through their Children's guardian) [2018] WL 04211878
Re L (a Child) [2019] EWHC 867 (Fam)
Re L (A child) (Contact: Domestic Violence) [2001] Fam 260

M,N

MK v CK [2011] EWCA Civ 793
NP v BR, T (Through her Guardian) [2019] EWHC 3854
Northamptonshire CC v AB, CD [2019] EWHC 1807 (Fam)

O

Olsson v Sweden (application no. 10465/83) [1992] ECHR 75
Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124
Re O and another (Minors) (Care: Preliminary Hearing) [2004] 1 AC 523
Ro v A local authority and others [2013] EWHC B31 (Fam)

P

Payne v Payne [2001] EWCA Civ 166
PA v TT, H (A child by way of 16.4 Children's Guardian) [2019] EWHC 2723
Re P (Contact: Supervision) [1996] 2 FLR 314
PM v CF [2018] EWHC 2658 (Fam)

Q/R

Re R (Care: disclosure: Nature of proceedings) [2002] 1 FLR 755
Riggs v Palmer 115 N.Y 506 (1889)

S

Salgueiro da Silva Mouta v Portugal [2001] FCR 653
Schneider v Germany (application No.17080/07) [2012] 54 E.H.R.R. 12
Suss v Germany (application No. 40324/98) [2006] 1 FLR 522

T

TE v SH, S (By his guardian ad litem, the National Youth Advocacy Service), [2010] 2010 EWHC 192 (Fam)
TP and KM v UK (application No.28945/95) [2001] 2 FLR 54

U,V,W

Re W (Children) [2012] EWCA Civ 999
R (on the application of Williamson) v Secretary of State for Education and Employment [2005] UKHL 15

X,Y,Z

Yousef v The Netherlands (application No.33711/96) [2003] 36 E.H.R.R. 20
Zawadka v Poland (application No.48622/99) [2007] 44 E.H.R.R. 9
ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4

Introduction

Introducing the Statutory and Interpretive Framework Relating to the Paramountcy Principle

Section 1(1) Children Act 1989 (hereafter CA), contains a seminal proposition of English family law. Described by Cretney as the 'clear statement of law that serves to centralise the child in the decision making process', the provision known as the paramountcy principle states that whenever a court is determining any question with respect to the upbringing of a child, or the administration of a child's property, the welfare of the child shall be the court's paramount consideration.[1] For the Law Commission,[2] such a principle dictated that the interests of the child assume 'absolute' priority. Indeed, it was for this reason that their series of reports preceding introduction of the Children Act 1989 advocated abandonment of the previous statutory construction that imported a degree of relative scale into assessing the interests of children as 'first *and* paramount'.[3] For Eekelaar, this construction signalled the shift from child instrumentalism to welfarism.[4] Decisions were now constructed and justified from a point of view centred on the child's interests themselves, as opposed to views concerning what the carer (often the father) desired for the child or some form of antiquated paternalism.[5]

In making a critique of the paramountcy principle's application in domestic law, this thesis recognises that section 1(1) CA does not explicitly term the proposition of law it contains a 'principle'. Instead, this thesis will place significance in the way section 1(1) CA has been referred to judicially, extra-judicially and in the academic scholarship. Here, particular importance will be placed on Law Commission documents and Hansard records setting out the intentions of draftsmen and Parliamentarians respectively. This intention was for the provision in section 1(1) CA to be both known and developed as the paramountcy principle in a practice-orientated sense.

Even before adoption into law in its current conception in section 1(1) CA, domestic courts had adopted a narrow interpretation of the paramountcy principle. The key case for this thesis'

[1] Stephen Cretney, *Family Law in the Twentieth Century*, (1st edition, OUP,2003) 719
[2] Law Commission, '*Review of Child law- Custody',* (Law Com No.96, 1986) 186-189
[3] S1 Guardianship of Minors Act 1971
[4] John Eekelaar, 'Beyond the Welfare Principle' (2002) 237 CFLQ 1
[5] ibid 2

critique of the paramountcy principle is *J v C.*[6] Despite the fact this was heard in relation to the paramountcy principle's predecessor, section 1 of the Guardianship of Minors Act 1971, Lord MacDermott's interpretation has become, and continues to be, the authoritative exposition of the requirements incumbent on a court when applying the paramountcy principle. This was affirmed by the Law Commission in its 1986 report prior to adoption of the Children Act 1989.[7] Here, the interests of the child became the sole consideration of the court and were, as such, determinative on the making, varying and discharging of any court order concerning the upbringing of a child. As the research in this thesis will indicate, this exposition has remained authoritative on courts determining section 8 Child Arrangements Orders under the Children Act 1989. At this preliminary stage, it is important to note that section 1(1) CA did not 'create' the paramountcy principle. Instead, it is derived from the Guardianship of Infants Act 1925, developed through section 1 Guardianship of Minors Act 1971 before finding current expression in section 1(1) CA 1989.

For the sake of this thesis, the operation of the paramountcy principle will centred largely around section 8 Child Arrangements Order applications under the Children Act 1989. The purpose of section 8 CA orders is for a court to decide with whom a child is to live and spend time. These orders have been chosen as the focus for this thesis because of the individualistic nature of the litigation therein. Section 8 order applications typically feature individuals; traditionally, but not exclusively, mother, father and child, each with competing interests existing in tension to each other. This tension will be evidenced through analysis of case law and hypothetical situations discussed throughout this thesis. Such litigation forms an ideal base upon which to consider the application and effectiveness of a reinterpreted, deontologically-focused, model of the paramountcy principle that centres its application around the balancing of individual rights as opposed to a simplistic welfare assessment. This thesis intends to confront the fact that domestic application of the paramountcy principle is incompatible with obligations under the ECHR in a post-HRA legal framework. This leaves litigants unable to vindicate the article 8 ECHR right to respect for private and family life at a domestic level. The primary cause is that, when the paramountcy principle applies in litigation, it necessitates that a child's best interests become the sole consideration of the court. This, as a result, precludes judicial analysis of any competing rights or interests in litigation.

[6] *J v C* [1970] AC 668
[7] Law Commission, '*Review of Child law- Custody'* (n2) 185

Overview of the Theoretical Lens Applied in this Thesis

This thesis derives its title from Ronald Dworkin's famous work *Justice for Hedgehogs*.[8] Whilst the content of this book lies largely beyond the scope of this thesis, Dworkin chose the title to illuminate the importance of interconnections in both thought and political discourse. Influenced by the seminal essay of Berlin, *The Hedgehog and the Fox*,[9] Dworkin argued that modern political discourse had become 'Fox-like' in its belief that individuals do not require coherence in respect of their theories or responses to ethical challenges. This belief, although not the focus of his work, was argued to lead to a paucity of coherent thought outside the political realm. In contrast to this, in order to defend a political theory, Dworkin argued one must be able to evidence connections to a viable ethical theory.[10] Such a theory speaks to the 'good life'. Here, Dworkin proposed a means by which individuals could pursue a good life and, as a result, how a coherent modern political discourse could flow from this. It is in this sense that the Hedgehog knows one big thing, the importance of interconnectivity, whilst the Fox knows many disconnected things.

Dworkin's *Justice for Hedgehogs* is relevant to this thesis in that it provides the three tenants of his moral theory. These will be examined in Chapter One but consist of a non-foundationalist conception of value; an anti-naturalist conception of morality and moral objectivism. These theories underpin Dworkin's normative construction of the legal system and model of judicial discretion. For Dworkin, the theory advanced by Hart in his *Concept of Law* forms a descriptively inaccurate account of the judicial interpretive process.[11] In Hart's descriptive approach, law exists positively by reference to the criteria in the central 'rule of recognition'. If a judge applies these criteria, and finds no law exists, they are then free to exercise independent judgement to fill 'gaps' in the law.[12] For Dworkin, this forms an inadequate theory of interpretation. As a result, he argues that there always exists an objectively right answer that judges are bound to discover by exhausting the interpretive process outlined in *Taking Rights Seriously.*[13]

[8] Ronald Dworkin *Justice for hedgehogs* (1st edition, Harvard Press, 2013)
[9] Isiah Berlin, *The Hedgehog and the Fox: An essay on Tolstoy's view of History,* (2nd edition, Princeton University Press, 2013)
[10] Ronald Dworkin on Justice for Hedgehogs, NYU School of Law
< https://www.youtube.com/watch?v=5UFVkRGViMc> accessed 27/6/2020
[11] H.L.A Hart, *The Concept of Law,* (3rd edition, OUP, 2012)
[12] ibid 105
[13] Ronald Dworkin, *Taking Rights Seriously,* (8th edition, Bloomsbury, 2018)

The purpose of Dworkin's work, analysed in Chapter One of this thesis, is to interrogate the framework that judicial interpretation ought to occur in. In short, when a judge is confronted with a novel situation to which no rule is directly applicable, Dworkin argues a judge must exercise discretion in disposal of the case. This discretion is characterised as weak in that a judge is bound to give effect to the encircling belt of rules and principles they are situated within. It is in this sense that Dworkin describes judicial discretion as the 'hole in the donut', the area of judicial indeterminacy in the application of a rule or principle of the legal system.[14] For Dworkin, these rules and principles provide a structured model of judicial discretion that controls an officials use of judgement in the determination of a dispute.

It is the aim of this thesis to utilise Dworkinian jurisprudence as the basis for both critiquing and redeveloping domestic application of the paramountcy principle. This will be achieved via close reference to the distinction between application of a legal principle and rule. With a thorough understanding of this distinction, it is argued that a new criticism can be levelled against judicial application of the paramountcy principle in that it operates as a legal rule in the Dworkinian sense. This will then be shown to have significant consequences in terms of domestic compliance with demands imposed on the UK by the European Convention on Human Rights (hereafter ECHR) in a post-Human Rights Act (hereafter HRA) legal system. Although not the focus of this thesis, the current domestic interpretation of section 1(1) CA will also be evidenced as existing in tension with international obligations under the UN Convention on the Rights of the Child.

The Problems Identified in this Thesis

During the period from around 1990 to 2005, academic attention peaked with numerous high-level contributions both critiquing and reinterpreting the paramountcy principle. Yet, since 2005, it seems as though the academic community has largely consigned itself to judicial disinterest in implementing and engaging with reform proposals. Arguably, this is due to the lack of impact the HRA has had on private family litigation, when compared to other areas of

[14] Ronald Dworkin, 'Is law a system of Rules*?'*, in *The philosophy of Law*, (1st edition, 1977, OUP) 52

law, which has been generously described as 'minimalist' by Harris-Short.[15] The aim of this thesis is to present a new angle of criticism, based on an understanding of analytical jurisprudence, and to restart debate surrounding a deontological reinterpretation of the paramountcy principle that seems to have stalled in recent years.

This thesis will develop two primary critiques surrounding judicial application of the paramountcy principle. The first will be underpinned by the jurisprudential lens established in Chapter One and the second is based on an in-depth analysis of the jurisprudence of the ECtHR. These two will combine to form the problem this thesis seeks to resolve through constructing a Convention-compliant model of litigating section 8 CA hearings that is theoretically informed but actionable in everyday practice. This would allow individual litigants to vindicate Convention-rights in a manner that is currently unachievable in litigation applying the paramountcy principle.

The Paramountcy Principle Operating as a Legal Rule

This thesis will identify judicial application of the paramountcy principle as akin to that of a legal rule in automatically necessitating a particular judicial approach to the making, varying and issuing of section 8 CA orders. This will be established by reference to Family Division case-law establishing that, as a result of applying the paramountcy principle, judges are bound to give effect solely to the best interests of the child. The leading case here is the aforementioned *J v C* which Reece describes as the 'seminal' authority for domestic application of the paramountcy principle.[16]

In the years following *J v C,* multiple Court of Appeal decisions reaffirmed Lord MacDermott's dicta as authoritative and developed the status of children's welfare interests to an overriding position when in conflict with parental interests or rights.[17] However, given the recent paucity of academic literature concerning the paramountcy principle, this thesis will analyse the contemporary case-law of the courts to assess any divergence away from the earlier *J v C*

[15] Sonia Harris-Short, 'Family law and the HRA 1998: Judicial restraint or revolution?' in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act,* (1st edition, CUP, 2007) 340

[16] Helen Reece, 'The paramountcy principle: Consensus or Construct?' (1996) 267 CLP 303 citing *J v C* [1970] AC 668

[17] *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, [128]

model. It is in this sense that this thesis seeks to update the work of previous academic contributions and lay the foundations for further debate. This thesis argues that recent case-law evidences the 'hybridisation' of a welfare and rights-based approach. For example, the 2019 High Court decision in *Re H* evidences how judges will make passing reference to article 8(1) ECHR rights, in attempting to establish a degree of Convention-compliance, before recentralising the role of a welfare assessment to resolving child-related litigation.[18] It is clear, from cases such as this, that the *J v C* model of application still determines the judicial approach to section 8 CA applications.

When such a finding is contrasted against the theoretical lens provided in Chapter One of this thesis, the tension between application of the paramountcy principle and its characterisation as a legal principle in the Dworkinian sense becomes clear. Dworkin argued a rule applies in an all or nothing fashion in that it is either applied or set aside. A rule cannot be balanced against competing considerations unless those considerations are specified in the rule itself. Therefore, a rule can be said to necessitate automatic legal consequence as a result of its invocation. It is in that sense that a rule differs to a legal principle. A principle enjoys an element of weight in that, in application, it will conflict with other competing principles and require a means of resolution. For example, in issuing judgment, a judge may have to balance the principles of fairness and consistency. One will not completely outweigh the other and a judge must ascribe an element of weight to each.

In practice, when a judge applies the paramountcy principle, they are automatically bound to a certain method of interpretation that necessitates the child's interests are the sole determining factor in the making, varying and discharging of any order. A judge is consequently unable to balance the interests of the child against any competing considerations. Such a model seems identical to Dworkin's definition of a legal rule. Taxonomically, it seems strange to term paramountcy a principle in the Dworkinian sense. It is argued that this observation has more than mere semantic value and directly impacts the second critique provided in this thesis.

[18] *PA v TT, H (A child by way of 16.4 Children's Guardian)* [2019] EWHC 2723

ECHR Non-Compliance

This thesis will further analyse the relationship between domestic application of the paramountcy principle and Strasbourg jurisprudence on the balancing of rights under article 8(2) ECHR. It will identify the central problem that domestic courts have misapplied the Strasbourg jurisprudence and this has led to a situation whereby lower courts are conducting everyday litigation that is non-compliant with demands under the ECHR.

From a Strasbourg perspective, the domestic model of the paramountcy principle, as outlined in Chapter Two, has not been accepted as compatible with article 8(2) ECHR. The ECtHR has been clear in a series of judgments that a balancing exercise is required under article 8(2) that does not automatically prioritise the rights of the child over those of the parents.[19] Instead, the rights of the child have been characterised as being capable of overriding parental rights *dependent* on their nature and severity. At the very least, the Strasbourg position is that a factual assessment is required in individual cases to assess the justification of the article 8(1) rights infringement.

In response, domestic appellate courts have reconfigured the paramountcy principle to achieve, at face-value, Convention-compliance in two ways. Firstly, courts have reasoned that divining the best interests of the child, via recourse to section 1(3) CA, satisfies requirements under article 8(2) as this is substantially the same factual assessment that must be completed under the Convention.[20] Alternatively, courts have employed a linguistic sleight of hand to interpret the best interests of the child as an automatic justification under article 8(2).[21] Either way, both of these solutions evidence a disregard for the Strasbourg jurisprudence. This has led lower-level judges to cite dicta, as erroneously issued by the House of Lords and Court of Appeal, to the effect that no change of approach is necessitated in a post-HRA legal system.

Academics have confronted this problem and sought to develop a reinterpretation of the paramountcy principle as a response to this in isolation. It is the contention of this thesis that the findings of Chapter Two have a direct bearing on domestic non-compliance. This is because, if the paramountcy principle is applied as a rule, party interests cannot be balanced

[19] *Johansen v Norway (application no. 17383/90)* [1997] 23 E.H.R.R. 33
[20] *Re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL 70, [31]
[21] *Payne v Payne* [2001] EWCA Civ 166

under article 8(2) given a rule applies in an all or nothing fashion. This thesis will use these findings to develop a reinterpretation of the paramountcy principle that ensures its application as a legal principle and, therefore, provides a structured model of judicial discretion for cases falling in the scope of section 1(1) CA.

The Literature Gap Pertaining to the Paramountcy Principle

Despite the numerous academic criticisms levelled against domestic application of the paramountcy principle, there exists a major literature gap pertaining to a theoretically informed critique or reinterpretation. This reflects the erroneous, yet widely-held, belief that legal theory is inapplicable to real-life family law given its context-specific and discretionary nature. Indeed, Dewar has described the 'normal chaos of family law' which refers to the notion that there must exist a certain amount of theoretical 'chaos' because of the discretionary nature of family law adjudication.[22] He argues modern family law has rejected the invocation of bright-line rules and instead relies on 'indirect symbolic controls' which manifest themselves in standards and principles governed by the exercise of judicial discretion.[23] Far from 'normative anarchy', this is representative of the law balancing welfare and rights-based justifications, between maximising utility for the individual litigant and the rights of family members respectively.[24] Given these two approaches are often incompatible, but both inevitable, Dewar questions why academics have criticised judges for failing to espouse a theoretical basis when the law provides no means to do so. Therefore, instead of criticising this 'chaos' academics should merely accept its existence.

Dewar's work raises important questions surrounding the role and nature of discretion in family law. This thesis argues that, instead of focusing on remedying the tension between rules and discretion, academics should instead seek to structure discretion in a way that achieves compatibility with a rule-based system as mandated by the ECHR. This thesis argues that this can be achieved with an understanding of Dworkinian legal principles. Given that a practice area such as family law inevitably requires a degree of discretion, this thesis argues that rules and principles need not necessarily exist in 'conflict'. Instead, as Chapter One will argue, a

[22] John Dewar, 'The normal chaos of family law' (1998) 61 MLR 467
[23] ibid 472
[24] ibid. For first exposition of the balance between utility and rights see Stephen Parker, 'Rights and Utility in Anglo-Australian Family law' (1992) 55 MLR 311

Dworkinian understanding of rules and principles achieves a balance between the two in a model of structured judicial discretion.

In terms of the literature that has attempted to apply legal theory to a critique of the paramountcy principle, the majority of this work focuses on the tension between judicial discretion and the operation of rules in family law. For example, Herring points to the tension between a utility and rights model of law.[25] Citing the work of Parker, he has drawn attention to the lack of theoretical coherence in moving from a utility to rights-based model of child law. In a utility-based model, a judge would decide a case in terms of utility in reaching an end goal; the welfare of the child.[26] Conversely, a judge acting in a rights-based model seeks not merely to evaluate an act on the basis of its consequences, but on the legal rights of the individual.[27]

The difficulty Herring draws with the work of Parker is that, in domestic child law, there does not seem a clear commitment to either model that is easily discernible from the case-law.[28] Whilst, on a traditional *J v C* model of the paramountcy principle's application, it would seem section 1(1) CA supports a utility-based model that seeks to isolate the best interests of the child. However, recent case-law suggests that the courts have undertaken a modest shift towards a rights-based model of litigation. This is, however, always followed by the standard caveat that the ensuing order is justified on the basis of the best interests of the child. This will be evidenced and analysed in Chapter Two of this thesis. In the courts now seeming to 'hybridise' a welfare and rights-based model of litigation, the balance to be struck between the two becomes unclear. Therein lies the aim of thesis; to provide a theoretical basis for a shift towards a deontological model of litigation that balances the rights of litigants under an ECHR-compliant methodology.

Importantly, Choudhry and Fenwick have briefly engaged with this juristic critique in arguing that 'the Welfare Principle has been elevated to the status of a *rule* that *determines* the outcome of such [welfare] applications'.[29] Indirectly, they seem to equate the paramountcy principle to a Dworkinian rule. This is because the language of determination seems to mirror the automatic

[25] Jonathan Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?', (1999) 223 CFLQ 2
[26] Stephen Parker, 'Rights and utility in Anglo-Australian family law' (1992) 55 MLR 311
[27] ibid
[28] Herring (n25) 2
[29] Shazia Choudhry and Helen Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 453, 458

legal consequences necessitated following a rules invocation. Unfortunately, Choudhry and Fenwick do not pursue this avenue of criticism to the conclusion which this thesis intends to reach. Presumably, this is because a theoretical criticism of the paramountcy principle lay outside the focus of their work. Instead, they pursue a similar critique to that of Herring in attempting to provide a theoretical basis for the paramountcy principle in terms of its classification as a rule-utilitarian (consequentialist) approach to family law.[30]

The existing literature highlights an academic concern with finding a unifying justification for the domestic operation of the paramountcy principle. Respectfully, this thesis argues this approach somewhat misses the point. If this becomes the sole aim of a theoretical criticism, the welfare principle becomes a 'juristic black hole' given the necessary co-existence of both rules and discretion.[31] Thus far, academic analysis has sought to defend the current operation of the paramountcy principle as accounting solely for the best interests of the child. This has sought to justify an approach that this thesis will identify as non-compliant with demands under the ECHR. As a result of the failure to find a theoretical basis to justify the paramountcy principle, academics have then sought to practically reinterpret section 1(1) CA and have, therefore, cast reinterpretation and defining its perceived basis as two separate inquiries. This thesis argues that such an approach is flawed in that any practical reinterpretation should only be undertaken following the establishment of a theoretical lens as mandated by the work of Dworkin.

Instead of seeking to resolve the tension between rules and discretion, this thesis will utilise traditional jurisprudence to achieve co-existence between rules and principles. This will occur in a legal framework that provides judges with a structured model of judicial discretion. This thesis will further use its theoretical lens to provide a novel critique of the paramountcy principle in highlighting its practical application as a rule as opposed to anything like what would traditionally be considered a legal principle. This is something academics have failed to acknowledge in previous literature and will be used to inform practical reform of section 1(1) CA.

[30] ibid 457
[31] Julia Blanchard, 'Honesty in corporations' (1996) 14 CSLJ 10

Methodology

The central claim of this thesis is that by better understanding the distinction between a legal principle and rule, we are able to provide a more coherent and theoretically-informed reinterpretation of the paramountcy principle. This claim will be advanced in the following way.

Chapter One of this thesis will outline the theoretical lens through which domestic operation of the paramountcy principle will be assessed. The purpose of this Chapter is to provide a basis for the novel critique surrounding judicial application of the paramountcy principle as a legal rule. In order to achieve this, this thesis will first justify its focus on Dworkin via reference to another jurist with a contrasting approach to conceptualising the legal system. This will necessitate extensive research into H.L.A Hart's *Concept of Law* and his descriptive account of judicial interpretation. Although a positivist, believing in the conceptual separation between law and morality, Hart sought to justify the legal system via a focus on rules, in particular the 'rule of recognition'; the rule from which other norms derive their validity. Hart's approach will be characterised as descriptive in nature and thus, when contrasted with the work of Dworkin, an inaccurate account of judicial interpretation. This thesis will then turn to the jurisprudence of Dworkin as a more accurate account of judicial interpretation. For Dworkin, the interpretive process a judge must undertake is structured by the encircling belt of rules and principles they must apply. It is this model of weak discretion that this thesis aims to use as a basis for reinterpretation of the paramountcy principle in Chapter Five.

Following this, the remainder of the Chapter will be devoted to analysis surrounding various models of judicial discretion. After having disregarded characterising discretion in the positive sense, a negative conception will be adopted that is closely linked to Dworkin's work. This will become relevant when this thesis discusses the development of a jurisprudence applying the reinterpreted paramountcy principle and the guidance judges should be afforded therein.

Chapter Two of this thesis will analyse the relevant case law pertaining to application of the paramountcy principle. Importantly, this relates to the first problem identified. Such analysis will include discussion of the orthodox *J v C* model before applying this to a typical section 8 CA application to evidence the consequences of its application. This is that the rights of other litigants are ignored to the extent that they do not weigh on the best interests of the child. This

will be shown to have led parents to attempt to align their own interests with those of the child and thus distort the protection section 1(1) CA should afford to children. In addition, this Chapter will include analysis of recent family law cases and thus serves to update the now ageing academic commentary in this area.

Chapter Two will provide a novel critique of the paramountcy principle by contrasting its application with the Dworkinian understanding of a rule. This forms this thesis' unique contribution in that, as the literature gap has evidenced, no other academic has taken traditional legal theory and applied this to the operation of the paramountcy principle. The tension this Chapter evidences will then serve to inform practical reform of section 1(1) CA in Chapter Five.

Chapter Three will relate to the second problem identified in this introduction and will involve an analysis of both domestic and Strasbourg jurisprudence pertaining to the relationship between section 1(1) CA and article 8(2) ECHR. This will be divided into two separate analyses. Firstly, this Chapter will briefly outline how a domestic claim under article 8 ECHR would proceed at Strasbourg level. This will include consideration of the margin of appreciation doctrine, scope of article 8(1) and the justificatory exercise under article 8(2). Subsequently, the *Johansen* line of case-law will be analysed to evidence a degree of consistency in the court's assertion that the rights of the child may, depending on their nature and severity, outweigh those of the adult. This will be contrasted to the court's findings in *Yousef* which some academics have used as authority for acceptance of the paramountcy principle at ECtHR level.[32] It is argued that this is a misinterpretation of the *Yousef* judgment and, as such, it forms a mere 'aberration' on the court's well established position.[33]

Chapter Three will then contrast this position with that of domestic courts. As referenced earlier, the domestic position will be shown to evidence a misunderstanding of the Strasbourg case law. This leads to conflict between the Strasbourg and domestic view of the relationship between article 8(2) and section 1(1) CA. This is the conflict this thesis aims to resolve via construction of a reinterpreted model of the paramountcy principle.

[32] *Yousef v The Netherlands (application No.33711/96)* [2003] 36 E.H.R.R. 20
[33] Shazia Choudhry, 'The adoption and Children Act 2002, the welfare principle and the Human Rights Act 1998- a missed opportunity?' (2003) 15 CFLQ 119

It is the purpose of Chapter Four to critique previous academic responses to reformulation of the paramountcy principle. These responses will be divided into oppositional, relational and deontological models. Each will be assessed, and this thesis will find that oppositional and relational models provide little scope for conflict resolution when applied in isolation. Instead, a deontological approach will be favoured that first seeks to identify the composite article 8(1) rights of litigants before applying an article 8(2) balancing exercise to each. For this to occur, Choudhry and Fenwick favour reinterpreting the paramountcy principle as the 'primary principle'. This is an approach that seeks to establish compliance with the ECtHR regime and will also be analysed in terms of its broad compatibility with demands found in the UN Convention on the Rights of the Child (UNCRC).

This 'parallel analysis' model of litigation forms the basis of the interpretive focus of Chapter Five. However, such a model will not be accepted without critique. Choudhry and Fenwick's parallel analysis will be shown to lack a theoretical basis given its paucity of reference to theoretical jurisprudence. It is argued that this leaves their model vulnerable to judicial interpretation akin to that evidenced in Chapter Two given indeterminacy inherent in the term 'primary'. This reflects the reality that, despite how academically sound their theory may be, it is to be applied by judges in real litigation. Their model will also be shown to be overly complex and unrealisable in practice given the process a judge must undertake in applying an article 8(2) balancing exercise to each composite set of article 8(1) rights. Chapter Four will conclude that, whilst the parallel analysis provides a theoretically Convention-compliant methodology, it requires further development to form a realisable model of litigation.

Chapter Five of this thesis will undertake the process of reinterpreting the parallel analysis in order to achieve a theoretically structured model of resolving section 8 CA disputes. In light of the criticisms identified in Chapter Four, this thesis will favour a model that first, like Choudhry and Fenwick, identifies the article 8(1) rights of litigants before conducting a cumulative article 8(2) analysis that focuses on the relationships between parties. This will be achieved via statutory amendment to section 1(1) CA. It is this statutory amendment, combined with a juristic understanding of legal principles, that will structure the discretion required in making, varying and discharging Child Arrangements orders and is, therefore, a more actionable model of litigation than the complex parallel analysis. Such a model has the incidental benefit of moving domestic practice further towards a position that is compliant with the UN Convention on the Rights of the Child.

Clarifications and the UNCRC

The focus of this thesis is on private litigation concerning the upbringing of children. Therefore, section 8 Child Arrangements Order applications will be used as the basis for analysing paramountcy principle's application. However, in light of a paucity of private family law cases reaching appellate courts, many of the cases applying the paramountcy principle take the form of public law challenges to state interreference . This, as will be argued, may indicate a judicial unwillingness to engage with the ECHR in private family litigation. Nonetheless, the presence of public family law dicta does not detract from the overall coherence of this thesis given it will be applied solely in a private law context.

Whilst this thesis will focus on children's right obligations under the ECHR, it is important to recognise that the UN Convention on the Rights of Child (hereafter UNCRC) offers exhaustive provision for children's rights at the international level.[34] Indeed, the UNCRC has become the most widely ratified rights document in history with all UN contracting states ratifying save for the USA.[35] However, in England and Wales, given a dualist approach to International Law, the UNCRC has not, as yet, passed in the general corpus of domestic law.[36] It is for this reason that the UNCRC will not receive exclusive focus in this thesis.

Instead, this thesis will seek to utilise the UNCRC as a means of highlighting how domestic and academic practice can bridge the gap between the pre-existing welfare-based model of welfare to a rights-based understanding. As Kilkelly notes, improved judicial engagement with the UNCRC will serve to bolster domestic rights enjoyment and enforcement.[37] As such, whilst direct incorporation seems unachievable, practice should seek to give a more 'prominent role' to children's international rights protections as a whole. It is argued that a domestic position that better reflects and engages with rights demands under the ECHR will also serve to encourage further rights engagement with rights-bearing documents such as the UNCRC. It is in this sense that the UNCRC can assist in bridging between a welfare-centric to rights-based model of domestic law.

[34] UN Convention on the Rights of the Child, United Nations, Treaty Series, Vol.1577
[35] Geraldine Van Bueren, 'Children's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, (3rd edition, OUP, 2018), 326
[36] See Oliver De Schutter, *International Human Rights Law* (2nd edition, CUP, 2017) 280-294
[37] Ursula Kikelly, 'Best interests of the child, A gateway to children's rights?', in, Lesley Anne-Barnes Macfarlane, Elaine Sutherland, *Implementing Article 3 of the UNCRC; Best Interests, Welfare and Well-Being*, (1st edition, CUP, 2016)

Chapter One

The Jurisprudence of Hart and Dworkin: Seeking a Jurisprudential Framework for the Application of 'Principles' in Law

Before contextual analysis concerning application of the paramountcy principle can take place, a theoretical lens against which to set this thesis must be established. This will be achieved via an exploration of analytical and descriptive jurisprudence to elucidate the interpretation and application of legal 'principles'. The aim of this Chapter is to draw upon the jurisprudence of both Hart and Dworkin to place the practical application of the paramountcy principle in a theoretical context.[1] Importantly, an attempt to resolve the Hart/Dworkin debate lies outside the scope of this thesis. Instead, the author will analyse both jurisprudential models and outline the basic position of the judge, including understanding of judicial discretion, before adopting a Dworkinian model of the legal system. This will permit analysis of the paramountcy principle's application in light of traditional jurisprudence. It is argued that this forms an avenue of criticism that has eluded academic attention thus far.

Through adopting a Dworkinian lens, this thesis intends to place special emphasis on the distinction between rules and principles. [2] By applying this distinction, this thesis intends to highlight divergence between judicial application of the paramountcy principle and its interpretation as a Dworkinian-style principle. Importantly, this Chapter will further conduct a detailed analysis of judicial discretion and its role in domestic family law. Again, this analysis will become central to subsequent reinterpretation of the paramountcy principle in later chapters and seeks to establish a system of structured discretion out of which a judge can apply the reinterpreted model of section 1(1) CA.

This chapter will proceed by analysing Hart's model of descriptive jurisprudence, exploring the purpose of Hart's project before outlining his overall model of a legal system. This will be followed by analysis of the Dworkinian legal system. The Hartian account will be critiqued through discussion of strong discretion and its necessary implications on the process of judicial interpretation. After having adopted a Dworkinian model, this Chapter will discuss the type of

[1] Use of the term 'Dworkinian' throughout refers to the jurisprudential model of Dworkin
[2] Ronald Dworkin, *Taking Rights Seriously*, (8th edition, Bloomsbury, 2018)

judicial discretion required under such a Dworkinian theory of law. The author will explore differing models of discretion, both positive and negative, before adopting a negative model. From this, the operation of judicial discretion will be modelled onto the welfare checklist as found in section 1(3) CA.

Constructing the Hartian Model of a Legal System

Law as the Union of Primary and Secondary Rules

The Hartian theory of law adopts aspects of simplistic positivism previously advanced by theorists such as Austin.[3] Hart began with legal positivism, the conceptual distinction between law and morality, and developed this into a complex system of primary and secondary rules reflecting the multi-faceted nature of a municipal legal system. An understanding of the Hartian legal system is a precondition to understanding the system of discretion that would necessarily be implied via its invocation in this thesis

Crucial to understanding Hart's work is an appreciation of his aims. Hart attempted to provide a descriptive account of law that presented the operation of a legal system as a matter of 'observable social fact distinct from the question of morality'.[4] Importantly, Hart's objective was descriptive analysis and not identification of the laws efficacy.[5] This descriptive approach aimed to explain why the law is normative and, for Hart, law achieves this quality when it is action-guiding. In his descriptive approach, the question of whether the law is objectively right is a normative question and need not be confronted. As opposed to the work of positivists before him, Hart developed the conceptual separation of law and morality into his social thesis of positivism. This social thesis holds that: a) Law is a social creation, b) The validity of legal norms is a function of social facts and c) Social facts constitute sources of law. These culminate to create a modified separation thesis that holds there is conceptual separation between laws existence and merit.

[3] John Austin, *The province of jurisprudence determined* (2nd edition, CUP, 1995)
[4] David Jennex, 'Dworkin and the doctrine of Judicial Discretion' (1992) 14 DLJ 473
[5] Keith Culver, 'Leaving the Hart-Dworkin debate' (2001) 51 UTLJ 367, 398

For Hart, the key to understanding the legal system lay in the union of primary and secondary rules. Primary rules are rules of obligation that impose duties or confer powers on individuals.[6] Secondary rules are the means by which officials are provided with the 'authoritative criteria for identifying primary rules of obligation'.[7] In a similar methodology to Fuller's desiderata,[8] Hart modelled a system of law incorporating only primary rules of obligation on the primitive society of *Rex* in which law is created by proclamation of obligatory commands.[9] Here, Hart identified three separate flaws. Firstly, such a society would suffer from uncertainty given that, without secondary rules, there exists no means of identifying valid rules of obligation. In addition, the law would prove static in that the possibility of deliberate legal change would depend on slow evolution and not prescribed rules of the sovereign. The law would further suffer from inefficiency if no agency or officials were empowered to adjudicate disputes.[10] For Hart, the remedy lay in the respective addition of secondary rules of recognition, change and adjudication.

Therefore, the foundation of a legal system lay in the use of a 'rule of recognition' which provides officials with authoritative criteria for the identification of valid primary rules of obligation. For Hart, to state a rule is valid is to accept it has passed all the requirements provided for in the rule of recognition.[11] Culver identifies two possible functions for the rule. Semantically, its application permits the statement, 'it is law that', whilst epistemically it allows officials to make authoritative judgements of legal validity.[12] Therefore, it is termed the ultimate rule of a legal system in that it provides the criteria by which the validity of other rules is assessed.[13] This provides officials with certainty regarding the identification of valid legal norms.

Integral to understanding the 'rule of recognition' is recognising the importance of plurality and hierarchy in its application. Given the various sources of law in a modern legal system, the rule of recognition cannot comprise one singular test. Therefore, in situations where various sources of law clash, the rule of recognition should provide for 'relative subordination'[14] in

[6] Leslie Green, 'Introduction', in H.L.A Hart, *The Concept of Law,* (3rd edition, OUP, 2012) 20
[7] ibid 21
[8] See Lon Fuller, *The morality of law,* (1st edition, Yale University Print, 1964) 46
[9] H.L.A Hart, *The Concept of Law,* (3rd edition, OUP, 2012) 51
[10] ibid 70
[11] Hart (n9) 100
[12] Keith Culver, Michael Guidice *Legalities borders,* (1st edition, OUP, 2014) 5
[13] Hart (n9) 105
[14] ibid 104

order for officials to grant 'relative place' in law and thereby resolve conflict.[15] Hart uses the example of an Oxfordshire County Council by-law to evidence how the rule of recognition operates in a legal system.[16] To gauge the validity of a by-law, an official must make reference to criterion provided by another rule. This may result in the official questioning whether the by-law was passed in accordance with powers granted to the council under a statutory order. In turn, the official must then turn to assess the validity of the statutory order empowering the council to act. This would lead to the official discovering whether the order was passed in line with powers granted to the Minister by Parliament. This deferred power is then subject to the same process and so on. Upon exhausting this chain of reasoning, the official reaches a rule that provides criterion for assessing the validity of other rules but which possesses no test for its own validity.[17] This rule is known as the supreme criterion as, by recourse to it, rules are recognised as valid, even if they conflict with rules identified by reference to other criteria.[18]

Importantly, the rule of recognition is not a formal rule in the same sense that the paramountcy principle is applied in litigation. For Hart, the rule of recognition is not stated but instead shown to exist by the fact that legal officials use it to assess a norms validity.[19] In this sense, the rule of recognition is 'seldom formulated but always used', and is, therefore, indicative of the internal point of view.[20] For Hart, the union of primary and secondary rules forms the essence of understanding how a legal system operates. By modelling the legal system thusly, Hart provides a test for determining legal validity and develops the simplistic positivism of Austin. However, as will now be shown, Hart does not provide an accurate account of the process undertaken when the rule of recognition fails to provide for the identification of a rule in novel cases.

The Role of the Judge in the Hartian Framework

The rule of recognition provides legal officials with an authoritative test for determining legal validity. Therefore, for Hart, when a judge identifies a rule to be applied in a case, this is effectively saying the legal official has utilised the rule of recognition to identify valid law.

[15] ibid106
[16] ibid 107
[17] ibid 106
[18] ibid
[19] ibid 101
[20] ibid 102

Yet, under a Hartian model, the process of judicial interpretation becomes less clear in cases where there is no applicable rule or, as Dworkin would term, 'hard cases'.[21] As Waluchow argues, law attempts to communicate its expectations via general rules yet this is not always possible in that, no matter how well rules are crafted, the individualistic nature of litigation will inevitably result in some cases falling outside of situations a rule purports to cover.[22] Hart models this situation on a rule banning the presence of 'vehicles' in a park. Whilst this prima facie bans typical cases of 'vehicles' such as cars and busses, its application to a bicycle is less certain. Hart then further questions whether this would apply to a child's toy vehicle being used in the park. For Hart, this highlights the open-textured nature of language.[23] The question of how a judge would dispose of such a situation thereby becomes an important element of his descriptive model.

For Hart, if there are no relevant rules to draw on then this is equivalent to saying there exist no norms that satisfy the rule of recognition given this is the authoritative means of identifying valid law. The law would be termed incomplete and require 'filling'. Therefore, the official must turn to the open-textured nature of language to permit discretion in applying the facts of a novel case to existing legal rules. As Waluchow states, sometimes this choice will arise accidentally in that a hard case may fall within a 'penumbra of uncertainty' meaning a judge must utilise choice in discharging the case.[24] This permits an official to resolve the child's toy car scenario in favour of the child to avoid absurdity.[25]

Therefore, whether the judge reverts to their own judgement or uses moral principles when filling legal gaps is irrelevant in a descriptive sense. As Jennex argues, this model commits Hart to a 'strong form of judicial discretion' and ensures that a high proportion of cases will be subject to such an approach given the realities of modern litigation.[26] This inevitability signals the balance between the requirements of formalism, the refusal to prescribe legislation designed to cover every possible scenario, and the desire to grant judges the ability to discharge individual cases in a factually sensitive manner. [27] It is important to recognise why Hart's

[21] Dworkin (n2)
[22] Will Waluchow, 'Mixed Blessings' in *A Common law theory of Judicial Review: The Living Tree,* (1st edition, CUP, 2006) 194
[23] For further see Bartosz Brozek, 'Analogy in legal discourse' (2008) 94 ALSP, 2, 188
[24] Waluchow (n23) 205
[25] ibid 194
[26] Jennex (n4) 474
[27] Kent Greenawalt, 'Discretion and Judicial Decision: The quest for the fetters that bind judges' (1975) 75 CLR 359

descriptive focus necessarily results in such a model of discretion. Given Hart aims to provide a morally neutral and non-justificatory account of law, his juristic project is limited to describing the process judges undertake when discharging a case. His project is not normative and consequently does not seek to question the efficacy of the law unless the rule of recognition prescribes such a test. Therefore, the question of how a judge fills legal gaps does not concern Hart and falls outside the ambit of his descriptive methodology. In applying this theoretical understanding to a hearing in the Family Division, a judge may simply come to their own decision in terms of applying the existing law to a novel factual matrix. For Hart, the question of how a judge does this, in terms of which rules and principles are accounted for, is irrelevant. In the descriptive sense, a judge exercises their own choice in making, varying or discharging a particular order.

Therefore, to summarise, a Hartian account of law envisages a legal system that is based on the union of primary and secondary rules of obligation and recognition. In this, the rule of recognition is crucial in providing criteria for assessing the validity of other primary rules. If no valid rule exists, the law is incomplete and a judge must exercise choice in 'filling' that gap. Here, judges are afforded strong discretion and may utilise their own judgement in applying the law to novel scenarios. Hart does not provide limitations for how a judge may interpret language and the open-natured texture of language affords judicial discretion in applying rules to a novel situation. This methodology will now be contrasted with Dworkin's normative approach that provides a detailed account of how a judge ought to act in such hard cases.

The Jurisprudence of Ronald Dworkin

Dworkin's Moral Theory and Critique of Hart

Having analysed the Hartian legal system, and its consequential impact on judicial interpretation, this will now be contrasted through examination of Dworkin's model of legality. Before attempting to analyse Dworkin's theory of law, it is important to locate his work inside the natural law/positivist debate. It will be shown that the moral position Dworkin adopts has a direct impact on the means by which he undertakes the process of structuring judicial

discretion. In his work *Justice for Hedgehogs*, from which this thesis derives its title, Dworkin outlines the three tenants of his moral theory.[28]

The first tenet is a non-foundationalist conception of value. This holds that it is not possible to use metaphysics to ground the truth of moral principles. Contrasting the work of philosophers such as Kant, whose maxims flow from one singular accepted premise, Dworkin argues it is impossible to reduce morality to one pre-accepted principle. Consequently, the truth of moral principles can only be established via argumentation and reason.[29] Secondly, linked to this, Dworkin purports an 'anti-naturalist conception of morality'. This states that the truth of values cannot be found by anything pre-existing and can only be reached via argumentation.[30] Finally, Dworkin is a moral objectivist. This essentially posits that there is always a right answer for a judge to reach via argumentation. This rests on the notion that objective moral truth can be reached in each case via the use of reasoning modelled in his interpretive framework.[31] Importantly, these three tenets taken together do not bind a judge to a specific factual solution but merely to a process through which the objectively right answer can be attained. Such a moral position highlights the importance of interconnectivity in political discourse central to his claims in *Justice for Hedgehogs*. This thesis seeks to harness this process to create a structured model of discretion to develop a reinterpretation of the paramountcy principle.

To contextualise this, Murphy situates Dworkin against the backdrop of liberal tradition the central tenet of which is the advancement and realisation of individual rights.[32] Murphy argues that Dworkin is directly influenced by Rawls' Neo-Kantian theory of justice. This posits that 'in pluralistic democracy….. respect must be given to each individual to choose their own ends'.[33] Crucially, in this light, justice becomes a question of rights rather than good. This is reflected in Dworkin's theory of interpretation that seeks to *'[take] rights seriously'* and centres itself around judicial enforcement of individual rights.

[28] Ronald Dworkin *Justice for hedgehogs* (1st edition, Harvard Press, 2013)
[29] Andrei Marmor, Coherence, Holism and interpretation: The epistemic foundations of Dworkin's legal theory, (1991) 10 LP 383
[30] See Stanford Journal of Legal Philosophy <https://plato.stanford.edu/entries/lawphil-naturalism/> accessed 14/6/2020
[31] Jon Mahoney, Objectivity, Interpretation and rights: A critique of Dworkin, (2004) 23 LP, 2004 190
[32] Jane Murphy, 'Rules, responsibility and commitment to children: the new language of morality in family law' (1999) 60 UPLR 1125
[33] ibid 1126

This focus on rights is an important part of Dworkin's overall project. In seeking to 'take rights seriously', Dworkin espouses a model of legality that sees legal officials balancing conflicting interests inside a structured model of discretion. Therefore, under a Dworkinian model, officials operate in a rights-based discourse in which government ought to respect individual rights and only infringe these rights if there is compelling need.[34] This becomes a central part of his theory and reflects the pivotal role a fully informed understanding of principles has in encouraging practical engagement with rights. It is this balancing of rights that will become central to developing the work of previous academics in reaching a Convention-compliant model of litigating section 8 CA applications utilising the paramountcy principle. This focus on rights will be shown as sitting uneasily in a welfare-centric model of children's litigation as explored in Chapter two. It is in that sense that this thesis argues increased domestic focus on the UNCRC and ECHR, as international rights documents, can assist in bridging between a rights-based and welfare-centric model.

Before elucidating his own theory, Dworkin provides a critique of the Hartian legal system. This critique will form the basis of this thesis' rejection of Hartian jurisprudence. Dworkin evaluates Hart's theory by arguing it provides an inadequate phenomenological account of the judicial decision-making process.[35] By referencing a phenomological account, Dworkin refers to a description of judicial interpretation from the position of the judge in terms of the way they ought to behave. For Dworkin, adjudication does not occur in two distinct stages as Hart's descriptive theory implies. In Hart's theory, a judge would firstly 'discover' law by the use of validating criterion in the rule of recognition. The judge would then, if there was no valid solution in law, fill the 'gap' via use of their own judgement. How the judge fills the gap does not concern Hart *per se*. In contrast, for Dworkin, such an account of adjudication in hard cases results in *strong* discretion.[36] The implication of this is that judges are effectively making new law and this is something Dworkin regards as repugnant on two levels. Firstly, it is morally wrong in that the law would apply retroactively and, secondly, it is anti-democratic in that law should only be created by those elected to do so.[37]

[34] Greenawalt (n28) 359
[35] Dworkin (n2) 111
[36] ibid 141
[37] ibid 141

The distinction between strong and weak discretion is central to Dworkin's critique. For the sake of this thesis, weak discretion is discretion as judgement. This occurs when an adjudicator is required to use personal judgement to fulfil a task such as 'choosing the 5 best men'.[38] Here, the adjudicators use of judgement is permitted only insofar as it is relevant to the decision made. Therefore, consideration outside of that relevant to choosing the five best men for the task is not permitted. In contrast, strong discretion arises when an official is asked to make a decision and is given no constraints limiting the range of solutions available or process by which the solution may be reached. As Dworkin states: 'Strong discretion does not mean the official is free to decide without recourse to fairness, but only that his decision is not controlled by a standard furnished by the authority we have in mind when we raise the question of discretion'.[39] For Dworkin, Hart's theory of interpretation descends into this form of unbridled judicial discretion which is morally and democratically unacceptable. Dworkin thereby seeks to reject strong discretion and model a system of judicial interpretation built around weak discretion existing inside a wider legal framework. This will be crucial to the reinterpretation of section 1(1) CA outlined in Chapter Five of this thesis. This reinterpretation seeks to establish the application of section 1(1) CA as a Dworkinian principle and, therefore, as a principle existing within a wider legal framework that serves to structure discretion in cases applying the reinterpreted paramountcy principle.

The Conceptual Separation of Rules and Principles

Dworkin critiques the descriptive model of Hart and argues that judges employ standards that are not rules but principles in the disposal of hard cases. As Dworkin states: 'Positivism is a model for a system of rules and its central notion of a single fundamental test for law forces us to miss the importance of standards within the law'.[40] Dworkin defines principles as 'standards to be observed because they are required by a dimension of morality and models their application on the US case of *Riggs v Palmer*.[41] *Riggs* concerned a defendant who murdered his grandfather in the hope of claiming inheritance due under a will. The court accepted that under a strict reading of the statute the Defendant would be due the inheritance owed to him.[42] However, as Dworkin asserts, all laws can be controlled by Common Law maxims, one such

[38] ibid
[39] ibid 33
[40] ibid 38
[41] ibid 39, citing *Riggs v Palmer* 115 N.Y 506 (1889)
[42] Dworkin (n2) 39

being an individual cannot gain from a crime he has perpetrated for the purpose of profit; *Ex turpi causa non oritur actio*. This maxim is not a legal rule but it was determinative in *Riggs.* Therefore, Dworkin seeks to explain why a principle can determine such a case when it lacks the binding nature of a rule.

The distinction Dworkin draws between rules and principles is that rules apply in an all or nothing fashion. Rules are either valid and applied or are invalid and set aside.[43] For example, Dworkin points to the rules of baseball in that, if a rule states that after three strikes a player is out, an official cannot acknowledge that as a binding rule of the game and then refuse to apply it.[44] Rules necessitate binding legal consequences if they are applied. Of course, exceptions always exist but the rule should provide for these in its formulation; for example, 'three strikes and out unless the ball is bowled in a fashion inconsistent with the rules of the game'.

In contrast, a principle 'states a reason arguing in one direction but does not necessitate a decision'.[45] Therefore, officials must take it into account but they are not bound by its content to apply automatic legal consequences. Given that principles will clash, they must enjoy a further dimension of weight. This allows officials to grant greater weight dependant on a principle's relevance in the instant case. As principles serve to influence an individual's reasoning they are commonly formulated in terms such as 'unreasonable' or 'fairness'. Evidently, these are terms require further judicial interpretation. This interpretive process forms the basis of judicial discretion.

Importantly, Dworkin argues these principles are binding but not valid according to any rule of recognition. Instead, principles are binding because they enjoy the force of reason. He argues that when considering whether the principle of fairness is relevant to a case, a judge does not look to see if it has passed into the general corpus of law but whether its consideration is appropriate in that scenario. As Dworkin states: 'The origin of these as principles lies not in a particular decision but in a sense of appropriateness developed over time'.[46] The positivist model of secondary rules cannot, for Dworkin, validate principles in the fashion that a Hartian rule of recognition should operate. Whilst a secondary rule may provide criteria for the

[43] ibid 41
[44] ibid
[45] ibid 42
[46] ibid 43

identification of such principles, this would distort the operation of the secondary rule of recognition to such a point that it would not function in the manner anticipated by Hart.[47] As Kearns observes, the existence of binding principles is crucial to Dworkin's project in that it prevents the existence of strong discretion. Judicial decision-making is structured by the existence of principles and these form the framework in which judges can carry out the required process of judicial interpretation.[48]

The Dworkinian Model of a Legal System

Given his rejection of Hart's two-stage descriptive model, Dworkin presents the rights thesis as underpinning his theory of law as interpretation. This forms a different methodology to Hart because it is a normative account of law. Dworkin's rights thesis posits that judicial decisions enforce existing rights established by existing law.[49] Consequently, gaps in the law do not exist. Therefore, judges do not use a rule of recognition to identify gaps in the law but, instead, use the existing legal framework to discover the correct legal interpretation. Judges are thereby obliged to use reason and argumentation to give effect to pre-existing legal rights.

This leads to the 'right-answer thesis'. This posits that, because judges do not behave as if there are gaps in the law, there is always a right answer that can be reached via reason and argumentation.[50] This draws on natural law theory in that law is a project that can be 'done well' according to objective moral standards.[51] These two ideas combine to form Dworkin's overall view of law as 'interpretation….. as a means of interpreting our rule based governance that shows how it is reasonable to use coercive force'.[52] The law is the process of interpreting facts about how we as a society have governed ourselves in the past and the purpose of the judge is to interpret this body of rules into a coherent theory.[53]

[47] Keith Culver, Michael Guidice '*Legalities borders',* (1st edition, OUP, 2014) 17
[48] Thomas Kearns, 'Rules, Principles and the law', (1973) 18 AJJ 118
[49] Dworkin, (n2)112
[50] Brian Brix, Ronald Dworkin's right answer thesis, in Brian Brix, *Law, Language and Legal Determinacy*, (2nd edition, Clarendon Press, 1995) 78
[51] For early examples of natural law theory see Thomas Aquinas, '*On law, morality and politics'* (2nd edition, Hackett Publishing, 2002). For later exposition see John Finnis, '*Natural law and Natural rights',* (2nd edition, OUP, 2011)
[52] Dworkin (n2) 43
[53] Jennex (n4) 475

For Dworkin, interpretation involves painting human actions in the best possible moral light and governmental practices in a manner motivated by moral principles or a common moral agenda.[54] However, these historical facts may seem to have multiple interpretations in that they may be driven by amorphous concepts such as freedom, justice or autonomy. In these situations, a judge is to find the interpretation that best justifies the use of coercion in the legal system according to criteria of fit and moral worthiness.[55] Importantly, a judge is not acting upon their own preferences when undertaking this process but is instead operating in the legal framework of the system's constitutional settlement and history.[56]

Given the authority provided to a judge under this model, some suggest this theory descends into strong discretion. Critics may argue that when a hard case arises, given the individual's rights pre-exist the legal decision, a judge is able to choose between various competing interpretations in line with fit and moral worthiness. In doing so, a judge may simply choose the interpretation that leads to a pre-determined answer. The judge could then invoke numerous principles that led to this decision without exhausting the interpretive process. This would seem to paint Dworkin's thesis in the same light as Hartian interpretation in that emphasis is placed on the decision and not necessarily the method by which it is reached. However, this thesis contends that this is an inaccurate portrayal of Dworkinian interpretation. This is because the judge is bound to attempt to discover the right answer consisting of the best interpretation of the legal system. In this sense, judicial interpretation is constrained by, and exists in, the framework of the right answer thesis.[57] This has led to some theorists going as far as to describe the judge as a 'fettered creature' who enjoys interpretive freedom only inside the bounds of the existing constitutional framework of the legal system.[58]

Thus far, this Chapter has analysed descriptive and normative accounts of a legal system. It has adopted a Dworkinian model given the accurate depiction of judicial interpretation it provides. It rejected Hart's account of law because he does not provide guidance as to how a judge is to go about filling gaps in the law. This thesis will now proceed to analyse judicial discretion necessitated within Dworkin's theory and how this becomes indistinguishable from his process of judicial interpretation.

[54] Dworkin (n2)124
[55] Dworkin, (n2) 124
[56] Murphy(n33) 1111
[57] Jennex (n4)
[58] Greenawalt (n28) 359

An Examination of Judicial Discretion

After having analysed the two competing models of a legal system, this Chapter will now outline theoretical and descriptive models of discretion whilst also evidencing its pervasiveness in the English model of family law. This section will firstly seek to provide a tentative definition of judicial discretion. This will be broken down into competing juristic and sociological conceptions. Following this, positive and negative models of discretion will be analysed. Throughout, this thesis will seek to contextualise the various models in relevant family law and will conclude by bringing the Dworkinian model of legality together with discretion as interpretation.

Juristic and Sociological Models of Discretion

Before any definition of judicial discretion can be proffered, it is important to note the distinction between juristic and sociological models of discretion. Sociological models of discretion analyse discretion from the perspective of the translation of rules into positive action by legal officials.[59] Whereas a jurist may analyse discretion solely in terms of the interpretation of rules, a social scientist places emphasis on discretion as a decision making term. For example, this may include a Policeman deciding whether to arrest the child in the earlier park-based scenario.[60] In this light, Teitelbaum has proposed the 'gap view' of sociological discretion. This concerns the 'gap' between an official's non-conformity and the rule which that non-conformity has violated.[61] This could be the gap between open-textured law and a Police Officers discretion to arrest on reasonable suspicion of breaking it. Galligan has further proposed distinctions between public and private law models of discretion.[62] Here, executive discretion has a limited role in the private sphere, given the personal autonomy of state subjects, but a much wider role in the policy-driven field of public law.[63] This approach, therefore, concerns the location of the official wielding the discretion as opposed to the jurist's concern with rules requiring interpretation.[64]

---

[59] Keith Hawkins, 'Issues in the use of Discretion', in Keith Hawkins, *The Uses of Discretion,* (1st edition, 1992, OUP) 14
[60] ibid 14
[61] L.E Teitelbaum, 'Individualisation, discretion and criminalisation', BYLR 799, 8
[62] D.J Galligan, *Discretionary Powers: A legal study of official discretion,* (1st edition, Clarendon Press,1968)
[63] ibid
[64]John Bell, 'Discretionary Decision-Making: A jurisprudential View', in Keith Hawkins *The Uses of Discretion',* (1st edition, 1992, OUP) 89

In contrast, the juristic approach to discretion has traditionally focused on the various ways to limit the discretion judges are afforded in individual cases. For the sake of this thesis, the phrase 'limiting' will be replaced by 'structuring'. The aim of this thesis is to provide a model of structured discretion that is not necessarily limited, but ordered in a manner to create a coherent jurisprudential framework for the reinterpretation of section 1(1) CA. Taking Fuller's neutral account of law as a foundation, Lacey explores the role of a jurist in the analysis of discretion.[65] If law is defined as the enterprise of subjecting individuals to rules, the jurist is concerned with the discretion afforded to judges in interpreting rules and thus centralises the role of the court in dispute resolution.[66] Traditionally, theorists have been concerned with limiting the role of discretion in such cases. Here, Davis posits that there exists a difference between confining and structuring discretion.[67] Confining discretion involves the drawing of certain boundaries and ensuring discretionary judgement does not escape these limits. Structuring discretion concerns controlling the way in which judge's exercise discretion via legislative means.[68] Such an approach does not try to reduce the amount of discretion a judge enjoys but merely ensures this exists inside a legal framework. It is the concept of *structuring* discretion that this thesis seeks to employ. As stated, it is argued this can be achieved via a theoretical understanding of principles and their interaction with rules in a Dworkinian legal system.

Schneider provides a concise explanation of the role of the jurist in analysing judicial discretion. This model mirrors the Dworkinian legal system in that it centres around the 'unremitting struggle' between rules and discretion.[69] For Schneider, there exists a constant continuum between the two.[70] Within this continuum, it is difficult to conceive of a rule requiring no discretion in its application. However, Schneider posits that near such a rule lies 'principles' that operate to structure and order judicial discretion.[71] Whilst this balance is constantly in flux, a juristic understanding of discretion seeks to prevent the over-rigidity of

[65] Lon Fuller *The morality of law*, (1st edition, Yale University Print, 1964) 106
[66] Nicola Lacey, 'The jurisprudence of discretion: Escaping the legal paradigm', in Keith Hawkins *The Uses of Discretion',* (1st edition, 1992, OUP) 369
[67] K.C Davis, '*Discretionary justice: A preliminary Enquiry',* (1st edition, 1977, University of Illinois Press)
[68] ibid
[69] Carl Schneider, 'The tension between rules and discretion in family law: a report and reflection' (1993) 27 FLQ 229
[70] ibid 232
[71] When Schneider talks of policy and principles this refers to a similar idea to Dworkinian principles; binding judges and ensuring the absence of strong discretion in that interpretation takes place within this framework.

rule application and serves to ensure that judges are able to interpret rules in a way that can develop the law if so required.[72]

Whilst the sociological and juristic models may seem diametrically opposed, Lacey points to the relationship of interdependence between the two arguing that, if jurists are to truly understand judicial discretion, we must modify our understanding to accommodate the benefits of a sociological outlook.[73] It is argued that, despite the existence of statutory provisions such as section 1(3) CA welfare checklist, jurists must come to appreciate that discretion is not always expressly granted via direct statutory authority. As will become apparent, judicial discretion plays an important part in the application of many aspects of family law and the ways in which this discretion is utilised are diverse in nature.

Positive and Negative Models of Discretion

One possible characterisation of discretion is as a positive concept. This emphasises the autonomy of the legal official in the process of judicial interpretation. Goodin defines a positive model of discretion thus: 'The empowerment to pursue some social goal in the context of individual cases in such a way as he judges to be best calculated in the circumstances to promote those goals'.[74] Therefore, for Goodin, the choice of action or inaction, and indeed the method used to legitimise and reach any decision therein, is central to the characterisation of judicial discretion.

For Bell, a positive characterisation of discretion involves three key elements; a power to choose standards for action by a legal character, whose choice is made unilaterally and that choice then legitamised by law.[75] If a legal official is termed as having discretion it is accepted they enjoy a degree of self-determination to act in the process of achieving a given aim (provided by principles of law). Therefore, whilst the content of a decision may be determined by law, Bell points to the fact the judge will often have discretion as to whether to initiate a legal process culminating in a given decision. This will become evident in application of the paramountcy principle itself. Here, if a situation is found to fall in the remit of section 1(1) CA,

[72] Schneider (n70) 235
[73] Lacey (n67)
[74] Robert Goodin, 'Welfare, rights and discretion' (1986) 6 OJLS 233
[75] Bell (n65) 92

the judge is bound to deliver the result that gives effect the best interests of the child. However, a judge must firstly find the situation in the scope of the paramountcy principle before the child's best interests can be held as determinative. The matter must, therefore, relate to 'the upbringing of the child', terminology which imports a degree of discretion as to the actual invocation of the principle itself.[76]

In advocating for a positive model, Bell states it is a mischaracterisation to state the function of law is to set the boundaries of discretion.[77] He argues it is more accurate, given jurists are not concerned with limiting discretion, to state the function of law is to provide a framework for judicial interpretation to take place inside. This would seem to be constructed as a framework which allows an official to choose between two or more competing interpretations when each is lawful to some extent.[78] It is the power to choose that positively characterises judicial discretion in the descriptive model. However, this does not provide a process by which a judge should choose between competing solutions in individual cases and is thus descriptive in nature. In contrast, a negative model of discretion provides the judge with a process through which to apply this discretion and consequently structures the process of judicial interpretation.

In contrast to the positive characterisations above, negative conceptions of discretion focus on the constraints placed upon the legal official and the methods by which the law can structure judicial exercise of discretion in individual cases. This section will proceed to analyse Dworkin's theory of discretion and some of the implications of this for the jurisprudential model in this thesis.

Dworkin termed judicial discretion as the '*hole in the donut'*.[79] In analysing this ambiguous description, Goodin has suggested Dworkin intended to characterise discretion as a 'residual' notion, as the 'area left open' by the restrictive belt of legal rules that forms the corpus of law in a legal system.[80] In a Dworkinian model, it seems clearer to define discretion by what it is not; the belt of rules encircling the discretionary exercise of judicial interpretation. This belt of

[76] For instances of the paramountcy principle's non-application see Jonathan Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?', (1999) 223 CFLQ 1,2
[77] Bell (n65) 94
[78] Ahoron Barak, *Judicial Discretion*, (1st edition, Yale University Press, 1989)
[79] Ronald Dworkin, '*Is law a system of Rules?',* in *The philosophy of Law*, (1st edition, 1977, OUP) 52
[80] Goodin, (n75) 234

rules and principles, for Dworkin, plays a crucial role in structuring judicial interpretation in hard cases.

As Goodin asserts, the mere absence of rules is insufficient to regard a situation as discretionary as discretion may also exist alongside legal regulation in indeterminate situations. Therefore, discretion may more accurately be described as a situation where there 'exists a prima facie expectation that the decision will be subject to legal rules… but these rules appear in some way legally indeterminate'.[81] This would appear to create a definition that paints judicial discretion as filling a legal lacuna. This speaks not so much to a 'unregulated hole in the donut', but more to a grey area of law requiring further interpretation. One such family law example may be the operation of Emergency Protection Orders (EPO). In order to grant an EPO, a draconian power used only in the most severe situations,[82] a court must be satisfied that there is reasonable cause to believe the child would be subject to significant harm if they are not removed to alternative accommodation or remain in the place where they are being accommodated.[83] If such a situation exists, following application of both section 1(1) CA and section 1(5) CA, a child may be removed from a home. In terms of judicial discretion, section 44(1) CA provides a rule that requires extensive further interpretation. A judge, when applying the law here, applies section 44(1) CA, alongside the paramountcy and no order principles, to the facts of the case. Therefore, the judge is influenced by three separate considerations inside the encircling belt of rules and principles to reach a conclusion justified by the facts before them. This models Dworkinian discretion in that the conditions for an EPO cannot simply be applied without recourse to other principles and, ultimately, the decision of the judge as to the severity of the danger facing the child. Therefore, we see the belt of rules and principles attempting to guide and structure the discretion enjoyed by a judge when making a decision of this kind.

For Dworkin, this encircling belt of rules and principles plays a leading part in his distinction between weak and strong discretion. He argues the existence of these principles guides a judge in the process of judicial interpretation and that a judge does not enjoy strong discretion because they are always under a legal duty to reach a decision that incorporates the best interpretation of the legal system according to standards of fit and moral worthiness.[84] This provides the

[81] ibid
[82] *Re X (Emergency Protection Order)* [2006] EWHC 510 (Fam)
[83] S44(1) CA 1989
[84] Greenawalt (n28)

structured model of discretion this thesis seeks to utilise. Such a finding is significant in the context of the overall argument advanced in this thesis in that a key aspect of the reinterpretation of the paramountcy principle is recourse to a theoretically informed model of legal principles.

Further Descriptive Accounts of Discretion

In addition to the strong and weak division highlighted by Dworkin, academics have subsequently proposed further descriptive accounts of judicial discretion. These models help pinpoint the type of discretion proffered in this thesis. For example, Goodin points to the contrast between formal and informal discretion.[85] Formal discretion occurs when the solutions available to a judge are explicitly written into a rule. Therefore, a judge may have to select between one of a number of statutorily pre-determined outcomes dependent on the individual facts of the case. In contrast, informal discretion occurs were there exists vagueness in a rules formulation. This can be due to the rule being based on abstract concepts. For example, the best interests of a child can take expression in any number of formulations dependant on case facts. This discretion pervades decisions of lower family courts in terms of routine evidential findings. For example, admitting heresy evidence in a criminal trial on the basis of the interests of justice demanding so. The 'interests of justice' is a subjective principle yet it falls in a judge's discretion to admit evidence on its basis. Such discretion becomes relevant in later chapters as, under the current interpretation of the paramountcy principle, courts are routinely tasked with evidentially divining the best interests of the child with this becoming determinative on the making, varying or discharging of a section 8 CA order.

Rosenberg suggests a further distinction between primary and secondary judicial discretion.[86] Primary discretion occurs when a decision maker has a multitude of options available and is free from the interference of legal rules in making the decision.[87] Secondary discretion concerns the hierarchy of judges in terms of when a legal system ascribes a degree of finality to the decision of the lower court only usually enjoyed in a higher court. For the sake of this thesis, this distinction is not overtly relevant but further evidences the multifaceted and complex nature of discretion.

[85] Goodin (n75) 235
[86] Maurice Rosenberg, 'Judicial Discretion of the trial court, viewed from above' (1971) 3 SLR 638
[87] ibid

Applying Discretion to Section 1(3) CA

Recalling Dworkin's model of a legal system, there exists a clear distinction between rules and principles. It is now important to fit Dworkinian discretion into this wider picture to illuminate the jurisprudential framework the authors reinterpretation of section 1(1) CA will operate within.

It is important to avoid viewing Dworkin's theory as creating a bright-line divide between rules and discretion. It is easy to view Dworkin's theory this way if the donut analogy is applied rigidly. It is argued that discretion is more than the 'dead analytical space' signalling the mere absence of rules in his negative characterisation and requires careful interpretation as part of his wider legal and moral theory.[88] Dworkin's development of weak discretion, the idea that an official's judgement is bound by amorphous principles in the process of interpretation, allows discretion to be viewed as a necessary part of the Dworkinian legal system. In order for a judge to find the objective right answer, they must look to principles of the legal system manifested in concepts such as 'fairness', 'justice' or 'reasonableness'.

One way to model the operation of these accounts of discretion is to analyse their applicability to existing statutory instruments applied in family law. The example of section 1(1) CA is relevant here. Importantly, this thesis will critique the application of section 1(1) CA to section 8 CA orders but, for the sake of evidencing the operation of discretion in family law, its current application will be used as a model here. When a court is issuing a section 8 Child Arrangements Order, s1(4) CA dictates that the court shall have regard to the welfare checklist, found in s1(3) CA. Whether or not using the checklist in and of itself amounts to strong discretion, these factors form a discretionary list that judges should have regard to when determining the best interests of the child.[89] These factors are provided by Parliament in the form of legislation with judges then left to apply them on a case by case basis.

The discretion offered under the welfare checklist may be characterised as positive in that the statute empowers a judge to choose which specific provision to give weight to. This draws

[88] R.C Post, 'The Management of Speech: Discretion and Rights' (1984) Supreme Court Review 169
[89] Kearns (n49). Note that this question falls outside the ambit of this thesis

upon the institutional autonomy of the judge to make a decision which is then validated by the discretion granted under the statutory framework. However, problematically for this thesis, a positive characterisation does not provide a legal framework through which judicial decisions can be structured in a normative manner and, therefore, seems suited to a Hartian account of law. If the operation of the welfare checklist were to be modelled on a Hartian account, all the external observer could state was that the official gave some regard to the factors therein. The judge would turn to the open-natured texture of language and derive discretion from this to reach a decision.

Whilst this positive characterisation is possible, a better case could be made for modelling this type of discretion in a negative Dworkinian sense. If we take judicial interpretation of the welfare checklist as the 'hole in the donut', it could be said judges carry out this interpretive task within the framework provided by statutes such as the Children Act 1989. Here, a judge will exercise discretion to give weight and interpret particular factors but only to the extent that the existing legal framework allows them to do. This process provides the structuring of weak judicial discretion in that a judge is provided with a list of factors and empowered to come to a solution as a result of their application.

Having characterised the discretion under the welfare checklist as negative, we may say this discretion is informal in that judges are provided with an abstract set of principles to take into account but given no guidance on how each relates to the other or the relative weights they enjoy. For example, a child's wishes and feelings expressed through section 1(3)(a) CA may be given greater weight correlating to the age of the child and thus developing understanding.[90] It is in a judge's discretion to account for this given they enjoy no guidance in the statute itself.

Conferral of Discretion

Given this thesis has analysed the operation of judicial discretion in the context of an existing family law scenario, it is important to consider how this discretion is conferred on the judiciary. The orthodox understanding here is one of a hierarchical relationship in which legislation empowers judges to exercise discretion in the application of legislation. In challenging this simplistic structure, Schneider has offered alternative interpretations of conferral to highlight

[90] For example see *Re S (Contact: Children's Views)* [2002] EWHC 540 (Fam)

how structured discretion can be used 'creatively' to provide certainty to ambiguous conferred powers.[91]

Rule-failure discretion occurs where a hard case arises which appears so novel, on its facts, that no existing rule or previous decision can sensibly be applied to it.[92] This equips judges with an element of flexibility, particularly in family law, to adapt to changing factual matrixes. Rule-compromise discretion occurs when legislators cannot decide on a given rule and instead hand authority to the individual decision maker.[93] Arguably, this allows legislators to avoid sensitive issues, often social reforms, in the formulation of the rule and leaves judges to apply and develop the law in individual cases. In contrast, rule-building discretion occurs where the legislature could make rules but elects to not make these exhaustive to allow judges to build a body of expert case law allowing specificity according to the facts before them. This is seen in common law adjudication in that, the more cases that come before the court, the greater the clarity of the rule and the more authority a judge can call upon to legitimise its application.

If the alternative accounts of discretion are adopted alongside these, we are able to construct a more accurate account of judicial discretion than the mere strong/weak or formal/informal dichotomies. For example, if the welfare checklist is taken as an example, it is possible to view conferral in the orthodox form. However, viewing the discretion as rule-building offers a more accurate depiction of the legal framework. In terms of section 1(3) CA, the legislature could have offered further statutory guidance on the operation of the checklist. For example, it may have specified which provisions take precedence over others, how judges are to structure analysis or how sections interact. In the absence of this, judges are left to develop case-law concerning application of the checklist and thus provide the guidance required in lower courts. This allows courts to build an appropriate interpretation of the checklist without outside interference on their expertise. This will become important for Chapter Five of this thesis in that rule-building discretion will be utilised to develop a jurisprudence surrounding the interpretation of proposed statutory reforms to section 1(1) CA.

[91] Schneider (n70) 47
[92] ibid 62
[93] ibid 63

Conclusions

This Chapter has sought to analyse a Dworkinian model of a legal system and the necessary role of judicial discretion. This shall form the theoretical lens through which the current application of the paramountcy principle shall be critiqued.

To briefly restate, this thesis adopted a model of the legal system centred around the distinction between rules and principles. A principle merely indicates reasons for a decision and does not necessitate automatic legal consequences. These principles then weigh on an official's judgement when carrying out the process of judicial interpretation. This process of interpretation then forms Dworkin's theory of discretion which this thesis has defended from a simplistic critique. It is the existence of weak-discretion that shields the judge from accusations of strong-discretion and thus links the process of interpretation to the principles encircling the area of judicial discretion. Dworkin's theory is a complex web of interconnected rules, principles and discretion. It is this web that forms the jurisprudential basis of this thesis. This will be developed to justify judicial creativity and discretion within the proffered reinterpretation of section 1(1) CA in which the term principle shall assume greater significance in terms of balancing the rights of children and other litigants.

Chapter Two

Analysing Domestic Case-Law to Evidence Taxonomic Conflict Between Section 1(1) CA and Dworkinian Principles

Having established the jurisprudential framework this thesis will utilise, the domestic operation of the paramountcy principle can now be analysed. This thesis has favoured a Dworkinian style model of legality that draws particular attention to the distinction between rules and principles. This was found to form the basis of Dworkin's 'interpretation as weak discretion'.[1] However, this cannot be applied in this thesis without analysis of domestic case-law applying the paramountcy principle. Given much of the academic commentary in this field was written between 1990 to 2005, it is important to update previous research in order to assess the continued applicability of the critiques academics have previously offered. The analysis of recent case-law will then be utilised in Chapter Five of this thesis in its attempts to provide a realisable Convention-compliant model of the paramountcy principle for use in litigation concerning children.

This Chapter aims to apply the legal theory of Chapter One to the contemporary application of the paramountcy principle in order to elucidate a previously unidentified criticism of its operation in domestic litigation.[2] Through a taxonomic analysis of the term 'principle', it is argued that section 1(1) CA is not applied in the way a principle ought. Instead, application of the paramountcy principle has developed into a rule whereby its invocation necessitates the automatic legal consequence that the interests of the child are prioritised over those of other litigants. This is not the way in which a Dworkinian 'principle' should function in that a principle enjoys an element of weight and thus must be balanced against competing considerations in its application.

Chapter Two will be divided into two sections. Firstly, section 1(1) CA will be contextualised with discussion surrounding the Law Commission reports and Parliamentary debates prior to adoption of the Children Act 1989. This will evidence uncertainty at a drafting level surrounding the status of the paramountcy principle as either a legal rule or principle. This will

[1] Ronald Dworkin, *Taking Rights Seriously*, (8th edition, Bloomsbury, 2018) 141

[2] The paramountcy principle is interchangeably referred to as the 'Welfare principle' or 'welfarism' in the relevant literature. This thesis will adopt the term 'paramountcy principle'.

be followed by extensive analysis of case-law pertaining to the paramountcy principle. Secondly, this thesis will take the application of section 1(1) CA and compare this against the Dworkinian definition of a principle in a taxonomic analysis. This tension will be assessed in terms of evidencing a disparity between the operation of the paramountcy principle and how a legal principle ought to function as part of the Dworkinian model of a legal system.

The Children Act 1989

Confusion in Law Commission Reports Prior to Adoption of the Children Act 1989

The provision of law termed as the paramountcy principle forms the central tenet of the Children Act 1989. Here, section 1(1) CA states that whenever a court is determining any question with respect to the upbringing of a child, or the administration of a child's property, the welfare of the child shall be the court's paramount consideration.

At this stage, it is important to note that section 1(1) CA does not explicitly refer to the paramountcy *principle*. Indeed, nowhere in the Children Act 1989 is the proposition of law referred to as a principle. Furthermore, it is acknowledged that the provision in section 1(1) CA has been academically referred to by several alternative names: the best interests test, the welfare test or the welfare principle. Of these terms, the most widely used, in the academic sense, are the welfare principle and paramountcy principle. Given the central tenet of this thesis is to criticise the (non)-application of section 1(1) CA as a legal principle, one may suggest that it is unfair to advance this critique given the 1989 Act does not refer to the term principle itself.

However, this thesis focuses on the way in which the provision in section 1(1) CA is referred to judicially, extra-judicially and in the academic scholarship. As this Chapter will evidence, Law Commission documents, relevant case law and academic contributions have all referred to paramountcy as a 'principle'. Specifically, this thesis argues that, in light of the Law Commission documents that will be analysed, it was the clear intention of Parliament to conceptualise the provision in section 1(1) CA as such. Therefore, in a practical sense, it seems that an understanding of section 1(1) CA as a principle has become embedded in the way judges and practioners deploy this provision.

Given evidence to support this claim that will be discussed in this Chapter, it is argued that section 1(1) CA is termed a principle not solely as a result of common terminology but in light of established practice determining as such. This is significant and is indicative the gulf between section 1(1) CA's statutory wording and its actual invocation in domestic family courts. Therefore, whilst section 1(1) CA does not explicitly term its provision as such, this thesis argues there is significance in domestic practice, and academic commentary, terming the provision in section 1(1) CA the paramountcy principle.

Before engaging in critical analysis of section 1(1) CA's application in domestic litigation, it is important to analyse the documents and debate leading to adoption of the Children Act 1989. Described as 'the most comprehensive and far-reaching reform of child law in living memory', the Act was an attempt to create a coherent framework for the robust protection of children's welfare.[3] The Act serves to centralise the child in family litigation and, whilst not a direct response to the sexual exploitation highlighted in the Cleveland report,[4] was underpinned by Parliamentary consensus that over-interference in the family by public bodies was non-beneficial.[5]

The Children Act 1989 was adopted as a result of wide-scale legal review into the domestic operation of family law by the Law Commission and Department for Health and Social Security. As Bainham notes, this is unusual in that the Act had multiple influences that resulted in the hybrid focus on both public and private child law.[6] This divided focus will be later shown to arguably impact upon the extent to which family courts have been receptive to Convention-based arguments in litigation. The first relevant review into the treatment of children in care was undertaken by the House of Commons Social Services Select Committee.[7] This report, largely into public aspects of child law, concluded that the applicable law at that time was ineffective and resulted in an inability to protect those children most at risk.[8] As a result of these findings, the Committee suggested that a wider scale report was required into the operation of domestic child law.[9]

[3] HC Deb, 27th April 1989, Vol.151, col 1135
[4] Cleveland Report Inquiry into child abuse in Cleveland 1987 (1988) *Report of the inquiry into child abuse in Cleveland 1987* Cm 412 London:
[5] Steven Cretney, *Family law in the twentieth century,* (1st edition, OUP, 2003) 722
[6] Andrew Bainham and Stephen Gilmore, *Children the modern law,* (4th edition Jordan Publishing, 2013) 33
[7] House of Commons Health and Social Services Committee, '*Report by the Secretaries of State for Social Services and for Wales on Children in care in England and Wales'* (Cmd 2322 1983)
[8] HC Deb, 27th April 1989 (n3) col 1111
[9] ibid

The recommendations of that report were, in turn, revised in light of the Law Commission proposals found in four separate reports from 1985-1987.[10] The final Law Commission recommendations were outlined in its 1988 report.[11] This report recommended the 'consolidation and [amendment] of the existing law to form a rationalised regime'; a coherent legal code that provided clear entry points to litigants in both the private and public spheres of family litigation.[12] This consolidated the previously piecemeal approach to child law and thus constituted a 'completely new' framework of rights and responsibilities with the central aim of protecting the child from both public and private persons.[13]

Importantly, throughout the process of the Children Bill gaining the approval of both Parliamentary chambers, the provision in section 1(1) was emphasised as central to the overall coherence of the Act. Such an approach is evidenced in the 1986 Law Commission paper analysing the domestic application of the paramountcy principle.[14] Here, the Law Commission stated that the paramountcy principle must be applied without 'qualification or gloss' and in a manner that gives 'absolute priority to the welfare of the child'.[15] This is further emphasised by statements from both the Minister of State for Health and Solicitor General during Second Reading of the Children Bill whom both pointed to the centrality of the principle: 'the child's welfare *must* be the paramount consideration.…. All courts in reaching all decisions about the care of children must do what is best for the child'.[16] Such comments are significant in the context of this Chapter in that such an approach would seem to mirror judicial application of the paramountcy principle in *J v C*. This lends further support to this chapter's contention that Parliament intended for the provision in section 1(1) CA to be termed a principle in law.

Interestingly, in the various Law Commission reports and Parliamentary debate, there exists some confusion as to the terminology to be employed surrounding the provision within section 1(1) and its application as a legal principle. This Chapter aims to evidence section 1(1) CA was

[10] See Law Commission, '*Review of Child Law- Guardianship',* (Law Com No. 91, 1985), Law Commission, '*Review of Child law- Custody',* (Law Com No.96, 1986), Law Commission, '*Review of Child law- Care, supervision and interim orders',* (Law Com No.100, 1987) and Law Commission, '*Review of Child Law- Wards of Court',* (Law Com No.101, 1987)
[11] Law Commission, '*Review of Child Law- Custody and Guardianship',* (Law Com No. 172, 1988)
[12] HL Deb, 6th December 1988, Vol.502, col 490
[13] Bainham and Gilmore (n6) 33
[14] Law Commission, '*Review of Child law- Custody',* (Law Com No.96, 1986)
[15] ibid 186-189
[16] HC Deb, 27th April 1989 (n3) col 1111 (emphasis added)

intended to be termed a principle by Parliamentary draftsmen and Law Commission researchers yet, even during its adoption, there existed confusion as to its precise status as a principle or rule. The significance of this remains under-unexplored given the lack of academic focus on traditional analytical jurisprudence in family law.

Records of Parliamentary debate evidence the view that both Parliamentary chambers intended the provision in section 1(1) CA to be termed a principle in law. The Secretary of State for Health stated that the 'welfare principle necessitates children's interests are paramount', whilst this characterisation is mirrored by the Solicitor General in his appraisal of the proposed Bill.[17] Such an approach is further evident in the House of Lords, in which the Lord Chancellor stated that 'the [paramountcy] principle requires….' and that there is a 'danger such a broad principle could lead to inconsistent practice'.[18] Further references to the language of principles can be found in the speeches of both Lord Mischon and Lord Meston.[19] This suggests that, throughout the Parliamentary process, legislators intended the legal provision in section 1(1) CA to be characterised as a principle and not a rule. This will have significant consequences for this Chapter as it points to the misapplication of section 1(1) CA as a Dworkinian style rule.

However, the characterisation of section 1(1) CA as a principle is not as clear when the Law Commission reports are analysed. In its 1986 paper, the provision was termed both a legal principle and rule.[20] Firstly, the Law Commission, in considering whether paramountcy was the right 'rule' to apply in the domestic setting, stated: 'Where the adults' interests are concerned the case against diluting the paramountcy rule is strong'.[21] Such a characterisation does not appear in isolation and accompanied by statements such as: 'the paramountcy rule will only apply where the child's welfare is directly in question' and 'the paramountcy rule suggests that, for as long as he is a child, he should be given the best opportunity to develop his own potential'.[22]

This said, the Law Commission report also provides authority for the characterisation of paramountcy as a legal principle by stating: 'it [paramountcy] provides a strong principle that

[17] ibid col 1145 (emphasis added)
[18] HL Deb, 6th December 1988 (n12) col 490
[19] ibid col 496 and col 500
[20] Law Commission, '*Review of Child law- Custody'* (n14) 179-182
[21] ibid 190
[22] ibid 186

the child's interests are to be paramount'.[23] Interestingly, the report contains an element of internal inconsistency in its approach to Lord MacDermott's authoritative judgment in *J v C.* Here, the Law Commission initially described the dicta as the 'most often quoted expression of the paramountcy *rule'*.[24] However, when discussing whether parental interests should influence a welfare assessment, the Commission reasoned: 'Since *J v C*, the meaning of the paramountcy principle has been clear'.[25] Therefore, on one level, *J v C* is cited as authority for paramountcy operating as a legal rule whilst, shortly after, it is cited as a legal principle. This would suggest the Law Commission used the terms rule and principle interchangeably and without regard for the taxonomical distinction between the two and the consequential impact on its application in domestic courts.

Whilst it would seem too far to charge the Law Commission as being disingenuous in their interchangeable use of language, this does suggest that the report regards legal principles and rules as applying in the same manner. The fact that *J v C* is characterised as authority for the paramountcy 'rule' would suggest that the drafters were imprecise in their use of language given they reverted back to the standard characterisation of the paramountcy *principle.* The Law Commission, when writing the report, did not have the benefit of a Dworkinian jurisprudential lens and so used rule and principle interchangeably without regard for the practical consequences of doing so. Such imprecision has, thus far, not impacted an academic critique of the paramountcy principle's application in domestic law because of reluctancy to engage with traditional legal theory. However, given the theoretical lens established in Chapter One of this thesis, the interchangeable use of rule and principle directly impacts the practical application of section 1(1) CA. This Chapter will go on to analyse how the paramountcy principle has been applied as a Dworkinian rule in domestic practice.

The Scope and Relationship of Section 1(1) CA to Section 1(3) CA

The paramountcy principle enjoys a relatively narrow sphere of application. It directly applies to courts when considering an issue concerning the upbringing of a child, or administration of property, but also enjoys further general application.[26] For example, the principle will apply in

[23] ibid 191
[24] ibid 185 (emphasis added)
[25] ibid 200
[26] Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* (11th edition, 2015, OUP) 419

wardship proceedings[27] and to the exercise of the court's inherent jurisdiction.[28] Beyond this, section 1(1) CA does not enjoy unlimited application.[29] Given the principle only applies to courts, private ordering is not caught in its scope and parents are consequently able to act in a manner that does not solely serve to maximise the welfare of a child. This contrasts to section 3(1) of the UN Convention on the Rights of the Child.[30] Here, the characterisation of children's interests as 'primary' enjoys a significantly wider field of application including administrative authorities, legislative bodies and private individuals in the process of taking decisions affecting the child.[31] As such, article 3(1) has become a threefold concept when applied to situations in which a child's interests are at stake; a substantive right, interpretive principle and procedural rule.[32]

Section 1(1) CA's limited field of application is further evidenced by its non-application to determination of leave to apply for a section 8 CA hearing on the basis that the question of welfare only arises in the section 8 hearing itself.[33] Accordingly, as Herring states,[34] domestic law makes no attempts to ensure private actions are viewed through the prism of the paramountcy principle and parents are free to prioritise their own/others interests over and above those of the child.[35]

Furthermore, for a case to fall in the scope of section 1(1) CA, the issues must directly affect the upbringing of a child.[36] The example this thesis will utilise is the issuing of section 8 Child Arrangements Orders. However, given the issue must directly relate to upbringing, there are practice areas in which a child's welfare is not the paramount consideration and merely forms a consideration for the court. Such situations include the lawfulness of deportation decisions concerning parents[37] and applications under Part IV Family Law Act 1996 for an occupation order in the domestic violence context.[38] This evidences that, despite the paramountcy principle

[27] See *J v C* [1970] AC 668
[28] See *Re T (a minor)(wardship: medical treatment)* [1997] 1 ALL ER 906
[29] Lowe and Douglas (n26) 420
[30] s3(1) UN Convention on the Rights of the Child, United Nations, Treaty Series, Vol.1577, 3
[31] Lowe and Douglas (n26) 420
[32] UN Committee on the rights of the child, *General commen No.14* [6]
[33] *Re A (Minors) (Residence Orders: Leave to Apply)* [1992] Fam 182 [191G]
[34] Jonathan Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?', (1999) 223 CFLQ 1,2
[35] Bainham and Gilmore (n6) 70
[36] s1(1)(a) Children Act 1989
[37] See *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4
[38] s33 Family Law Act 1996

pervading family practice, there are clear instances of lesser or non-applicability. The full force of section 1(1) CA will only apply in a small number of contested cases directly affecting the upbringing of the child and in which another statutory provision has not ousted its influence.[39]

Judicial Application of the Paramountcy Principle

The J v C Model of Section 1(1) CA

This thesis will now examine the jurisprudence of family courts to evidence judicial trends in application of the paramountcy principle. This will begin with analysis of the House of Lords decision in *J v C.* Following discussion of subsequent jurisprudence, it will become apparent that, despite family courts becoming less willing to explicitly cite the traditional *J v C* model, domestic practice has undergone little change. This Chapter reflects the fact that academic debate surrounding the paramountcy principle critiques domestic interpretation rather than the construction of section 1(1) CA *per se.*[40]

As already stated, the previous statutory expression of the paramountcy principle, found in section 1 Guardianship of Minors Act 1971, required the courts to treat the child's interests as the first and paramount consideration. The inclusion of 'first' suggests that, in practice, there existed two competing models for its application. On one level, a child's interests could be considered alongside the interests of other relevant parties. Under such a construction, the welfare of the child forms an important first consideration but is to be balanced against other interests in litigation. The opposing interpretation is that the child's welfare forms the *only* consideration of the court. Consequently, the course of action found to evidentially be in that child's best interests determines the making, varying or discharging of an order.

In England and Wales, even before the introduction of the Children Act 1989, the courts had arguably adopted a narrow conception of the paramountcy principle that resulted in the welfare of the child becoming the only consideration of the court. The authoritative exposition of this is found in the pre-Children Act 1989 case of *J v C* in which Lord MacDermott stated*:*

[39] See s105(1) Children Act
[40] Jonathan Herring, 'Farewell Welfare?' (2005) 27 JSWFL 159

> Reading these words [first and paramount] in their ordinary significance…. The course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood…… [the child's welfare forms] the paramount consideration because it *rules upon or determines* the course to be followed.[41]

As the Law Commission argued, such an approach necessarily implies the terms 'first and' became superfluous to section 1 Guardianship of Minors Act.[42] Therefore, following *J v C,* it became evident that the child's welfare dictated any order a court was able to grant; the notion of welfare being merely the first consideration amongst others had been firmly rejected by the House of Lords. This necessitated the automatic rejection of the rights and interests of other parties to litigation. It is the central claim of this Chapter that, when critiqued through a Dworkinian lens, such a finding offers an important development in attempting to construct a Convention-compliant model of litigation.

Following section 1(1) CA superseding section 1 Guardianship of Minors Act, *Re O* confirmed that Lord McDermott's exposition of the law was equally applicable to the new statutory regime.[43] Therefore, section 1(1) CA confirmed that, in cases falling under the scope of the paramountcy principle, the child's welfare was determinative on the order a court was able to issue.[44]. This narrow interpretation was subsequently approved in *Re K* in which it was stated that the law was clear; 'The welfare of the child is the paramount consideration…. This was stated with clarity by Lord MacDermott and will be in the mind of every judge who tries an infant case'.[45] Whilst this case pre-dates the Children Act 1989, it is representative of a judicial willingness to elevate paramountcy from the position of a 'first consideration'.

Indeed, in much of the initial jurisprudence following the Children Act 1989 such an approach is prevalent. For example, several Court of Appeal decisions from this period suggest the paramountcy principle was determinative on the making of an order in that analysis of a child's best interests must occur in isolation to the interests of the primary carer.[46] Such an approach

[41] *J v C* (n27) (emphasis added)
[42] Law Commission, '*Review of Child law- Custody',* (n14) 186
[43] *Re O and another (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 [24]
[44] Lowe and Douglas (n26) 414
[45] *Re K* [1977] Fam 179, [183] (emphasis added)
[46] Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (n33) 1

is favoured in *Re KD.*[47] Here, Lord Oliver stated: 'parenthood confers the privilege of ordering a child's early years but this is subject to limitations'.[48] Here, the court's interpretation of the paramountcy principle constituted one such limitation. In these situations, parental privilege does not terminate but becomes subservient to the welfare principle and the best interests of the child.[49] As a result, parental interests could only be assessed insofar as they weighed on the best interests of the child. This was further developed in *Re O,* in which the paramountcy principle was termed a 'fundamental principle overriding all else'.[50] This dicta was approved as recently as 2012 in the Court of Appeal decision of *Re W.*[51] Here, the court held the 'definitive exposition' of the [paramountcy] principle, in relation to parental disputes, is to be found in *Re O* and, as a result, the best interests of the child, divined after a welfare analysis, overrides all other considerations in such cases.[52]

In this light, Harris-Short has examined judicial resistance to tempering the operation of the paramountcy principle to allow for the balancing of rights and interests following adoption of the HRA 1998.[53] She draws particular attention to cases such as *Dawson v Wearmouth,*[54] to evidence the problematic influence of the *J v C* model of application in denying courts the opportunity to balance various rights and interests. In *Dawson,* the court confirmed that, once a section 8 dispute has arisen, the 'paramount consideration is the welfare of the child' and, consequently, the views and interests of parents are relevant only insofar they bear on that child's welfare.[55] Subsequent cases have raised no prospect of 'interfering with the established line of authority [*J v C*] binding the interpretive approach of the court'.[56]

It is important to distinguish between the impact of the paramountcy principle's narrow interpretation in *J v C* and its actual application by domestic courts. As is apparent, the courts have used a variety of terms to express the effect of the paramountcy principle on cases falling under the ambit of section 1(1) CA.[57] These subsequent cases do not necessarily cite *J v C* as

[47] *Re KD (Minor) (Ward: Termination of Access)* [1988] 1 All ER 577
[48] ibid [58]
[49] ibid [58]
[50] *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 [128]
[51] *Re W (Children)* [2012] EWCA Civ 999
[52] ibid [37]
[53] Sonia Harris-Short, 'Family law and the HRA 1998: Judicial restraint or revolution?' in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act,* (1st edition, CUP, 2007)
[54] *Dawson and Wearmouth* [1999] 1 FLR 1167
[55] ibid [1174]
[56] *Re A (Permission to Remove Child from Jurisdiction: Human Rights)* [2000] 2 FLR 225 [226]
[57] See *Re P (Contact: Supervision)* [1996] 2 FLR 314 [328]

authority. Indeed, the most recent Court of Appeal application of *J v C* is found in the 2013 case of *Re G;* concerning the impact of section 1(1) CA on a section 31 CA Care Order.[58] Here, the Court of Appeal merely noted that *J v C* remains the authoritative interpretive approach to the paramountcy principle and that the child's welfare is the paramount consideration.[59] As Harris-Short suggests, the subsequent failure to cite *J v C* does not diminish the importance of Lord MacDermott's exposition.[60] Instead, following enactment of the Children Act 1989, a narrow interpretation of the paramountcy principle became entrenched in the Family Division's jurisprudence with, as an automatic legal consequence of its application, the interests of the child assuming priority over and above those of other parties to litigation. This is dependent on evidentially demonstrating what is in the child's best interests.[61] When a court has determined this issue, the interests of others may become a consideration 'only insofar as they bear on the welfare of the child'.[62] As will be discussed in the second part of this Chapter, this gives effect to a rule-like application of the paramountcy principle. This entrenchment mirrors the imbedded nature of the categorisation of the provision in section 1(1) CA as the 'paramountcy principle' in domestic practice.

The J v C Model in Practice

The *J v C* model of application purports to place the child at the centre of the decision-making process. This serves to isolate the child's interests from the interests of other parties to litigation.[63] This thesis will now model this approach onto a section 8 CA application to highlight the process courts are bound to when applying a *J v C* model of the paramountcy principle. The factual scenario this thesis will utilise comes from the case of *Re E.*[64] For Herring, *Re E* is emblematic of a wider tension in family law between 'promoting welfarism and respecting the rights of family members'. As a result, he concludes that the issues raised in it are illustrative of prevailing trends in children's litigation.[65]

[58] *Re G (A Child)* [2013] EWCA Civ 965
[59] ibid [55]
[60] Harris-Short (n53) 347
[61] Shazia Choudhry and Helen Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 460
[62] *Re O (Contact: Imposition of Conditions)* (n50) [128]
[63] John Eekelaar, 'Beyond the Welfare Principle' (2002) 237 CFLQ 1,10
[64] *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638
[65] Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (n33)2

Re E concerned a mother, residing in London, who enjoyed a residence order in favour of her child.[66] The father was granted regular contact and this was found to be largely beneficial for the child. Upon the mother indicating a desire to move to Liverpool, the father sought a condition to be placed upon the residence order preventing relocation. This is a case of clashing parental interests alongside the calculation of the child's best interests. On one hand, the child benefitted from regular contact with the father and there was nothing to suggest it was in the child's best interests that this stop or decrease in frequency. Furthermore, there was no evidence to suggest a move to Liverpool would benefit the child if considered in complete isolation. On the other hand, the mother argued that her continued residence in London had such an effect on her that it inhibited her ability to care for the child. This was significant given she was the primary carer and, therefore, counsel submitted this should be considered in a welfare assessment as she was primarily responsible for maximising welfare. Ultimately, the court found for the mother in that such a limitation could not be placed onto a residence order as it would have the effect of limiting her ability to freely choose where both herself and her child would reside.

Such cases give rise to the conventional criticisms of the paramountcy principle's application in domestic child law. One such argument is that the paramountcy principle fails to robustly protect the interests of children given its application often provides the means of expressing the interests of others.[67] For example, in *Re E,* the mother aligned her own interests with the best interests of the child by arguing that remaining in London would adversely impact her child's welfare.[68] Despite the order being framed as in the best interests of the child, it is difficult to reason how moving to Liverpool, thus losing contact with the father, was positively in that child's welfare interests if considered in total isolation. The order could only be granted if the child's welfare was tied to that of the mother. This is something the individualistic application of the paramountcy principle seeks to prevent.

This, for Eekelaar, evidences the susceptibility of the *J v C* model to the ideological input of those not explicitly relevant to the formulation of the child's best interests.[69] This input can operate on two levels. On one level, Reece points to the potential of welfarism to undermine

[66] Note, following the Children and Families Act 2014 Schedule Two (3), Residence Orders are now termed Child Arrangements Orders.
[67] Eekelaar (n63)10
[68] *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 [15]
[69] Eekelaar (n63) 10

the rights of adults given the move from a rights to welfare based model. To evidence this she draws on the line of case-law pointing to the homophobic preference for heterosexual carers in the issuing of Residence Orders.[70] Given judges applied their own biases by equating the best interests of the child to being raised in a traditional nuclear family, she argues that the paramountcy principle led to the favouring of heterosexual parents.[71] Given the paramountcy principle imports a degree of discretion to the trial judge, cases such as *Re D* highlight the dangers of allowing an individual to divine the best interests of a child in a manner that gives effect to prejudices.[72] These cases speak of the dangers of 'exposing' children to 'ways of life [leading] to a severance from normal society and discriminating against homosexual parents on the grounds of so-called 'lifestyle choices'.[73] For Reece, the paramountcy principle results in an approach that equates social normality to best interests and thereby 'approximates that the nuclear family is always better for the child'.[74] The discretion afforded under section 1(1) CA allows for these individual biases to find expression in case-law.

Alternatively, relevant to this thesis, the paramountcy principle gives rise to a situation whereby parents can seek to align their own interests with those of the child. As a result, children's interests are viewed through the prism of litigation brought and dominated by adult parties.[75] This is the inevitable consequence of family litigation being initiated by parents with children often remaining unrepresented; as per Baroness Hale in *Williamson*: 'This is a case about children, their rights and those of the parents…. Yet no one is here to speak on behalf of the children… The battle has been fought on grounds selected by the adults'.[76]

At a domestic level, it is apparent that the necessary implication of the child's interests being the sole consideration of the court is that parents will attempt to align their own interests with those of the child. The consequence is that the best interests of the child often become indicative of primary carers. Despite the fact this refers to the manner in which the paramountcy principle

[70] Helen Reece, 'The paramountcy principle: Consensus or Construct?' (1996) 267 CLP 291, 303. Note, Residence Orders refer to what are now termed section 8 Child Arrangements Orders.
[71] *C v C* [1991] 1 FLR 223. It is important to note the ECtHR has specifically stated that discriminating on the grounds of sexual orientation in residency disputes is prohibited under the convention. See *Salgueiro da Silva Mouta v Portugal* [2001] FCR 653
[72] *Re D* [1977] AC 602
[73] ibid [629]
[74] Reece (n70) 291
[75] Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (n33) 10
[76] *Regina v Secretary of State for Education and Employment and others(Respondents) ex parte Williamson (Appellant) and others* 2005 UKHL 15 [71]

is applied in litigation, as opposed to the statutory construction of section 1(1) CA itself, this formulation is problematic on both a theoretical and practical level. Practically, it reflects the fact that the paramountcy principle is not operating in the manner in which it ought. Under a narrow application of the paramountcy principle, courts are tasked with issuing orders determined by evidentially assessing the best interests of the child. In a strict reading thereunder, courts should not consider the interests of others unless they directly impinge on the interests of the child as per the *J v C* model. This is emblematic of the wider divergence between the textual provision in section 1(1) CA and its subsequent application in the courts.

Arguably, by the court 'smuggling' the interests of others into a welfare analysis, the protections afforded to children are 'watered down'.[77] For Bainham, this is a particular problem if the aim of law is to protect children, not necessarily their rights.[78] Therein lies an important distinction. Protecting children necessitates a certain degree of paternalism, of divining their best interests in the form of a value judgement.[79] If this is the aim of the law then it is not functioning consistently if the interests of others are 'smuggled' into the conducting of a welfare test. In this light, the question of whether the court was protecting the interests of the child or mother in *Re E* can be raised. If the latter, this at the expense of the interests of the father who lost contact time with his child. If the court was protecting the child, then the decision to allow relocation seems a strained maximisation of their best interests.

Impact of the HRA on Litigation Applying Section 1(1) CA

Given the period in which academic interest peaked in the paramountcy principle, it is important to recognise that existing analysis of the case law is considered limited. Consequently, this thesis will now examine contemporary case law to determine whether family judges have maintained the *J v C* approach to litigation engaging the paramountcy principle. Emphasis will be placed on the modest recognition of rights, as opposed to interests, to ground discussion of domestic Convention-compliance in Chapter Three of this thesis.

[77] Eekelaar (n63) 2
[78] Andrew Bainham, 'Can we protect children and their rights?' (2002) 279 FL 1
[79] ibid

Cases Concerning the Presumption in Favour of Biological Parents

The line of case-law concerning the potential presumption in favour of biological parents provides an insight into the contemporary judicial approach to the paramountcy principle. Despite concerning presumptive standards, which are not the subject of this thesis, these cases serve to highlight both the continued application of the paramountcy principle and the lengths to which courts have gone to reflect the importance of natural parenthood whilst simultaneously respecting the determinant nature of children's welfare post *J v C.*[80] This section will now evidence examples of courts seeking to use presumptions to predetermine an outcome that is not based on a welfare assessment under the Children Act 1989. Such attempts have been firmly rejected and, post *Re B,* courts will utilise a welfare-based approach to litigating section 8 CA applications.[81] It is now the case that appearing as the child's biological parent yields no right or presumption to contact.

Following initial judicial support for the idea of a presumption in favour of biological parents found in *Re D,*[82] the courts have retreated and emphasised the centrality of the paramountcy principle in that any section 8 CA order must be justified by reference to the best interests of the child. As Herring and Powell state, 'the courts have rejected the utility of these presumptions and assert that in each case the court should seek to determine the welfare needs of the child before it'.[83] This was affirmed in *Re B* in which it was stated: 'All consideration of the importance of parenthood in private law…… must be *firmly rooted* in an examination of what is in the child's best interests'.[84] Therein, the Supreme Court made clear that a courts role in section 8 applications was to determine the best interests of the child.[85]

In *Re B,* the Supreme Court was faced with the task of interpreting dicta from the earlier House of Lords decision in *Re G* that had been consistently cited in a manner that seemed to give rise to a presumption in favour of biological parents.[86] *Re G* concerned a dispute between a same-sex couple over the upbringing of two children conceived via artificial insemination. Following

[80] Nigel Lowe, 'J v C: Placing the child's welfare centre stage', in Stephen Gilmore, Jonathan Herring and Rebecca Probert, *Landmark cases in Family law,* (1st edition, Hart Publishing, 2011)
[81] *Re B (a child) (residence order)* [2009] UKSC 5
[82] *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 134
[83] Jonathan Herring and Oliver Powell, 'The rise and fall of presumptions surrounding the welfare principle' (2013) 43 FL 553
[84] *Re B* (n81) [37]
[85] ibid [20]
[86] See Lady Hale, 'New Families and the Welfare of Children', (Morgan Centre Conference, LSE, 20th June 2013)

birth of the children, the relationship between the parents broke down and both parties formed new relationships. The biological mother took care of the children and moved to Leicester whilst allowing the non-biological parent to maintain contact. However, upon the non-biological mother's application for a shared residence order, it became clear that the biological mother intended to move to Cornwall. In light of this, the Court of Appeal granted a shared residence order to protect the non-biological mothers role in the child's life. Further proceedings were brought upon the biological mother relocating. The House of Lords allowed the appeal and reversed the decision of the Court of Appeal in providing that the shared residence order should be varied to reflect its original form and that the children's primary residence should be with the biological mother.[87]

Dicta from *Re G* has been subject to contested interpretation. Baroness Hale, as she then was, emphasised the significance of natural parenthood by stating; 'the fact that CG is the natural mother of these children….. while *raising no presumption* in her favour, is undoubtedly an *important* and *significant* factor in determining what will be best for them now and in the future'.[88] It was further stated that *J v C* was the 'plain' exposition of the law in that the child's welfare dictates the issuing of an order.[89] Consequently, there is no question of a parental right or presumption in favour of contact with a child.[90] This serves to both reinforce the centrality of the paramountcy principle whilst also reject the characterisation of such clashes as deontological in nature.

Whilst this seems to reject the presence of any presumption, the judgment of Lord Nicholls appears contradictory. Here, Lord Nicholls challenged anyone with the 'tendency to diminish the significance of natural parenthood.[91] Thus, on one level, the House of Lords rejected the existence of presumptions whilst simultaneously emphasising the importance and significance of natural parenthood. In this formulation, a court must bear in mind that the 'ordinary way' of rearing a child via biological parenthood can be normally expected to be in their best interests.[92] In practice, this was used to attempt to create a presumption in favour of biological parents when conflict arises in a section 8 CA application.[93]

[87] *Re B* (n81) 5 [44]
[88] *Re G (Children) (Residence: Same-sex partner)* [2006] 2 FLR 629 [44] (emphasis added)
[89] ibid
[90] ibid [30]
[91] ibid [44]
[92] ibid [2]
[93] Hale (n86)

The later Supreme Court judgment in *Re B* attempts to provide clarity surrounding *Re G* and firmly rejects the existence of a presumption in favour of natural parents. The court made clear that: 'the quest is to determine what is in the best interests of the child'.[94] In this, it is only as a 'contributor to the child's welfare that parenthood assumes any significance' and it must be assessed in terms of its potential to fulfil the ultimate maximisation of the child's best interests.[95] The Supreme Court seemed to firmly reject framing paramountcy in terms of rights and thus failed to balance the various interests of the parties; 'to talk in terms of a child's rights, as opposed to best interests, diverts from the child's welfare'.[96] Indeed, the very question of balancing rights is only raised once in analysis of the first instance judgment. Here, Lord Kerr provided a somewhat cursory approval of the trial judge's approach when acknowledging '[the judge had] balanced all interests in making their decision and had treated Harry's welfare as paramount'.[97]

Furthermore, both *Re B* and *Re G* reject the formulation of parental interest's as rights. This was explicitly stated by the House of Lords in both cases. This opposition is emblematic of a clear hostility to a rights-based discourse that is both entrenched and 'markedly felt' in litigation.[98] This is despite some modest efforts by individual judges to characterise disputes in terms of clashing rights. Harris-Short identifies the judgment of Mr. Justice Charles in *Re R* as a concise exploration of why the family judiciary are reluctant to introduce a rights-based discourse.[99] Here, the judge stated that he feared a rights-based approach may obscure section 1(1) CA as the central tenet of children's litigation. If parental interests were characterised as rights then, as Harris-Short argues, they become qualitatively different in that there is no developed Strasbourg jurisprudence on children as independent rights holders.[100] This is further reflected in the paucity of jurisprudence interpreting the impact of UNCRC on children as rights bearers.

[94] *Re B* (n81*)* [20]
[95] ibid[28]
[96] ibid [19]
[97] ibid [15]
[98] Harris-Short (n53) 347
[99] *Re R* (Care: disclosure: Nature of proceedings) [2002] 1 FLR 755
[100] Harris-Short (n53) 344. Here, Harris-Short cites Philipson in that 'Rights have a different status over and above interests'. See Gavin Philipson, 'Transforming Breach of confidence? Towards a common law right of privacy under the Human Rights Act' (2003) 66 MLR 726

The message from these cases is that there exists no presumption in favour of biological parents. Instead, biological parentage is a factor that must be fed into a wider welfare assessment. If the child being raised by biological parents is evidentially found to be in their welfare interests, it becomes a factor in the issuing of a section 8 order. However, it cannot stand alone as either a presumption or assumed to be in the best interests of the child and must be shown evidentially. Furthermore, both *Re B* and *Re G* firmly reject the characterisation of interests as rights. This is an important finding in the context of this thesis given requirements in a post-HRA legal framework to balance rights under article 8(2) ECHR as discussed in Chapter Three.

Subsequent Presumption Cases

Both *Re G* and *Re B* apply the paramountcy principle in a manner that centralises the child's interests in the judicial decision-making process. This thesis will now examine subsequent jurisprudence to evidence that, whilst the child's interests remain paramount, there exists an modest judicial willingness to characterise such cases as clashes of rights and thereby invoke an rights-based discourse.

Interestingly, subsequent cases in this area have adopted a similar approach to, and largely cited dicta from, *Re B.* For example, *TE v SH,* concerned an application by the father for a section 8 CA order in respect of an 11-year-old boy.[101] This would have involved removing the child from the care of his mother. In exposition of the law, Judge Bellamy drew extensively on dicta in *Re B,* citing Lord Kerr's guidance in interpreting *Re G* as requiring legal analysis centred on the welfare of the child.[102] The judge, in *TE,* repeated on numerous occasions that, when conducting the analysis required under the welfare checklist, the child's welfare was his paramount consideration. This was affirmed via citation of Baroness Hale's approval of *J v C* in *Re G.*[103] This led Judge Bellamy to the conclusion that 'all other principles [in this case] are secondary to that central principle, that any decision about S's residence must be firmly rooted in an examination of what is in his best interests'.[104] This constitutes an approach that follows the previous Supreme Court authority.

[101] *TE v SH, S (By his guardian ad litem, the National Youth Advocacy Service)* [2010] 2010 EWHC 192 (Fam)
[102] *Re B* (n81) [19]
[103] *Re G* (n88) [30]
[104] *TE v SH* (n101) [60]

Similarly, the 2012 case of *Re B*, concerned a grandmother's challenge to a first instance decision granting the mother a residence order in favour of her child.[105] The Court of Appeal was presented with dicta from the trial judge that was arguably inconsistent with the line of authorities discussed above. Here, the trial judge had stated that, if the mother had a suitable place to live, the child ought to be living with her rather than grandmother.[106] The judge then further added: 'the law is clear that a child should have the right to grow up with his own parents and should not be in the care of third parties *unless* welfare demands it'.[107] Evidently, language invoking a 'right' to be brought up by natural parents is not supported by *Re B* or *Re G* and is, in fact, flatly rejected by both. However, in the context of this case, the Court of Appeal held that the language employed by the trial judge did not 'involve an elementary error of law' as it did not amount to an assumption that the mother's status granted automatic entitlement to her child.[108] Instead, the addition of 'unless welfare demands' ensured that the judgment was grounded in the child's best interests. In reaching this conclusion, the Court of Appeal was clear in its statement that 'the mother's status provides no rights governing a residence application'.[109]

Similarly, *Re RO* concerned a residence order application by a father following the death of the child's mother.[110] During the intervening period, the child had been cared for by a guardian. Here, Recorder Keehan QC, as then was, began with standard exposition of the law stating that the court was bound by section 1(1) CA meaning the child's welfare must form the paramount consideration.[111] However, unusually for these cases, he then stated that, were article 8(1) rights of the child conflict with those of the parent, the rights of the child prevail. This seems unusual in that, throughout the judgment, there is no mention of rights and the submissions of the various parties are firmly framed in the language of 'interests'. It is, therefore, unclear as to why the judge thought it necessary to introduce this reference to the process required under article 8(2) ECHR when his disposal of the case makes no mention of such a process.

[105] *In the matter of B (a child)* [2012] EWCA Civ 632
[106] ibid [12]
[107] ibid [16] (emphasis added)
[108] ibid [21]
[109] ibid [21]
[110] *Ro v A local authority and others* [2013] EWHC B31 (Fam)
[111] ibid [8]

Interestingly, the trial judge introduced language that would, as per the previous example of *Re B*, lead to questions of compatibility with the previous line of established authorities. The judge stated that the child was 'in desperate need of a mother... she needs a mother figure' and that the benefit of this was stability.[112] These comments were then followed by a welfare analysis that found the father wanting in terms of the emotional support he could provide given he was found to be partially motivated by a desire to acquire leave to remain in the jurisdiction. The rejection of the father's application was made on the basis of applying the paramountcy principle and the finding of F's welfare interests. This, to some extent, distances the decision from the finding that the child 'required' a mother figure but, as per *Re B,* seems to move towards language that invokes a presumption.

The final judgment this thesis will examine is the 2015 Court of Appeal decision in *Re E-R.*[113] This was an appeal against the granting of a residence order in favour of the father which permitted some contact with the mother. At first instance, the trial judge instructed himself thusly: 'There is a broad natural parent presumption in existence under our law and indeed commons sense would cause one to recognise that a young child will be better off in the care of a parent'.[114] This led the judge to conclude that the argument in favour of the status quo was not strong enough to displace the proposition that the father as a capable parent should assume T's care.[115] This effectively casts the presumption as rebuttable so long as positive evidence is provided. Here, unsurprisingly, the Court of Appeal was brief in its analysis of the first instance decision. In a return to the orthodoxy, the court cited Baroness Hale in *Re G* and thereby confirmed application of the *J v C* model of the paramountcy principle.[116] The court then further cited dicta from *Re B* confirming that a judge must centre their analysis around the best interests of a child. This is the totality of a court's role in these cases.[117] Given this construction of the law, the Court of Appeal held that the trial judge had erred in stating there existed a presumption in favour of natural parents.[118] The consequence of such a statement would be that the father is granted care of the child for being 'capable'.[119]

[112] ibid [18]
[113] *Re E-R (a child)* [2015] EWCA Civ 405
[114] ibid [24]
[115] ibid [26]
[116] ibid [28] citing *Re G* (n88) [30]
[117] *Re E-R* (n113) [30] citing *Re B* (n80) [20]
[118] *Re E-R* (n113) [31]
[119] ibid [32]

In light of these contemporary authorities, it can be stated that domestic courts have followed the approach of the House of Lords in both *Re G* and *Re B* in subsequent section 8 CA applications. These cases highlight that a *J v C* model of the paramountcy principle lies at the heart of the assessment a judge must undertake when conducting litigation concerning children. In this light, Herring and Powell have argued that presumptions have been 'whittled away to vanishing point'.[120] Despite the reference to article 8(1) rights in *Re O,* judges have continuously refused to cast parental interests as rights, as per direction in *Re G,* and have not engaged in balancing the various interests and rights granted domestic effect by the Human Rights Act 1998. As Harris-Short states: 'Whilst recognising its [paramountcy] flaws, many family lawyers and judges remain deeply loyal to its basic premise'.[121] Therefore, the conclusion to draw from these authorities is that the best interests of the child remain the key determinant within litigation concerning section 8 CA applications.

However, interestingly, these authorities also evidence that, despite clear guidance from both Court of Appeal and Supreme Court, judges are increasingly willing to use language that would seem to tentatively indicate the privileging of parental interests. Evidently, if a judge were to state a presumption exists this would be overturned on appeal as per *Re E-R.* However, statements referring to the necessity of a 'mother figure' or how a child *ought* to live with a natural parent remain unchallenged.[122] Such judgments will not be found to err in law if the paramountcy principle is invoked to justify granting the order. Thus, judges are able to make such comments so long as they are followed by the caveat that the child's interests remain determinant. In this light, one may suggest that the paramountcy principle is used to mask certain problematic dicta in cases concerning the privileging of natural parents in section 8 CA applications. It is the assertion of this thesis that such a process need not occur if family courts were to embrace the language of rights in a Convention-compliant reinterpreted model of litigation.

[120] Herring and Powell (n83) 556
[121] Harris-Short (n53) 347
[122] See *Ro v A local authority and others* [2013] EWHC B31 (Fam) and *In the matter of B (a child)* [2012] EWCA Civ 632 (emphasis added)

Analysis of Recent Section 8 Order Applications

The above analysis evidences the modern approach to the paramountcy principle in section 8 applications as consisting of a purely welfare-based assessment. It evidenced a modest willingness to apply section 1(1) CA alongside rights-based reasoning but concluded that decisions are still determined via reference to the best interests of the child. However, this thesis does not posit that judges have completely rejected the influence of the HRA in domestic family litigation and, in recent cases, some judges have undertaken brief balancing exercises in terms of assessing the rights of parties. This is relevant to this chapter's exposition of the paramountcy principle in that it suggests a modest shift away from the requirements inherent in the *J v C* model of application. It is the purpose of this section to analyse recent section 8 CA order applications in order to fully update the academic commentary in this area.

The first relevant case is *Re H.*[123] This was an application to transfer the care of a child from mother to father. Here, Mr. Justice Keehan began with exposition of the relevant law by citing section 1(1) CA and, as per his analysis in *Re O,* stating that the article 8(1) rights of the child will prevail over those of the parents. This suggests a characterisation of the child's interests as Convention rights. However, as per *Re O,* this was quickly followed by statements re-emphasising the centrality of the paramountcy principle: 'The test is, and must always be, based on a comprehensive analysis of the child's welfare' as dictated by reference to the section 1(3) CA welfare checklist.[124] Therefore, the judge stated the only way in which these best interests could be met was via a section 8 order in favour of the father.

However, as opposed to previous judgments, Mr. Justice Keehan felt it necessary to state: 'I am satisfied that this order is a necessary and proportionate response to the situation'.[125] This was after listing accounted in favour of granting the order in favour of the father including: the child had lived with his mother continuously, he was settled in school, he had lived in the Midlands previously and would therefore have to form new friendships upon moving to the South of England.[126] In the language of rights, the latter aspects of this list would seem to exist as infringements to the child's article 8(1) rights. Therefore, the judge seems to have sought to

[123] *PA v TT, H (A child by way of 16.4 Children's Guardian)* [2019] EWHC 2723
[124] ibid [5] citing *Re L (a Child)* [2019] EWHC 867 (Fam)
[125] ibid [34]
[126] ibid [32]

justify these infringements by commenting on the support the child would receive from new family and the trauma caused by the status quo. This evidences a tentative move towards a rights-based discourse. However, it is important to remember that the judge did explicitly state the test must be based on application of the paramountcy principle. Therefore, as per the presumption cases, it appears other interests (or rights) are being considered in the formulation of a child's best interests but are hidden behind classical exposition of the requirements inherent in applying section 1(1) CA.

The language of rights being introduced into these judgments is again seen in *Re G*.[127] Concerning a section 8 application, the judge began analysis with section 1(1) CA and a basic statement of the paramountcy principle. However, following this the judge stated: 'In addition to those statutory provisions the court must have regard to the article 8 rights of both parents and G and must endeavour to arrive at an outcome that is both proportionate *and* in G's best interests'.[128] This statement seems to hybridise a proportionality exercise and welfare-centred assessment of the child's best interests. By stating it was the courts role to undertake both assessments, His Honour Judge Bellamy seemed to temper the narrow application of the paramountcy principle with a modest acknowledgment of the necessity for a proportionality exercise. However, presumably to satisfy the requirements of previous authorities rejecting such an approach, the judge cited Baroness Hale's dicta in *Re G*, expressly approving *J v C*, and, therefore, rejected the characterisation of parental and children's interests as rights.[129] Following these cases, it seems that, at best, the judicial approach is one of striving to achieve a balance between the narrow application of section 1(1) CA and requirements on the court in a post-HRA legal framework. As this and later chapters will make clear, the co-existence of these two approaches does not give rise to a genuinely Convention-compliant model of litigation.

It appears an overstatement to argue that the courts have a tendency to engage with the process of balancing rights in section 8 order applications. Instead, it appears there exists differing practices amongst judges that leads to an element of inconsistency in terms of linguistic expression regarding the conflict of interests. For example, in *G v M* heard in 2019, discussion of the law pertaining to section 8 orders (and applications to bring those orders) contained no

[127] *Re G (A child: Intractable Contact)* [2019] EWHC 2984 (Fam)
[128] ibid (emphasis added)
[129] ibid [73] citing *Re G* (n88) [30]

reference to rights at all.[130] Instead, His Honour Judge Ahmed simply cited section 1(1) CA and stated the interests of the child are paramount in these cases. Such an approach is further seen in *Re G* (2013) in which the paramountcy principle was characterised simply by reference to section 1(1) CA.[131] As a consequence, cases that do cite requirements under the ECHR evidence only a modest shift towards normalising a rights-based discourse. Noticeably, even in cases where this is apparent, reference is made to the centrality of section 1(1) CA to justify the order on the best interests of the child. Therefore, whilst other considerations may now come into play during litigation, judges still feel bound to revert back to the paramountcy principle. This dictates the children's interests are the *only* interests the court can account.

Whilst, in 2006, Fortin was correct to state the courts rarely mentioned ECHR obligations in children's litigation, contemporary evidence suggests that the position is now more nuanced.[132] The overall picture is one of inconsistency with some judges invoking rights-based reasoning in a justificatory process. Others, it appears, simply invoke section 1(1) CA as necessitating the child's interests become the paramount consideration. This forms what Fortin terms a 'judicial myopia' in terms of accounting Convention rights in children's litigation.[133] Whilst this is true, this thesis points to the 'hybridisation' of a welfare and rights-based approach that detracts from the overall coherence of the law in this area. With some judges seemingly willing to apply deontological reasoning and others rejecting rights-based discussion in totality, judicial reasoning becomes hard to predict and appears without any theoretical basis.

In terms of why some judges will tentatively apply a rights-based approach, it is apparent that the judicial discretion inherent in the making, varying and discharging of section 8 CA orders permits the expression of individual judicial personalities and permits a degree of flexibility in the construction of an order. Therefore, as long as a judge justifies the order by reference to the centrality of section 1(1) CA, they are able to modestly pursue rights-based reasoning whilst remaining protected from appeal. The paramountcy principle would, therefore, appear to operate as a shield behind which individual judicial personality may find expression.

[130] *G v M* [2019] WL 05624598
[131] *Re G (A Child)* [2013] EWCA Civ 965
[132] Jane Fortin, 'Accommodating Children's Rights in a post Human Rights Act Era', (2006) 69 MLR 1, 10
[133] ibid 8

Taxonomic Analysis of Section 1(1) CA

Following findings relating to the marginalisation of parental interests insofar as they do not weigh on the best interests of the child, this section will now evidence how such an interpretation of the paramountcy principle does not mirror how a legal principle ought to be applied in the Dworkinian sense. Importantly, this thesis has drawn attention to the entrenched judicial practice of applying section 1(1) CA as the paramountcy principle. This mirrors Law Commission and Parliamentary intent as expressed before adoption of the Children Act 1989. This thesis argues that this justifies critique of section 1(1) CA's application as the paramountcy 'principle'.

Dworkinian Principles

As stated in Chapter One of this thesis, Dworkin defined a principle as a standard to be observed as required by morality.[134] Such principles operate in a manner distinct from rules in that they do not necessitate automatic legal consequences as a result of their invocation.[135] Therefore, judges are merely bound to account for the principle in their exercise of weak discretion. Given the inevitability of these principles conflicting with each other, Dworkin provided them with an element of weight. As these principles will always require further interpretation in their application, they are central to forming Dworkin's theory of weak discretion.

In contrast to this, Dworkin characterised a rule as applying in an all or nothing fashion.[136] Here, Dworkin employs a baseball analogy as a means of describing their operation. A referee cannot acknowledge a rule of Baseball as being 'three strikes and out' before proceeding to not apply the rule consistently. If he does not apply this standard it is not a valid rule of the game. Therefore, a rule necessitates binding legal consequences that the official cannot ignore without ceding that the rule is not valid in that situation.

Here, it is important to recall the central tenants of Dworkin's theory of weak discretion. For Dworkin, discretion is characterised negatively in that it occupies the area encircled by a belt

[134] Dworkin (n1) 39
[135] ibid 72
[136] ibid 41

of legal rules and principles that exist in a legal system; the domestic corpus of law. In the exercise of interpretation during a novel case, a judge cannot be said to possess strong discretion in that they are constantly guided by principles of the legal system. These principles structure judicial discretion given interpretation occurs within the existing framework of a legal system.

The Application of Section 1(1) CA as a Rule

In the light of this, it is ironic that the paramountcy principle is termed a 'principle' in law. It is the contention of this thesis that, instead of operating as a principle in the Dworkinian sense, the paramountcy principle has been applied as a rule in the context of section 8 CA order applications. This new line of criticism has been briefly acknowledged by Choudhry and Fenwick in their contention that: 'the Welfare Principle has been elevated to the status of a rule that determines the outcome of such [welfare] applications'.[137] Indirectly, they seem to equate the paramountcy principle to a Dworkinian rule in that the language of determination mirrors the automatic legal consequences necessitated following a rules application. Indeed, as evidenced by previous analysis of Law Commission Reports and Parliamentary debates, Choudhry and Fenwick's classification of the paramountcy principle as a rule seems to enjoy historical precedent.[138] In these documents, the conflation of 'principle' and 'rule' is widespread and used without regard to practical implications. This is further evidenced in Cretney's work where he refers to the paramountcy rule and welfare principle interchangeably.[139] This thesis argues that this conflation has very real practical consequences for the manner in which the paramountcy principle is applied in domestic law if viewed through the prism of Dworkinian jurisprudence. The lack of precision surrounding the terms principle and rule reflects the paucity of focus on legal theory by academics who have treated theory and practice as two separate enquires.

Contrasting Dworkin's account of a legal principle with the prevailing application of the paramountcy principle, it seems difficult to formulate an argument whereby the two can be reconciled. Beginning with the question of necessitating a legal result, it is clear that application of the paramountcy principle results in the automatic legal consequence of the child's welfare

[137] Choudhry and Fenwick (n61) 458
[138] See Law Commission, '*Review of Child law- Custody'* (n14) 179-182
[139] Stephen Cretney, *Principles of family law*, (Eight edition, Sweet and Maxwell, 2008) 654

becoming the sole consideration of the court. This creates a judicial starting point that de-prioritises the interests of others unless these can be shown to be directly impinging the welfare of the child.[140] This is despite the fact that judges have undertaken a modest shift towards considering the rights of others in a deontological framework. Such an approach is necessitated by the domestic construction of the relationship between section 1(1) CA and article 8 ECHR as will be discussed in Chapter Three of this thesis. Here, it will be suggested that there is case law showing erroneous interpretation of Strasbourg jurisprudence and that judges have behaved as though the HRA had no impact on litigation concerning children.

If the previously analysed presumption cases are examined, language that seems to indicate automatic legal consequences is evident in the *Re G* judgment. For example, Baroness Hale states: '*J v C* is the plain exposition of the law in that the child's welfare dictates the issuing of an order'.[141] This is subsequently developed in *Re B* through dicta that states the effect of the paramountcy principle is that the role of a judge is limited to determining the best interests of the child.[142] Therefore, once the paramountcy principle is applied in these section 8 applications, it follows that the child's welfare interests are the sole consideration of the court. Logically the interests of parents and other parties are automatically deprioritised and the interests of the child assume a determinant position.

Consideration must then shift to whether the paramountcy principle can be said to enjoy any element of weight in domestic law. Given the exposition above, it would seem not. If a section 8 CA order is sought, recourse to section 1(1) CA is mandated via section 1(4) CA. In the rare circumstances in which a court will attempt to identify the article 8(1) rights of the adults and the interests of the child independently, any order is still justified by reference to the best interests of the child. The question then becomes not whether but how to give effect to the best interests of the child through a welfare test. Seemingly, in domestic law, the only way to temper the effects of the paramountcy principle is for a parent to align their own interests alongside those of the child or to hope that an individual judge gives effect to other interests in a welfare analysis. The ways in which judges have done this are inconsistent and have been shown to create theoretical and practical confusion in section 8 applications. Therefore, the current

[140] Fortin (n132) 8
[141] *Re G* (n88) [44]
[142] *Re B* (n81) [20]

judicial interpretation of the paramountcy principle cannot be said to possess an element of weight.

With its current application, it appears the paramountcy principle constitutes more a 'rule' than 'principle'. Whilst applying the paramountcy principle cannot bind a judge to reach a certain factual decision, given the diverse range of factual matrixes the courts are presented with, it binds the judge to a certain interpretive process that requires the automatic de-prioritisation of parental interests and prioritisation of a child's best interests. Instead of the child's interests becoming a consideration amongst multiple factors, the court is bound in its interpretation of the welfare checklist to consider the interests of the child in complete isolation. Therefore, this thesis argues that to term the paramountcy principle a 'principle' is misleading given its current application. Instead, as will be shown in the following chapters, section 1(1) CA requires reinterpretation in light of this new critique to ensure its application as a genuine legal principle.

The Impact on Dworkinian Weak Discretion

Given this thesis will utilise a Dworkinian critique to inform reinterpretation of section 1(1) CA, it is important to briefly consider the effect of the paramountcy principle's misapplication on Dworkin's theory of weak discretion. As identified in Chapter One, there is a distinction between 'structuring' and 'confining' discretion. As Davis argues, the confinement of discretion involves the creating an express limitation on a judge's ability to employ discretionary judgement.[143] This thesis has sought to avoid such a conception and has instead sought to structure discretion in a wider framework of rules and principles. This speaks more to balancing the continuing struggle between rules and discretion whilst recognising and appreciating the need for both in a functioning legal system.[144]

If the Dworkinian negative conception is adopted, discretion is 'the 'hole in the donut' or area of legal indeterminacy surrounded by the belt of rules and principles that guides judicial interpretation.[145] Taxonomically, the paramountcy 'principle' should lie in this belt and guide the operation of judicial interpretation in the process of making, varying or discharging a

[143] K.C Davis, *Discretionary justice: A preliminary Enquiry,* (1st edition, 1977, University of Illinois Press)
[144] See Carl Schneider, 'The tension between rules and discretion in family law: a report and reflection' (1993) 27 FLQ 232
[145] Ronald Dworkin, 'Is law a system of rules*?',* in *The philosophy of law* (1st edition, 1977, OUP) 52

section 8 CA application. The principle should guide the operation of judicial discretion and become part of a wider web of considerations during the process of choosing the right interpretation of the law.

Therefore, it is evident the findings of this Chapter have a marked impact on how judicial discretion operates in litigation. In the context of a section 8 child arrangements application, judges applying the paramountcy principle enjoy only one legitimate interpretive avenue. This is to give effect to the best interests of the child. At the moment, on analysis of the contemporary jurisprudence in this Chapter, competing interpretations, such as giving effect to rights obligations under the ECHR, are subsumed by the paramountcy principle. The fact that section 1(1) CA enjoys no element of weight obscures the process of weak discretion so important to the Dworkinian lens utilised in this thesis. The prevailing interpretation of the paramountcy principle does not seem an attempt to 'structure' discretion but an attempt to 'confine' it. Here, a bright-line rule is formed that creates a boundary past which the family judge cannot exercise discretion; once section 1(1) CA is found to apply in a case, a judge is bound to give effect to the best interests of the child no matter what competing considerations exist. As Chapter Four will evidence, this leads to situations whereby judges manipulate the facts of cases to prevent section 1(1) CA applying and thereby retain the discretion required to balance the various interests of litigants.[146] Without doing so, a judge's hands are 'completely tied' to a certain interpretation as the result of a singular rule dominating the discretionary area characterised as discretion.[147] This is not the way in which a Dworkinian model of discretion and principles should operate.

Conclusions

This Chapter has analysed the domestic application of the paramountcy principle and advanced its current misapplication as a legal rule. Cases used to highlight this reveal the practical impact and deficiencies of characterising the paramountcy principle as a rule. Given application as such, domestic judges are automatically bound to a starting point that places the interests of the child as the only consideration in the issuing of an order. As such, the rights of others escape

[146] Such a criticism will be developed within Chapter Four and discussion of *Re S (A child) (identification: restrictions on publication)* [2003] EWCA Civ 963 [1]
[147] Eekelaar (n63) 1

rigorous assessment by the court. Therefore, it is no surprise that judges refuse to engage with balancing rights since a rule cannot be balanced; it applies or is set aside.

This thesis argues that the courts cannot begin to adopt a deontological approach to section 1(1) CA until this fundamental mischaracterisation is explicitly recognised. Therefore, this thesis identifies a critique that has, until now, remained unexplored because of the paucity of juristic analysis in this field. Rather than starting with the practical application of the paramountcy principle, as other academics have, this thesis has traced the taxonomy of a principle back to Dworkin. By exposing the application of the paramountcy principle as a rule, the inevitability of the court's refusal to engage with rights, and recognise the interests of others, is evidenced.

It is argued that if the paramountcy principle is applied as a principle ought, this brings the Family Division closer to a model of litigation that is Convention-compliant. It is to this question of achieving compliance that this thesis will now turn. Chapter Three will analyse the relationship between section 1(1) CA and Article 8 ECHR from both the perspective of the ECtHR and domestic courts. This will suggest manifest non-compliance with obligations in a post-HRA legal framework. The reinterpretation required to remedy this will take into account not only traditional considerations but also the findings of this Chapter and impact of a Dworkinian lens on the operation of legal principles.

Chapter Three

Assessing the Paramountcy Principle's Compliance with Rights Obligations at the ECHR and Domestic Level

Under section 2 HRA, domestic courts are required to take into account Strasbourg jurisprudence when conducting litigation engaging Convention rights. It has already been shown that, in the practice of determining section 8 CA applications, the courts will adopt a *J v C* model of the paramountcy principle in that the child's best interests are determinative on a judge in granting an order. This Chapter will compare this position to the approach under relevant ECtHR jurisprudence. Here, it is important to clarify that this Chapter will not examine the domestic operation of the paramountcy principle but will instead focus on the perceived relationship between section 1(1) CA and article 8 ECHR. This will be analysed from the perspective of both the Strasbourg and domestic courts. In the context of section 8 CA applications, this relationship differs depending on whether the Strasbourg or domestic court is delivering judgment. For the Strasbourg court, the requirements of article 8(1) and 8(2) must be met before any privileged status can be attached to the interests of the child. For domestic courts, the interests of the child assume a paramount status automatically as a result of a judge applying section 1(1) CA.

Chapter Three will seek to contextualise domestic unwillingness to adopt a rights-based discourse via reference to ECtHR jurisprudence on the weighting of children's interests in an article 8(2) balancing exercise. It will highlight that the ECtHR has not accepted the paramountcy principle as compatible with article 8 ECHR. It will then move to analysing the domestic interpretation of the Strasbourg case-law in a post HRA legal system. This case-law will be analysed to suggest an inaccurate interpretation of the ECtHR position on the part of domestic courts.[1] It will be argued that, instead of engaging with Convention rights, the domestic judiciary have simply reconfigured section 1(1) CA to justify non-compliance with requirements under the ECtHR jurisprudence. Upon analysis of the domestic relationship between article 8 and section 1(1) CA, this thesis will propose that the paramountcy principle now forms an automatic justification under article 8(2) when the rights of adult and child clash.

[1] David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial approaches to the HRA' (2003) 52 ICLQ 580

At this preliminary stage, it is important to note that the Strasbourg jurisprudence exists against a backdrop of varying standards of child welfare in contracting states. Therefore, other states do not adopt a 'paramountcy principle' as understood in England and Wales. Instead, they have their own domestic approaches that are compliant with the Strasbourg regime. In this sense, the findings of this Chapter indicate that domestic model of paramountcy exists as an outlier in that it is inconsistent with Strasbourg jurisprudence. The exact content of other contracting states legislation pertaining to the welfare of the child lies beyond the scope of this thesis.

Basic Structure of Rights Claims Brought under the ECHR

Before engaging with the relevant ECtHR jurisprudence, the basic structure of claims brought under the ECHR will be analysed. This will be divided into two sections. Firstly, this thesis will provide analysis of the qualified article 8(1) Convention right itself. Secondly, it will engage with domestic statutory provisions granting domestic enforceability in the form of various provisions found in the HRA 1998.

Whilst an exhaustive analysis of Convention rights lies outside the scope of this thesis, a broad outline of how a claim engaging qualified Convention rights would be assessed by a court is of utility. The Convention right explicitly relevant to this thesis is article 8(1) ECHR. Importantly, article 8(1) is termed a materially qualified right in that its application is dependent on balancing the rights of the individual against the interests of wider society.[2] Article 8(1) ECHR enshrines the right to respect for private and family life and can be divided into two composite sections. Section 8(1) ECHR contains the positive right therein; 'everyone has the right to respect for his private and family life'. It is important to note that article 8(1) imports a right to respect for family life. Therefore, the respect owed to various aspects of family life will vary from state to state depending on national practices.[3] Again, this is indicative of varying national formulations of the balance struck between a child's welfare interests and rights of the adult.

[2] Jane Fortin, 'International Children's rights', in J Fortin, *Children's rights and the developing law,* (3rd edition, CUP, 2012) 58

[3] Helen Fenwick, 'Selected key substantive articles and ECHR doctrines' in Helen Fenwick, Gavin Philipson, Alexander Williams, '*Text, cases and materials on public law and human rights',* (4th edition, OUP, 2015) 284

Article 8(2) reflects the fact that article 8(1) rights are materially qualified: 'there shall be no interference by a public authority with the exercise of this right *except* such as in accordance with the law and is necessary in a democratic society in the interests of national security…'.[4] Therefore, the article 8(1) right to respect for private and family life can be infringed if the limitation fulfils three composite requirements: accordance with the law, required to meet a legitimate objective and necessary in a democratic society. The implication inherent in qualified rights is that the court must balance their application against the competing rights of other parties. This balancing of interests is of crucial importance to this Chapter given it forms the crux of domestic non-compliance with requirements under the ECHR.

As Fortin states, in children's litigation, the requirements pertaining to accordance with the law and legitimate objective are usually prima facie established given the national court will have acted under a statutory framework motivated by maximising the best interests of the child.[5] This legislation will take various forms in differing contracting states. However, the requirement of necessity is more demanding in that the restriction must be both relevant to the aim pursued and the minimum action required to secure the pressing social need. This is known as the doctrine of proportionality.[6] Therefore, the action taken by the state must be logically connected to the aim pursued and cannot go further than is needed to achieve this.[7] The ECtHR has been clear in that if a less intrusive method of infringing the right is available it should be pursued. Given this, there is a proportionate relationship between the level of interference and justification provided by the state.[8]

When undertaking the process required under the doctrine of necessity, the ECtHR will give effect to the margin of appreciation doctrine. This reflects the notion that primary responsibility for rights protection lies with member states given the Strasbourg court is a secondary body of rights review.[9] Thus, in recognising divergent practices in members states, the Strasbourg court has stated:

[4] Article 8(2) ECHR
[5] Fortin, 'International Children's rights' (n2) 59
[6] See *Olsson v Sweden (application no. 10465/83)* [1992] ECHR 75
[7] Fenwick, 'Selected key substantive articles and ECHR (n3) 301
[8] Fortin, 'International Children's rights' (n2) 60
[9] Roger Masterman, 'Section 2(1) of the HRA 1998: binding domestic courts to Strasbourg?' (2004) Win PL 728

> it is not possible to find in the domestic law of the contracting states a uniform conception of morals…. [by virtue of this] state authorities are in a better place than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction intended to meet them.[10]

The margin of appreciation accepts that member states will adopt different methods of implementing certain qualified Convention rights based on national conceptions of morality.[11] The ECtHR thus affords a degree of discretion in the interpretation and application of Convention rights which will narrow/widen dependent on the severity of the alleged breach and justification relied on by the state.[12] The Convention, therefore, forms an 'irreducible minimum' that falls to interpretation and development by members states in a manner compatible with domestic practice.[13]

This permits states to go further than strictly required under the Convention. For example, the UK legalised same-sex marriage under the Marriage (Same-Sex Couples) Act 2013. This goes further than is required under article 12 ECHR guaranteeing the right to marry and found a family. This right was interpreted conservatively by the ECtHR in *Schalk and Kopf v Austria* in which the court found that the terminology of man and woman was deliberate and could not legitimately be interpreted as including 'everyone', thereby excluding same-sex couples.[14] This judgment was predicated on the lack of consensus across Europe regarding same-sex marriage and thus a wide margin of appreciation was afforded to the member state. Despite this, the UK legalised same-sex marriage in 2013.

Whilst the ECtHR has traditionally afforded a wide margin of appreciation in private family disputes, Harris-Short identifies an increasingly interventionist position in the Strasbourg jurisprudence.[15] Such a position was identified in *Gorgulu v Germany* in which the court, after acknowledging the margin of appreciation is dependent on the nature and severity of the

[10] *Handyside v UK* (1979-1980) 1 E.H.R.R. 737, [48]
[11] Franz Matcher, 'Methods of interpretation of the convention', in Franz Matcher, Ronald Macdonald, Herbert Petzold, '*The European system for the protection of Human Rights',* (1st edition, Brill, 1999)
[12] *K v Finland* (2001) 31 E.H.R.R 18, [166]
[13] Jack Beatson, Peter Duffy and Stephen Grosz, *The 1998 Act and the European Convention,* (1st edition, Sweet and Maxwell, 2000) 20
[14] *Schalk and Kopf v Austria* (application no.30141/04) [2012] 1 WLUK 255
[15] Sonia Harris-Short, 'Family law and the HRA 1998: Judicial restraint or revolution?' in Helen Fenwick, Gavin Philipson and Roger Masterman, '*Judicial reasoning under the UK Human Rights Act',* (1st edition, CUP, 2007) 361

interests at stake, held stricter scrutiny is required for limitations going beyond simple custody arrangements.[16] Therefore, when authorities restrict the contact rights of parents, resulting in the curtailing of the enjoyment of family life, the court will narrow the margin of appreciation and conduct strict review into the rights determination of the national court.[17] Such considerations are significant for this thesis in that, as will become clear, the domestic interpretation of section 1(1) CA is inconsistent with ECtHR jurisprudence. If this were to be challenged at ECtHR level, the stringency of review would be dependent on the margin of appreciation afforded to the member state. As Short has argued, this margin seems to be narrowing.[18]

Substantive rights contained in the ECHR are granted domestic effect by the HRA 1998. Upon litigants invoking a Convention right, the courts must read, insofar as possible, primary and subordinate legislation in a manner compatible with Convention rights.[19] In doing so, section 2(1) HRA mandates the court to have regard to jurisprudence of the ECtHR. As Masterman states, the construction of section 2 HRA, mandating courts to 'take into account' Strasbourg jurisprudence, permits a 'more generous' domestic interpretation regarding the scope of Convention rights.[20] Here, where the Strasbourg position is 'clear and constant', domestic courts are obliged to take the jurisprudence into account insofar as it is relevant to the instant case.[21] Such an approach was approved by Lord Bingham in *Anderson* in which he stated:

> 'the duty under section 2(1) HRA is to take into account judgments of the ECtHR which are not strictly binding, the House will not without good reason depart from the principles laid down in a judgment of the European court'.[22]

This latter formulation affords the court greater discretion in accounting for the Strasbourg position as it speaks of following 'principles' as opposed to jurisprudence.[23] This seems to

[16] *Gorgulu v Germany (application No.74969/01)* [2004] 1 FCR 410 [41]
[17] *Schneider v Germany* (application No.17080/07) [2012] 54 E.H.R.R. 12 [94]
[18] Harris-Short, (n15) 361
[19] s3(1) Human Rights Act 1998
[20] Roger Masterman, 'The status of the Strasbourg jurisprudence in domestic law', in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act*, (1st edition, CUP, 2007) 58
[21] *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions'* [2001] UKHL 23 [26]
[22] *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 [18]
[23] Masterman (n9) 728

accord closely with the position of the ECtHR regarding the binding nature of its own jurisprudence. Whilst the Strasbourg court has no equivalent of the domestic system of precedent, it has made clear that it is in the interests of legal certainty and equality that national courts should not depart without good reason.[24] Therefore, for domestic courts, if Convention rights are engaged, a judge is bound to follow any clear and consistent jurisprudence of the ECtHR unless there is good reason to not do so. As this thesis will argue, the domestic courts have not adequately achieved this in relation to the Strasbourg position on the paramountcy principle.

Section 3 HRA places an interpretive obligation on the court to read and give effect to domestic legislation in a manner that is compatible with Convention rights. Given section 6 HRA dictates that the court as a public authority must act in a convention compliant manner in any case concerning ECHR rights, a judge is under an obligation to interpret domestic legislation in a compliant manner insofar as possible. If such compatible interpretation is not possible, courts are empowered to issue a section 4 Declaration of Incompatibility. These declarations, raised in proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right, are issued only when the court is satisfied the legislation is incompatible with the ECHR right. Importantly, these declarations do not affect the continued validity of the legislation and the burden of rectifying any incompatibility rests with Parliament.[25]

The Jurisprudence of the Strasbourg Court

It is important to note that the ECHR does not specifically provide for children's rights protection. This non-engagement with children's rights is indicative of the ECHR's focus on first generation, i.e. civil and political, rights. Typically, these are viewed as 'negative' rights in that a state is to refrain from infringing the individual's right to participate in the community.[26] As a result, the ECHR contains few child-specific references because it is unlikely that the right to freedom of speech, assembly and political participation would apply

[24] *Goodwin v UK* [2002] 35 E.H.R.R 18 [74]
[25] s4(6)(a) HRA
[26] Fausto Pocar, 'Some thoughts on the Universal Declaration of Human Rights and the 'generations of rights', (2015) 10 IHRLR 43

to a minor. In contrast, subsequent rights Conventions, such as the UNCRC, are considered 'second generation' in that they require positive action from the state in their enactment. This is evident in article 3(1) UNCRC dictating that the interests of the child are to be the 'primary consideration' for states. Such treaties, allow states to 'children's rights-proof' domestic law against consistent international standards.[27] Indeed, the UNCRC currently has 194 state signatories making it the most widely ratified Human Rights treaty in history.[28] It is these subsequent documents, applying enumerated human rights norms to specific groups, that grant children's rights an 'international dimension which is difficult for national governments to ignore'.[29] However, such international rights treaties enjoy a lesser degree of enforceability in a dualist system, such as the UK, in which the treaty must be incorporated into domestic law. It is for this reason that this thesis' focus lies with the ECHR granted domestic effect by the HRA.

Whilst the ECHR fails to offer 'even the most basic [explicit] recognition of the child', it is inaccurate to state it provides no basis for such protection.[30] The Convention does offer a system of petition, open to citizens of member states, to challenge alleged rights infringements and this procedure is available to both children and individuals who claim on their behalf. Furthermore, although the ECHR is not specifically designed for application to children, the Strasbourg Court has utilised both the ECHR and subsequent international Conventions to develop a significant volume of jurisprudence pertaining explicitly to children's rights.[31] Such jurisprudence relies on interpretation of the Convention as a 'living instrument' and as a list of abstract rights the individual holds against the state that is capable of development according to societal and moral developments unforeseen at the time of drafting.[32] This reflects the potential of the ECHR to develop according to a children's rights agenda to account for the limited focus of the Convention itself.[33]

[27] Ursula Kilkelly and Laura Lundy, 'Children's rights in action: using the UNCRC as an auditing tool' (2006) 331 CFLQ 32
[28] Susan Bissell, 'Overview and Implementation of the UN Convention on the Rights of the Child' (2006) 25 The Lancet 689
[29] Fortin, 'International Children's rights' (n2) 34
[30] Ursula Kilkelly, *The Child and the European Convention on Human Rights,* (2nd edition, Routledge, 2016) 4 (emphasis added)
[31] Conor O'Mahony, 'Child protection and the ECHR' (2019) 27 ICJR 662
[32] George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy', in Andreas Follesdal, Birgit Peters and Geir Ulfstein, '*Constituting Europe, The ECtHR in a National, European and Global context',* (1st edition, CUP, 2013) 106
[33] Ursula Kilkelly, 'Protecting children's rights under the ECHR' (2010) 61 NILQ 247

In achieving this recognition for the status of children, academics point to the theoretical value of both article 1 and 14 ECHR.[34] Here, article 1 provides that the rights contained in the Convention apply to everyone, including children, whilst article 14 states that Convention rights will be secured without discrimination. Therefore, both of these article could, theoretically, be used to secure recognition of children's rights. This said, these articles have rarely been raised in actual litigation concerning application of the Convention to a child. Instead, the ECtHR has developed its jurisprudence via reference to article 8 and the child's right to respect for family life. For the purposes of this thesis, article 8 has been utilised in seeking to compensate for the lack of a comparable provision to section 1(1) CA in the ECHR itself. As a result, there is no initial privileging binding the ECtHR that dictates the balance to be struck between an adult and a child's rights.[35] Consequently, the ECtHR has developed its own approach to balancing a child's best interests and the article 8(1) rights of the adult. In finding this balance, the jurisprudence of the court can be divided into composite approaches.

As Fortin argues, the ECtHR position on reviewing the decisions of national courts in cases involving the paramountcy principle, or (more usually) domestic equivalents, has suffered from an inconsistency of approach. Whilst Fortin's argument has developed from 1999, immediately following domestic adoption of the HRA,[36] she maintains that the Strasbourg court has, at best, adopted an ad-hoc approach to the question of the continued compatibility of section 1(1) CA with the ECHR regime.[37]

Johansen v Norway and the Balancing of Rights under Article 8(2)

Johansen v Norway represents the orthodox exposition of the obligation on national courts to undertake a balancing exercise under article 8(2) when resolving conflicts between the best interests of children and the rights of adults.[38] The case concerned an appeal by the applicant mother against an adoption order granted in relation to her child by the Norwegian authorities. Here, the mother was 17 when she gave birth and lived with an abusive partner. Her child was

[34] Kilkelly, '*The child and the European Convention on Human Rights* (n30) 12
[35] Fortin, 'International Children's rights' (n2) emphasis added
[36] Jane Fortin, 'Rights brought home for children', (1999) 62 MLR 350. Here Fortin argued the rights-based regime would merely result in the amalgamation of the rights and interests of parent and child.
[37] Jane Fortin, 'A decade of the Human Rights Act and children's rights', (2011) 176 FL 1
[38] *Johansen v Norway (application no. 17383/90)* [1997] 23 E.H.R.R. 33

taken into care at 12 and, shortly after, she gave birth to a second child. This child was removed as the national authorities concluded she was unable to meet the child's welfare requirements.

In rejecting the mother's application, the ECtHR provided significant guidance on the process domestic courts should follow when undertaking an article 8(2) balancing exercise. Here, the court stated the oft-cited principle of law: 'In this regard [taking a child into care] a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child'.[39] Therefore, domestic courts are charged with balancing the qualified article 8(1) rights of various parties in order to establish whether the infringement was justified. In order to resolve tension between competing rights, the court stated: 'In carrying out this balancing exercise, the Court will attach *particular importance* to the best interests of the child, which, *depending* on their nature and seriousness, *may* override those [rights] of the parent.'[40]

Therefore, when faced with a child's interests interfering with the article 8(1) rights of the parent, a domestic court must balance the interests of the child against the rights of the parent under article 8(2). Rather than the child's interests forming the paramount consideration in such a process, as the national government argued, they hold particular importance and, depending on their nature and severity, may justify overriding the rights of the parent.[41] It is in this light that Fortin described the court's ruling in *Johansen* as 'skilful compensation' for the absence of a best interest's formula in the ECHR itself.[42]

However, it is important to view *Johansen v Norway* as part of a continuing effort by national authorities to achieve recognition of a paramountcy principle-style provision at ECtHR level.[43] Indeed, *Johansen* itself was heard subsequently to other significant rulings. In 1992, *Olsson v Sweden* established that the interests of the child must be respected alongside other individual article 8(1) rights in an article 8(2) exercise.[44] The court stated: 'the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under

[39] ibid [78]
[40] ibid (emphasis added)
[41] For the national authorities' submissions as to the national equivalent of the paramountcy principle see ibid [76]
[42] Fortin, 'International Children's rights' (n2) 70 (emphasis added)
[43] Stephen Gilmore and Lisa Glennon, *Hayes and Williams' Family Law,* (6th edition, 2018, OUP) 481
[44] *Olsson v Sweden* (n6). See Heather Swindells, 'Family law post the Human Rights Act 1998', in Stephen Cretney, *'Essays for the new millennium',* (1st edition, Jordan publishing, 2000) 63 (emphasis added)

article 8 of the Convention'.[45] Subsequently, in *Hokkanen v Finland*, the court stated that: 'the interests as well as rights and freedoms of all concerned must be accounted, and *more particularly,* the best interests of the child and their rights under article 8.[46] Placing *Johansen* in this continuum, the finding that children's interests occupy a particular place in the balancing exercise under article 8(2) seems a logical development from *Hokkanen* and *Olsson.*

Importantly, the approach in these cases stops short of characterising the child's interests as paramount in their own right. As Probert states, the most once can take from *Johansen* is that the interests of the child may override the article 8(1) rights of the parent dependent on the circumstances. This judgement is one for national courts to make.[47] Additionally, the rights of the child are not cast as independent but as qualifications to the article 8(1) rights of the parent. Therefore, the child's substantive rights were rarely independently formulated. Instead, they were analysed only in terms of an article 8(2) exercise and, therefore, as a means of justifying any rights infringement brought by the parent.

It is important to provide some context into the type of litigation this Chapter will analyse. *Johansen* formed a public law challenge to an adoption order issued by the Norwegian authorities. As such, the proceedings naturally contained heavily context specific considerations such as the degree to which state interference was required in those circumstances given the issuing of the order resulted in the removal of the child from the mother's care. Therefore, it is unsurprising that the Strasbourg court spoke in the language of conditionality resulting in a finding that the child's interests override dependent on their severity. Such litigation is contrasted to the private law focus of this thesis. Such private contact cases do not sit as comfortably in the traditional 'individual v state' paradigm and instead concern a horizontal relationship between the parties. It is, therefore, unsurprising that litigation raising questions of law posed by the ECHR have, thus far, occurred predominantly in the field of public law. Comparatively, few private family law cases reach the Court of Appeal or Supreme Court and, even when this is the case, litigation has rarely considered questions of law linked to the ECHR. For example, *Re B,* one of the last major private child law cases to reach the Supreme Court, re-emphasised the centrality of section 1(1) CA to a

[45] *Olsson v Sweden* (n6) [90]
[46] *Hokkanen v Finland (application No.19823/92)* [1995] 19 E.H.R.R. 139 [55]-[58] (emphasis added)
[47] Rebecca Probert and Maebh Harding, *Cretney and Probert's family law,* (10th edition, Sweet and Maxwell, 2018) 251

welfare assessment without confronting its relationship with article 8 ECHR.[48] Therefore, in the context of private law disputes, it is perhaps unsurprising that lower courts have failed to come to grips with requirements under both the ECHR and ECtHR jurisprudence if, as this Chapter will show, they are largely ignored by appellate courts.

Subsequent Application of Johansen v Norway

The ECtHR has cited *Johansen* subsequently as authority for the requirement of balancing the rights and interests between parent and child under article 8(2). However, the weight attached to the interests of the child has received linguistic development that has established the 'ad-hoc' approach which Fortin identified.[49] There are multiple instances of dicta from *Johansen* being cited as authority for the balancing exercise under article 8(2). One such example is *K v Finland* in which the court stated: 'In this regard, a *fair balance* has to be struck between the interests of the child… and those of the parent. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which may override those of the parent'.[50]

Such a formulation of the balancing exercise is evident in several other ECtHR cases from this period. In *Hoppe v Germany,* the ECtHR stated consideration of the child's best interests was of 'crucial importance but that a 'fair balance must be struck between those interests and the rights of the parents'.[51] Therefore, the best interests of the child may override the rights of the parent's dependent on their nature and severity.[52] Similar dicta can be found in *Gorgulu v Germany* in which the German Court of Appeal was found to err in its approach to article 8(2) in finding that denying the father contact with his child was justified in law but not necessary in a democratic society.[53] This was because the national court had not considered the long-term impact of denying the child a meaningful relationship with the father. Similarly, *Suss v Germany* evidences a direct reference to the dicta in *Johansen* in that the court held a fair balance had to be struck between the rights and interests of the litigants and, in this process, importance had to be attached to the best interests of the child.[54] These cases seem to evidence

[48] *Re B (A Child)* [2009] UKSC 5
[49] Fortin, 'A decade of the HRA and its impact on children's rights' (n37) 1
[50] *K and F v Finland (application No. 25702/94* [2001] 31 E.H.R.R. 18, [156] (emphasis added)
[51] *Hoppe v Germany (application No. 28422/95)* [2001] 1 FLR 384, [48]
[52] ibid [49]
[53] *Gorgulu v Germany* (n16) [50]
[54] *Suss v Germany (application No. 40324/98)* [2006] 1 FLR 522, [88]

a straightforward repetition of the *Johansen* formulation and are significant in that they suggest a degree of consistency surrounding the weight to be attributed to a child's interests in an article 8(2) balancing exercise. Here children's interests have the potential to displace the rights of parents dependent on a factual assessment of their nature and severity.

In his discussion of the developing jurisprudence of the court in this period, Eekelaar points to *Elsholz v Germany* as succinctly summarising the Grand Chamber's approach to the best interests of the child.[55] *Elsholz* formed a challenge brought by an unmarried father who resided with his child and partner for a period of two years.[56] Following relationship breakdown, he continued to see the child for another three years but this was ended on the basis of the child's wishes. The father applied to the national courts for a contact order which was granted on the basis of a welfare assessment. Given the national court held that contact was not in the best interests of the child it refused to grant the order.

The Strasbourg court found there had been an infringement of the father's article 8(1) rights. Nevertheless, under an article 8(2) analysis, the court found that the breach was in accordance with the law and pursued the aim of protecting the child.[57] The court was unwilling to grant a wide margin of appreciation in its analysis given the national measure went beyond merely limiting the child's time with the father and, instead, resulted in the complete severance of contact from the father's life.[58] Citing *Johansen*, the court stated that a fair balance of the rights of the litigants had to be undertaken with particular regard being paid to the best interests of the child.[59] Owing to the narrow margin of appreciation afforded, the Grand Chamber found that the infringement was not necessary in that the national court should have sought expert psychiatric review of the child's wishes instead of relying on statements made in infancy.[60]

As Swindells argues, *Elsholz* evidences the difference in paying particular regard to the child's best interests and regarding such interests as paramount.[61] Despite the domestic finding of fact that contact was not in the best interests of the child, the Grand Chamber found that the article

[55] John Eekelaar, 'Beyond the welfare principle', (2002) 14 CFLQ 237
[56] *Elsholz v Germany (application No. 25735/94)* [2002] 34 E.H.R.R. 58
[57] ibid [46]-[47]
[58] ibid [49]
[59] ibid [50] (emphasis added)
[60] ibid [51]
[61] Heather Swindells, 'Family law post the Human Rights Act 1998', in Stephen Cretney, *Essays for the new millennium,* (1st edition, Jordan publishing, 2000) 65

8(1) infringement was not justified by such a consideration. Thus, the evidential burden on the state was 'very strong indeed' to displace the rights of the father.[62] This emphasises the key dicta in *Johansen* demonstrating that the best interests of the child may, depending on their severity, displace the rights of the parent.[63] *Elsholz* highlights that such displacement is conditional on an individual proportionality exercise and that a national court may legitimately find that the best interests of the child do not outweigh the rights of the parent.

Yousef v The Netherlands and Apparent Acceptance of the Paramountcy Principle at Strasbourg Level

As *Johansen* had been used as authority for the necessity of balancing rights in an article 8(2) analysis, dicta in the same judgment has been used by national authorities to endorse an approach akin to the domestic interpretation of the paramountcy principle. In *Johansen,* the ECtHR stated: 'In particular, as suggested by the Government, the parents cannot be entitled under article 8 to have such measures taken as would harm the child's health and development'.[64] For Choudhry, this comes close to 'endorsing paramountcy in and of itself' in that the statement determines parents are not able to pursue a course of action that would actively damage the interests of the child.[65] This dicta was subsequently emphasised in *K v Finland* in which the court stated that the inability to act contrary to the health and development of the child was a particular feature of the balancing exercise the court must undertake.[66] Here, the Grand Chamber concurred with the submissions of the national authority in *Johansen* in that the child's interests were paramount and formed a justification under article 8(2). In doing so, the Grand Chamber seemingly paved the way for recognising children's interests as paramount at the Strasbourg level.

Yousef v The Netherlands is significant for the development of the ECtHR's approach to the balancing exercise required under article 8(2).[67] *Yousef* concerned an unmarried father's appeal against the refusal to grant a deed of recognition regarding parenthood in relation to his biological daughter. This refusal, made by the domestic court, was on the basis that such an

[62] ibid
[63] Eekelaar, (n55) 242
[64] *Johansen v Norway* (n38) [78]
[65] Shazia Choudhry, 'The adoption and Children Act 2002, the welfare principle and the Human Rights Act 1998- a missed opportunity?' (2003) 15 CFLQ 119, 130
[66] *K v Finland* (n50) [156]
[67] *Yousef v The Netherlands (application No.33711/96)* [2003] 36 E.H.R.R. 20

order was contrary to the best interests of the child.[68] Interestingly, the father in *Yousef* hoped to have his fatherhood recognised in Dutch law despite never having care of the child.[69] The question confronting the court concerned the weight attached to the interests of a child in justifying infringement of the father's article 8(1) rights. If we recall *Elsholz,* the child's interests were paid particular regard in such an exercise and this resulted in the infringement being found to be unjustified.[70] However, in *Yousef,* the court adopted a different linguistic approach to the interests of the child by stating that: 'the court *reiterates* that where the rights under article 8 and those of a child are at stake, the child's rights must be the paramount consideration'.[71] Furthermore, in a statement that seems remarkably close to the domestic interpretation of the paramountcy principle, the court held that 'if any balancing of interests is necessary, the interests of the child *must* prevail'.[72] Therefore, considering that the applicant intended to interfere with the welfare of the child via acquiring the order, the national court had conducted the correct process in balancing the interests of the adult and child at first instance.[73]

Linguistically, the selection of 'paramount', in describing the weight attached to the interests of the child, seems to contradict previous language which ascribes particular or crucial importance therein. In this light, Harris-Short has described *Yousef* as an 'outlying case' that provides 'some scope' for defending the paramountcy principle's compatibility with the ECHR regime.[74] In contrast, Prest has characterised *Yousef* as providing a 'strong line of authority' for the advancement of the rights and interests of children as paramount in the ECtHR jurisprudence.[75] This is on the authority of both dicta in *Johansen* and the latter case of *Maire v Portugal* which, for Prest, cements the potential for the Strasbourg court to accept national rulings pre-empting the article 8(2) balancing exercise via the invocation of a domestic conception of the paramountcy principle.[76]

---

[68] ibid [71]
[69] Robert Tolson QC, 'The welfare test and Human rights- where's the beef in the sacred cow?', < https://www.familylawweek.co.uk/site.aspx?i=ed307> accessed 6/4/2020
[70] *Elsholz v Germany* (n56) [50]
[71] *Yousef (n67)* [73] (emphasis added)
[72] ibid (emphasis added)
[73] ibid [74]
[74] Harris-Short, (n15) 356
[75] Charles Prest, 'The right to respect for family life: obligations of the state in private law children cases' (2005) 124 FL 100
[76] *Maire v Portugal (application No.48206/99)* [2006) 43 E.H.R.R. 13

However, Choudhry has criticised the court's approach in *Yousef* as creating uncertainty surrounding the judicial approach to the balancing exercise required under article 8(2). In order to justify its approach, the Strasbourg court cited *Elsholz v Germany*[77] and *TP v UK*.[78] Importantly, it did not cite *Johansen*. As has already been shown, *Elsholz* does not provide authority for the child's interests forming the paramount consideration in an article 8(2) balancing exercise. Instead, *Elsholz* merely states that they are a particular consideration and thus affirms the position of *Johansen*.[79] Similarly, in *TP*, the court stated that the interests of the child are of 'crucial' importance when considering justifications provided by the national authority.[80] This, again, mirrors the construction of the law in *Johansen*. These cases do not equate to a model of paramountcy that prioritises the interests of the child as understood domestically.[81] Therefore, in *Yousef,* through the court '*reiterating'* that the interests of the child are paramount, it employs a linguistic sleight of hand that suggests its position has remained unchanged from that of *Elsholz* and, as a result, *Johansen.*[82] This is not the case. As Tolson argues, it is important to recognise the unusual facts of *Yousef* in that the court recognised the father's motivation for pursuing the order was to interfere with the welfare of the child.[83] Therefore, it is less surprising that the ECtHR gave effect to the best interests of the child on a factual level. What is surprising is the legal justification it provided for doing so. Nevertheless, *Yousef* is significant in that it has been the case domestic courts have cited to establish compliance with demands under the ECHR. This will become the focus of the following section of this Chapter.

Subsequent Application of Yousef v The Netherlands

In order to determine whether *Yousef* indicates a change of approach for the ECtHR, this thesis will now analyse subsequent case-law of the Strasbourg court. Significantly, the language of *Yousef* is replicated in *Zawadka v Poland.*[84] *Zawadka* concerned a public law appeal against a district court order that first limited, and subsequently severed, the applicant's contact with his child. This was following an attempted abduction. The applicant, relying on his article 8(1)

[77] *Elsholz v Germany* (n56) 58
[78] *TP and KM v UK (application No.28945/95)* [2001] 2 FLR 549
[79] *Elsholz v Germany (application No. 25735/94)* [2002] 34 E.H.R.R. 58 [50]
[80] *TP and KM v UK* (n78) [70]
[81] Choudhry, (n65) 123
[82] ibid
[83] Tolson (n69)
[84] *Zawadka v Poland (application No.48622/99)* [2007] 44 E.H.R.R. 9

rights, claimed the authorities had failed to take effective steps to enforce contact between the two.[85] The court found for the applicant in that there had been a breach of the father's article 8(1) rights and this was, in itself, sufficient to justify issuance of the damages sought .[86] As per *Johansen*, the national authority sought to establish that its decision was justified on the basis of the best interests of the child assuming paramountcy in a balancing exercise.[87] Here, the difficulty for the national authority was that, in the first instance decision, no finding was made as to contact being adverse to the interests of the child and, indeed, expert evidence indicated the necessity of maintaining the link between father and child.[88]

The Strasbourg court acknowledged that the strained relationship between parents made cases such as these difficult to manage yet this did not affect the obligation on national authorities in respect to upholding article 8(1) rights.[89] Instead, such tension 'imposed an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child*'*.[90] This finding was followed by the court stating that, whilst national courts must do their utmost to facilitate parental cooperation, this obligation must be limited since 'the interests and rights of all concerned must be accounted, and more particularly the best interests of the child and their rights under article 8 of the Convention'.[91]

Upon closer inspection, it appears the court adopted two contradictory positions in relation to the weight afforded to the best interests of the child. On one level, it appears to grant the interests of the child paramount importance, a position seemingly corresponding to dicta in *Yousef*, despite the case not being cited by the court. Such an approach is similarly evident in *Maire v Portugal*, in which the court noted it should not be forgotten that the children's interests are paramount.[92] This found similar favour in *Kearns v France*, in the adoption context, in which the court stated that, when striking a balance between various interests and rights, the child's interests shall assume paramountcy.[93]

[85] ibid [H2]
[86] ibid [H3]
[87] ibid [51]
[88] ibid [66]
[89] ibid [67]
[90] ibid (emphasis added)
[91] ibid [68]
[92] *Maire v Portugal* (n76) [77]
[93] *Kearns v France (application No.35991/04)* [2010] 50 E.H.R.R. 04, [79]

However, language purporting to accept paramountcy in these cases is situated alongside dicta that seems to favour an approach akin to that in *Johansen*. For example, the direction to national courts to have 'more particular' regard to the interests of the child in *Zawadka* directly correlates to *Johansen* and indeed cites *Hokkanen* and *Olsson* as authority.[94] In a recent analysis of these cases, Bridge has stated that the court's decision in *Zawadka* was based on a balancing exercise and on 'taking the child's best interests into account'.[95] These authorities, as per the above exposition, do not support an ECtHR position that would seem to acknowledge the paramountcy principle automatically prioritising the interests of children.

Further reflecting this inconsistency, the ECtHR, post-*Yousef,* has handed down judgments that do not characterise the child's interests as paramount and instead revert to 'a more familiar formula'.[96] These cases have seen repetition of the orthodox position in that it has been held that the interests of the child shall assume particular importance and may override the interests of the parents depending on their nature and severity. Such examples include *Hoppe v Germany,*[97] handed down shortly following *Yousef, Gorgulu v Germany,*[98] and *Suss v Germany,*[99] handed down shortly before *Zawadka.* Interestingly, *Suss v Germany* cites *Johansen, Elsholz, Hoppe and Gorgulu* as authority for the balancing of interests the national authority was expected to undertake. Therefore, authority for the interests of children holding particular importance can be found both before and after the *Yousef* judgment. This is significant for this thesis in that it rejects the proposition that paramountcy has been accepted as a Convention-compliant model of litigation and, instead, will adopt the approach in *Johansen* as the authoritative position of the Strasbourg court.

Where Does this Leave the ECtHR Position?

It appears that the ECtHR oscillates between positions that pay 'particular regard' to the interests of the child and those that attribute 'paramount' importance. Both approaches have been applied by the courts in the years since *Yousef.* However, on analysis of the case law, it becomes clear that the Strasbourg court has more readily cited the *Johansen* position in terms

[94] *Hokkanen v Finland* (n46) [55]-[58] and *Olsson v Sweden* (n6) [90]
[95] Caroline Bridge, '*Human Rights- Zawadka v Poland (application No.48622/99)* [2007] 44 E.H.R.R. 9', (2005) 774 FL 436
[96] Fortin, 'International Children's rights' (n2) 58
[97] *Hoppe v Germany* (n51) [48]
[98] *Gorgulu v Germany* (n16) [49]
[99] *Suss v Germany* (n54) [88]

of a numerical assessment. Therefore, whilst more case-law is required to definitively answer whether *Yousef* signals a new approach, for the moment it appears the court has reached a position whereby a balancing exercise is mandated under article 8(2) that *may* tolerate a national authority treating children's interests as paramount. As Prest notes, 'in carrying out the balancing exercise, the interests of the child should be treated as paramount…. yet it remains unclear under which circumstances parental rights will outweigh the interests of the child'.[100] Importantly, when this Chapter refers to interests being treated as paramount, this refers not exclusively to the paramountcy principle in English law but to any equivalent provision in the law of various contracting states.

Problematically, alongside these developments, the *Johansen* line of case-law has become 'firmly established' in the jurisprudence of the court.[101] Therefore, what these cases evidence is linguistic inconsistency regarding the weight afforded to the best interests of the child. From a practice perspective, Tolson argues that the approach of the ECtHR remains that of *Johansen*.[102] This is the case given subsequent cases 'establishing' the paramountcy principle at ECtHR level actually cite and entrench case-law supporting the *Johansen* position.[103] Such a finding has been evidenced throughout this Chapter. Therefore, Prest's assertion that a domestic interpretation of the paramountcy principle has been accepted by the ECtHR seems inaccurate.

Despite this inconsistency, Fortin argues there is a basic formulation we can draw from the case-law. Whether the court uses the phrase 'particular,[104] 'notable',[105] or 'crucial importance',[106] it seems clear that, when deciding if the rights infringement is justified, the court will attach special significance to the best interests of the child. Therefore, at the ECtHR level, the interests of the child will prevail only after a balancing exercise has been undertaken with the rights and interests of the various parties being assessed on a presumptively equal footing.[107] Following this, the interests of the child may then override those of the parents

[100] Prest (n75) 104
[101] ibid 104
[102] Tolson (n69) (emphasis added)
[103] See Rosalind English, 'The adoption dilemma: the rights of parents v child's interests', <https://ukhumanrightsblog.com/2011/06/02/the-adoption-dilemma-the-rights-of-parents-v-childs-interests/> accessed 2/4/2020
[104] *Johansen v Norway* (n38)
[105] *Olsson v Sweden* (n6)
[106] *L v Finland (application No. 25651/94)* [2001] 31 E.H.R.R. 30 [117]
[107] Fortin, 'International Children's rights' (n2) 62 (emphasis added)

depending on the courts assessment of their nature and severity.[108] The positioning of this privileging will be crucial when this thesis turns to comparing the domestic and ECtHR positions. Such an approach seems similar to the process required when applying legal principles in the Dworkinian sense. Here, at the Strasbourg level, the child's interests only indicate a particular legal consequence after the rights of all litigants have been assessed. It is accurate to state that the interests of the child enjoy an element of weight alongside the rights of the parents. This cannot be said of the process judges undertake domestically as evidenced in Chapter Two of this thesis.

The Domestic Approach to the Relationship between Section 1(1) CA and Article 8 ECHR

This thesis has considered the ECtHR position on the relationship between article 8 ECHR and the paramountcy principle. In order to evidence domestic non-compliance with the demands of the EHCR, this thesis will now examine the domestic jurisprudence concerning the paramountcy principle and its interrelationship with article 8. This Chapter will analyse the post-HRA jurisprudence of the court and the various ways in which courts have avoided conflict between ECtHR jurisprudence and the domestic interpretation of section 1(1) CA.

Post-HRA Engagement with Section 1(1) CA and Article 8 ECHR

In terms of engagement with the ECHR in a post-HRA legal system, Fortin describes the judiciary as taking 'two steps forward and one step back'.[109] Whilst one reason for this failure is partially down to 'loyalty to the supposed demands of section 1(1) CA', Fortin attributes the majority of the blame to the relationship the domestic judiciary have attributed to the relationship between the Children Act 1989 and article 8 ECHR.[110] Similarly, Fenwick, Harris-Short and Bonner have described judicial reasoning under the ECHR as 'conspicuous by its absence' and characterised judicial approaches to ECtHR jurisprudence as 'openly hostile'.[111]

[108] Choudhry, (n65) 119
[109] Fortin, 'A decade of the HRA and its impact on children's rights' (n37) 1
[110] ibid 2
[111] Bonner, Fenwick and Harris-Short, (n1)560

Re KD, although a pre-HRA case, highlights the approach of continuing as though implementation of the HRA necessitated no substantive alteration to the application or interpretation of the paramountcy principle.[112] Importantly, *Re KD* formed the first domestic challenge to the co-existence of section 1(1) CA and article 8 ECHR. The case concerned a challenge to a local authority decision to terminate contact between a mother and son so that the child could be placed for adoption. Counsel for the mother argued that, upon proper application of article 8 ECHR, a natural parent has the legal right to contact with their child were this was found to not actively damage the welfare of the minor.[113] In response, the House of Lords held that, despite the first instance court characterising the risk of harm in mild terms, this statement amounted to 'a finding that there existed a present risk of harm from continued access [to the child]'.[114] Therefore, given there was a risk of harm to the child resultant of contact, the court was not required to rule on the nature of the 'right' to contact.[115]

However, the court evaluated, albeit obiter, the relationship between the domestic interpretation of section 1(1) CA and requirements under article 8. For Lord Templeman, there existed 'no inconsistency of principle in application' between the two.[116] However, it was the opinion of Lord Oliver that provided the clearest exposition of the domestic approach to demands under article 8. Responding to the question of the continued applicability of Lord MacDermott's dicta in *J v C,* Lord Oliver stated: 'I do not discern any conflict between the propositions laid down in *J v C* and the pronouncements of the ECtHR'.[117] He went on to argue that:

> 'such conflict as exists is, I think, *semantic only* and lies in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.[118]

[112] *Re K.D (A Minor) (Ward: Termination of access)* [1988] A.C 806.
[113] ibid [817]
[114] ibid, [820]
[115] Stephen Gilmore and Lisa Glennon, *Hayes and Williams' Family Law,* (6th edition, OUP, 2018) 475
[116] *Re K.D* (n112) [812]
[117] ibid [824]
[118] ibid (emphasis added)

Therefore, for Lord Oliver, to ask whether the jurisprudence of the ECtHR contradicted the domestic position was a question 'without content' given that, if a child's welfare was maximised by contact, it added nothing to speak of a parental right to that contact.[119] The concern of the Court was the best interests of the child and Lord Oliver found nothing in the jurisprudence of the ECtHR to contradict the centrality of a welfare-based assessment. As a result, the domestic interpretation of section 1(1) CA was found to be compliant with demands under article 8 ECHR.

Subsequently, as Lowe and Douglas note, the adoption of the HRA provided the opportunity for 'reappraisal' of this position.[120] However, as this thesis will now evidence, such reappraisal has proven elusive. For example, in the post-HRA case of *Re L,* Butler-Sloss P stated that domestic interpretation of section 1(1) CA was compatible with ECtHR jurisprudence.[121] In this ruling, the manner in which Butler-Sloss P approached the ECtHR case-law merits analysis. The court began by citing *Hendricks v Netherlands* as an example of the Strasbourg court resolving a serious conflict of interests between parent and child in favour of a minor under article 8(2).[122] It then continued to reference *Johansen* by stating 'the principle of crucial importance being the best interests of the child has been upheld in subsequent decisions of the ECtHR'.[123] Therefore, crucial to the finding of compatibility was the previously referenced dicta in *Johansen* that states a national authority is unable to take measures that would harm the interests of the child. Similarly, dicta in the 2001 case of *Dawson v Wearmouth* indicates that there 'exists nothing in the Convention or case-law that requires the courts to act otherwise than in the interests of the child'.[124] Therefore, for Butler-Sloss P, dicta stating that parents could not act contrarily to the interests of their children was sufficient to establish domestic Convention-compliance.

Such an approach is significant in the context of this thesis in that it evidences a perception among lower courts that adoption of the HRA necessitated no alteration in terms balancing the rights of adult and child. If one views this in light of the hierarchical relationship between courts, this is unsurprising given the obiter in *Re KD* guiding practice. However, it could be

[119] ibid [827], see Lord Templeman [812]
[120] Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* (11th edition, OUP, 2018) 415
[121] *Re L (A child) (Contact: Domestic Violence)* [2001] Fam 260, [277]
[122] ibid [139] citing *Hendricks v Netherlands* [1982] 5 E.H.R.R. 223, [124]
[123] *Re L* (n121) [139]
[124] *Dawson v Wearmouth* [1999] UKHL 18

assumed that, given the advent of the HRA, a case reaching the House of Lords four years subsequently would acknowledge the material difference required under an ECHR compliant model of litigation. As this Chapter will now evidence, such an acknowledgment did not occur.

The House of Lords was next confronted with the question of Convention-compliance in *Re B.*[125] Here, the Court of Appeal judgment of Hale LJ, as she then was, merits consideration in that it identifies the non-compatibility lying at the heart of this thesis' critique of the paramountcy principle.[126] In her judgment, Hale LJ dedicated a significant section to the impact of the ECHR regime on domestic interpretation. She found there was 'no pressing social need' to deprive the child of a relationship with her birth family and this found expression in a restrictive interpretation of the statutory provision, section 15(3)(b) Adoption Act 1976, to achieve ECHR compatibility.[127] In first identifying the article 8(1) right and then applying the article 8(2) qualifications, Hale LJ affirmed that a proportionality exercise must be conducted on a case-by-case basis and that a simple application of section 1(3) CA was not sufficient to achieve Convention-compliance.[128] This approach rejected avoiding the question of non-compliance in favour of recognising the impact of the HRA on children's litigation. This is significant in that it forms the basis of this thesis' proposals for reinterpreting the application of section 1(1) CA in Chapter Five.

However, upon *Re B* reaching the House of Lords, Hale LJ's approach was found to be unnecessary. Lord Nicholls reasoned that, in granting an adoption order, the court hears evidence from all parties to the litigation. The order was then determined by what the court considered the best interests of the child to be. Consequently, Lord Nichols failed to see how an order made under those circumstances could infringe a child's article 8(1) rights. Lord Nicholls stated:

> Inherent in both these Convention concepts is a balancing exercise, weighing the advantages and the disadvantages. But this balancing exercise, required by article 8, *does not differ in substance* from the like balancing exercise undertaken by a court

[125] *Re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL [70]
[126] *Re B (A Minor) (Adoption: Natural parent)* [2001] 1 FLR 589
[127] ibid [40]
[128] Choudhry (n65) 131

> when deciding whether, in the conventional phraseology of English law, adoption would be in the best interests of the child.[129]

Therefore, for Lord Nicholls, despite the differing phraseology, the same criteria were applied when deciding whether an order is justified under article 8(2) and in divining the best interests of the child under domestic law.[130] As the result under both approaches would be the same, article 8(2) called for 'no more' than a thorough exploration of the child's best interests.[131] This subsequently became the authoritative exposition of domestic compatibility with the ECHR regime.

The approach of the House of Lords is unsurprising in light of the hostility to rights-based arguments permeating domestic family litigation following adoption of the HRA. Whilst public law litigation may not reject rights-based reasoning to the same degree as the 'deeply entrenched hostility' of private law, it is easy to see the attraction in a simplistic assertion that existing domestic practice is in accordance with the demands of the ECtHR. Therefore, as was the case in *Re KD,* family courts continued in the erroneous belief that domestic interpretation of section 1(1) CA was fully compliant with Strasbourg jurisprudence. This was despite, shortly following *Re B,* calls from Munby J to rectify the obliviousness of the domestic judiciary to the changes necessitated in judicial mind-set resultant of the HRA.[132] It is clear that the Human Rights message had not made its way onto the ground in private family litigation at this stage.[133] This is further emphasised by lack of engagement with a rights-based focus of the UNCRC by both Parliament and the courts.

Erroneous Analysis of the Strasbourg Jurisprudence

In order to further evidence this 'cavalier' approach to the ECtHR jurisprudence, Choudhry argues the courts went to extraordinary lengths in misinterpreting requirements under the ECHR regime.[134] One oft-cited example is the judgment of Thorpe LJ in *Payne v Payne.*[135] *Payne* concerned a mother, originating from New-Zealand, who married an English-national

[129] *Re B (A Minor)* UKHL (n125) [31] (emphasis added)
[130] ibid [31]
[131] ibid [31]
[132] See *Re G (Care: challenge to local authority decisions)* [2003] EWHC 551 (Fam)
[133] Harris-Short (n15) 341
[134] Choudhry (n65) 131
[135] *Payne v Payne* [2001] EWCA Civ 166

father. They had a son and upon relationship breakdown the mother sought to return to New-Zealand with the child. The father argued that the existing approach of granting such relocation orders, in situations where the proposal was reasonable and practical, was contrary to his article 8(1) right to contact.[136] Giving judgment, Thorpe LJ made comments that have been described as 'misunderstanding the Convention'.[137] Citing *Johansen*, Thorpe LJ stated that the ECtHR position was that: 'the court will attach particular importance to the best interests of the child, which…. may override those of the parent'.[138] This, taken alongside what he perceived as acknowledgment of the paramountcy principle in section 3(1) UNCRC, led to the conclusion that 'the jurisprudence of the ECtHR *inevitably* recognises the paramountcy principle, albeit not expressed in the language of the domestic statute.[139]

It is important to analyse the reasoning of Thorpe LJ. Firstly, he misquotes *Johansen*. The full quotation, as shown above, reads: 'the court will attach particular importance to the best interests of the child, which depending on their nature and severity, may override those of the parents'.[140] The omitted section of dicta is crucial to an article 8(2) analysis in that, given the rights of the child may override dependent on severity, a domestic court must undertake an individual proportionality exercise in every case. In neglecting to include 'depending on their severity', Thorpe LJ effectively precludes article 8(2) analysis in that, instead of weighing the individual factors in the case, the paramountcy principle automatically necessitates the interests of the child override those of the parents as a matter of law. Furthermore, article 3(1) UNCRC does not affirm the paramountcy principle as domestically understood. Instead, the provision states that the interests of the child shall be a 'primary' consideration. This observation will prove significant when this thesis considers reinterpretation of section 1(1) CA as the primary principle in chapters Four and Five of this thesis. On the weight to be attached to the interests of the child, the UNCRC position mirrors that suggested by Fenwick and Choudhry in their reform proposals and, indeed, the later statutory amendment presented in this thesis.

Whilst the judgment in *Payne* has been subsequently challenged in a series of cases outside the scope of this thesis, Thorpe LJ's dicta concerning the paramountcy principle has escaped

[136] *Poel v Poel* [1970] 1 WLR 1469
[137] Shazia Choudhry and Helen Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 453
[138] *Payne v Payne* (n135) [488]
[139] ibid [488] (emphasis added)
[140] *Johansen v Norway* (n38)

judicial criticism. Indeed, in the 2011 case of *K v K,* the Court of Appeal, in a panel including Thorpe LJ, approved dicta from *Payne* pertaining to the paramountcy principle: 'the only principle to be extracted from *Payne v Payne* is the paramountcy principle'.[141] This, evidences a continued failure to engage with the requirements of the ECtHR jurisprudence or, at worst, an attempt to avoid culpability for a much-criticised section of dicta.[142]

Another example of failure to engage with Convention requirements is *Re H*.[143] This case concerned a father seeking a contact order in favour of his child. This was opposed by the mother on the basis that the father suffered from Huntingdon's disease and was a risk to the child.[144] Wall J began his judgment by acknowledging that it will make minimal reference to ECtHR jurisprudence.[145] He stated that almost every contact order involved an interference with article 8(1) rights and, therefore, the interference must be proportionate.[146] However, in assessing this proportionality, Wall J stated that a proper application of section 1(3) CA was equivalent to requirements under article 8. Given this, section 1(3) CA served as a useful 'crosscheck' to assess justification for the order.[147] For the judge, a welfare analysis under domestic law was enough to satisfy requirements under article 8(2) ECHR. Therefore, in this period, welfare remained the conclusive consideration for the court and ousted rights-based analysis in private family litigation.[148]

Harris-Short characterises such an approach as 'disappointing'.[149] The message from the case-law is that the HRA necessitates no change in the paramountcy principle as interpreted in *J v C.* One thing to highlight is the judicial approach to citing ECtHR jurisprudence. As demonstrated in *Re B, Payne* and *Re H,* it is unlikely judges will cite ECtHR jurisprudence in depth *before* concluding that the interests of the child automatically outweigh the rights of the parents. However, where such cases have been cited, the citations are 'incomplete and even inaccurate'.[150] Whilst this may not be disingenuous, it is difficult to see how a court could

[141] *MK v CK* [2011] EWCA Civ 793 [39]
[142] This was further affirmed in 2019 *Re H (Children: Relocation)* [2019] EWHC 2881 (Fam) [4]
[143] ibid
[144] For a full commentary of the unusual facts of this case see John Mitchell (District Judge), 'Contact and the unusual parent' (2003) 168 FL 169
[145] *Re H* (n142) [59]
[146] ibid
[147] ibid
[148] See Bonner, Fenwick and Harris-Short (n1) 549
[149] Harris-Short (n15) 345
[150] Bonner, Fenwick and Harris-Short (n1) 580

misquote dicta if lifted directly from an ECtHR ruling. Therefore, as previously stated, such application of the case-law can be attributed to the desire to find a simplistic solution to Convention-compatibility that can be readily applied in the lower courts. The approach adopted by the Family Division achieves this in that no change is required.

In dealing with the perceived incompatibility, the judicial approach can be sub-divided. One approach is that undertaking the process of divining the best interests of the child via use of section 1(3) CA automatically satisfies requirements under article 8(2). Factually, this holds that the outcome of such a domestic analysis would be the same as if under an ECHR approach. This was evident in *Re B* in which Lord Nicholls found the welfare checklist was an alternative means of giving effect to the balancing exercise required under article 8(2). This seems difficult to accept given section 1(3) CA was clearly not devised with a rights-based framework in mind.[151] Alternatively, the court may analyse the article 8(1) rights of the parent. If such rights are engaged, the court will attempt to undertake an article 8(2) balancing exercise. Here, the judiciary have cited *Johansen* to establish ECtHR acceptance of the domestic interpretation of the section 1(1) CA. Therefore, under article 8(2), the children's interests automatically override the rights of the parents without any need to analyse the individual facts of the case. The question is a matter of law not fact. This approach sees support in *Payne* via the misquotation of *Johansen.* This forms the so-called 'welfare-first' approach.[152]

Both these approaches culminate in a belief that the HRA necessitates no shift in the domestic application of the paramountcy principle from that established in *J v C*. This evidences the fact that the courts have merely 'reconfigured' the paramountcy principle to amount to an automatic justification under article 8(2).[153]

Fortin maps this judicial approach onto a hypothetical section 8 CA application and states it is unlikely that a court, applying the *Re B* approach, would feel it necessary to undertake an article 8(2) analysis. The full extent of the court's assessment concerns whether the application sought by the father is more in the best interests of the child than that proposed by the mother.[154] In

[151] Law Commission, '*Review of Child Law- Custody and Guardianship',* (Law Com No. 172, 1988) 18
[152] Probert and Harding (n47) 251
[153] Harris-Short (n15) 351
[154] Jane Fortin, 'Children in Court', in J Fortin, *Children's rights and the developing law,* (third edition, CUP, 2012) 298

essence, the paramountcy principle pre-empts the invocation of ECtHR jurisprudence.[155] As Probert and Harding suggest, this interpretation serves as a mere linguistic adjustment to achieve a sufficient degree of compliance.[156] It is the purpose of this thesis to utilise the Dworkinian distinction between rules and principles to better structure the judicial discretion afforded under section 1(1) CA and, thereby, reduce the extent to which judicial personality can hide behind application of section 1(1) CA. This, it will be argued, provides a degree of certainty as to the process a court will undertake when litigating section 8 CA applications.

Has This Approach Changed in the Contemporary Case-Law?

It is apparent that the aforementioned approach to Convention-compliance has not been directly challenged by appellate courts. As Fortin argues, the courts have not gone beyond a 'cursory nod' to the balancing exercise required under article 8(2).[157] Recent case-law suggests the contemporary approach to achieving ECHR compatibility is to cite *Yousef* as authority for the approval of something like the domestic interpretation of section 1(1) CA at ECtHR level. This is apparent in two 2018 public law judgments handed down by Keehan J. In *Re PM,* Keehan J summarised the influence of the ECHR as '[having] regard to the article 8 rights of the children, mother and father, I bear in mind that where there is a tension between the article 8 rights of each, the rights of the child prevail'.[158] Similarly, in the latter case of *Re AB,* Keehan J repeated his approach stating 'When considering welfare in this case, I account a) the court's paramount consideration is the welfare of the child, b) the welfare checklist, c) the article 8 rights of the child and adults'.[159] He went on to repeat the fact that, when rights conflict, the ECtHR position in *Yousef* is that the rights of the child prevail.[160] Therefore, in *Re AB,* the welfare interests of the child dictated the granting of a section 8 order in favour of the respondent. In concluding comments to this effect, the child's article 8(1) rights escaped elucidation, given it was the child's welfare that determined the order. Again, such an approach was evidenced in *Re H* in which the order was justified solely by reference to the welfare of the child; that was the central

[155] ibid
[156] Probert and Harding (n47) 251
[157] Fortin, 'A decade of the HRA and its impact on children's rights' (n37) 1
[158] *PM v CF* [2018] EWHC 2658 (Fam) [14]
[159] *AB v CD, EF, GH, IJ* [2018] EWHC 1590 (Fam) [36]
[160] ibid [73]

and only consideration of the court.[161] Here, as per the above, *Yousef* was cited as authority for the rights of the child prevailing in an article 8(2) balancing exercise.[162]

Whilst Keehan J cites *Yousef* as authority for the prioritisation of the child's interests at ECtHR level, other judges have provided passing reference to a balancing of interests. For example, in *Re G,* Bellamy J stated that 'in addition to those statutory provisions [section 1(1) CA] the court must also have regard to the article 8 rights of both parents and of the child. It must endeavour to arrive at an outcome that is both proportionate and in the child's best interests'.[163] Indeed, he continued to cite McFarlane LJ in *Re A* establishing that, in public law cases, a court has the duty under article 6(1) ECHR not to determine the application in a way that is incompatible with article 8.[164]

However, those examples aside, it seems that, from 2018 onwards, the courts have consistently chosen to cite *Yousef* as authority for the automatic prioritisation of children's welfare at ECtHR level. Here, courts have not engaged with dicta from *Yousef* and have instead merely cited the case by name only. The pervasiveness of this belief in *Yousef* as authority for the interests of the child assuming paramountcy in a balancing exercise is highlighted by its numerous invocations in lower level family courts. Here, judges have cited Keehan J's analysis in *Re H* in cases including *Re T,*[165] *Re A,*[166]*Re M,*[167]*Re ME,*[168]and *Re AB.*[169] Importantly, this suggests that lower courts are no longer undertaking the article 8(2) balancing exercise in any meaningful way. Instead, it appears that judges are content to cite previous authority that asserts the ECtHR has accepted that domestic interpretation of section 1(1) CA automatically results in the interests of the child prevailing over those of the adult.

Therefore, in analysing whether contemporary jurisprudence evidences the court becoming more receptive to the exercise demanded under article 8(2), one can conclude that the evidence suggests that, at most, the court are more willing to hear ECHR-based arguments in litigation.

[161] *PA v TT, H (A child by way of 16.4 Children's Guardian)* [2019] EWHC 2723
[162] ibid [5]. This led to the conclusion at [37] that transfer of residence to the father was in the welfare interests of the child.
[163] *Re G (A child: Intractable Contact)* [2019] EWHC 2984 (Fam), [72]
[164] ibid [73], citing *Re A (A child)* [2013] EWCA Civ 1104
[165] *NP v BR, T (Through her Guardian)* [2019] EWHC 3854 (Fam)
[166] *Parent A v Parent B, Parent C, Child D, E, F, LA A* [2019] EWHC 406 (Fam)
[167] *LA v M, F, A, C (Minors acting through their Children's guardian)* [2018] WL 04211878
[168] *LA v M, ME, The children (Minors acting thorough their children's guardian)* [2018] WL 04208000
[169] *Northamptonshire CC v AB, CD* [2019] EWHC 1807 (Fam)

However, when it comes to the balancing of interests, family judges merely cite ECtHR jurisprudence which they perceive justifies the automatic prioritisation of the child's interests. It is difficult to argue that the courts are paying anything other than lip-service to the obligation to balance interests and have instead utilised a 'linguistic adjustment to achieve domestic compliance'.[170] The contemporary position of the Family Division is, in essence, symptomatic of the earlier stance taken by the House of Lords in both *Re KD* and *Re B.* This is a position that asserts adoption of the HRA necessitates no substantive alteration to interpretation of section 1(1) CA and that, as a consequence, domestic practice is fully compliant with Strasbourg jurisprudence.

Locating Conflict Between the Domestic and ECHR Positions

In analysing the difference between the domestic and ECtHR position as stretching beyond mere 'semantics,[171] Herring points to the differing starting points for litigation brought under section 1(1) CA and article 8 ECHR. This is to evidence how, dependant on the judicial starting point, the interests of children will receive different weighting and priority when balanced against the rights of adults. Such a contrast between the approaches can now be made given the exposition of both provided in this Chapter.

The Domestic Starting Point in Litigation.

As has already been stated in this thesis, the domestic interpretation of the paramountcy principle does not allow judges to consider interests other than those of the child and, based on this, Herring has cast the paramountcy principle as inherently individualistic in nature.[172] Therefore, the starting point in a standard section 8 CA application is a factual determination of what the best interests of the child are.[173]

[170] Choudhry (n65) 131
[171] *Re K.D* (n112) [824]
[172] Jonathan Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (1999) 223 CFLQ 1
[173] As affirmed in the recent case of *PA v TT,* (n161)

In a section 8 CA dispute, Herring asserts that the court begins with the presumption that contact, for example, should be encouraged.[174] Since publication of Herring's work, this has been enshrined in section 1(2A) CA and the presumption of continued parental involvement.[175] The relationship between section 1(1) CA and section 1(2A)was analysed in *Re A and B.*[176] This case highlights that the presumption can be rebutted by evidence pointing to the best interests of the child. Here, Russell J summarised the law thus:

> The court is well aware of the amendments to section 8 CA and that section 1(2A)CA now includes the presumption that, unless the contrary is shown, involvement of a parent will further that child's welfare. But, the presumption is subject to the *requirement* that the parent concerned may be involved in a way that does not risk the welfare of the child.[177]

Evidentially, the presumption in favour of the father's continued involvement could be rebutted on the basis of a welfare analysis. Consequently, the best interests of the children dictated the exclusion from their upbringing and thus displaced the presumption under section 1(2A) CA. Therefore, whilst the domestic courts have engaged with the presumption of continued parental involvement, in reality, this is subject a best interests assessment. Section 1(2A) CA does not materially change the starting point in section 8 CA applications.

Despite a lack of academic attention, it is difficult to identify the utility of section 1(2A) in a practice-orientated sense. Certainly, and at a theoretical level, the presumption forms another statutory attempt to structure the discretion in this area of law. In terms of the rights focus of this thesis, one would presume that a presumption in favour of contact would assist a parent's article 8(1) claim. Therefore, whilst section 1(2A) does not explicitly form a deontological development in litigation, it has the potential to foster a rights-based approach in that, in the same way in which an article 8(1) rights infringement must be justified, a parent now has the prima-facie assumption of contact. However, in terms of practice, the presumption has become conditional on a welfare analysis factually proving continued involvement to be in the child's best interests. Therefore, despite modest promise to develop a rights-based framework, it seems

[174] Herring (n172) 5
[175] See Children's and Families Act 2014
[176] *Re A and B (Children: Restrictions on parental responsibility: Extremism and radicalisation in private law)* [2016] EWFC, [40]
[177] ibid [141] (emphasis added)

the courts have rejected this in favour of continued centralisation of the paramountcy principle to contact disputes. It is clear that presumptions cannot assist in developing a rights-based framework in section 8 CA litigation.

In litigation, once the factual welfare determination is made, the court will pay lip-service to ECHR demands via the statement: 'where a clash between parental rights and children's interests occurs, the interests of the child will prevail'.[178] Therefore, the interests of the child are granted priority *before* balancing can take place under article 8(2). As Choudhry and Fenwick suggest, judges effectively neglect to balance the interests of all parties on a presumptively equal footing.[179] In failing to do so, the court accounts consequentialist arguments, with a place under article 8(2) ECHR, without first identifying the composite article 8(1) rights of litigants.[180] Therefore, as a matter of law, the interests of the child automatically displace parental rights.[181]

ECtHR Position

To highlight the divergence between the domestic and Strasbourg approach, Herring contrasts this with the process undertaken in a case engaging ECHR rights. In denying a parent contact via a section 8 order, the court must first identify the article 8(1) right before then justifying the degree of interference. Therefore, an ECHR approach would begin with an article 8(1) right, as opposed to a presumption, encompassing contact with a child. Here, the child's rights exist separately to those of the adult and this means that all substantive rights must be divined and assessed individually. It is at this stage that the interests of the child can be assessed on an equal footing with those of the parents.[182]

The court must then turn to the question of justifying infringement of the article 8(1) right via conducting the balancing exercise necessitated under article 8(2). It is at this stage that the interests of the child, identified under article 8(1), can receive privileged status. The ECtHR has characterised these interests as 'particularly important' but has not approved their formulation as the domestic understanding of section 1(1) CA necessitates . Therefore, under

[178] As per the judgments of Keehan J above, see *AB v CD, EF, GH, IJ* (n159) [36]
[179] Choudhry and Fenwick, (n137) 458
[180] ibid
[181] Jane Fortin, 'Accommodating children's rights in a post-Human Rights Act era' (2006) 69 MLR 299, 304
[182] Choudhry (n65) 131

article 8(2), the best interests of the child become one of a number of factors the court will consider. In an ECHR compliant jurisdiction, there is nothing to support the basic assumption that a child's interests will assume priority before the rights and interests of other litigants have been balanced.[183] The conflict, therefore, lies in beginning from the premise that the parent's article 8(1) rights may be justifiably infringed under article 8(2) versus determining a section 8 order application solely on the basis of the child's best interests.[184] As *Elsholz* evidences, there is a significant difference between regarding children's rights as prioritised, therefore determinative, and affording them a special weight.

According to Herring, the difference in approaches is two-fold.[185] Firstly, the burden of proof is greater under the ECHR. In order to justify a rights breach, evidence must be 'clear and convincing' and point to the fact that any infringement was necessary and proportionate.[186] For example, as per *Elsholz*, the court may be required to seek specific psychiatric or medical evidence pointing to contact damaging the best interests of the child. Under the domestic approach, the court need only characterise evidence as pertaining to 'best interests' and it will automatically determine the outcome of an application. It would appear less evidence is required to rebut a presumption of continued parental involvement, via reference to the best interests of the child, than to justify a rights infringement under article 8(2).[187] In this process, the factors falling for consideration will also differ. Under the domestic approach it has been shown that evidence pertaining to the child alone will be considered. Evidence relating to other individuals will only be evaluated insofar as it relates and bears upon the welfare of the child. Under the ECHR approach, a right to a relationship with the child, derived from article 8(1), may require the court to have regard to interests of the parent that do not bear on the best interests of the child.[188]

Secondly, under each approach, the nature of the question differs. The question under the ECHR is one of judgement in that a court is tasked with determining if a breach has occurred and, if so, whether it is justified. Here, respect for Convention rights dictates a conclusion the court should reach unless justification is found under article 8(2). Under the domestic approach

[183] See Hirst LJ in *R v Secretary of State for Home Department ex parte Gangadeen; R v Secretary of State for Home Department ex parte Khan* [1998] 1 FLR 762
[184] Fortin, 'International Children's rights' (n2) 58
[185] Herring, (n172) 4
[186] ibid 5
[187] See *Re A and B* (n176).
[188] Bonner, Fenwick and Harris-Short, (n1) 582

the question is factual.[189] The only question the court need answer is what the best interests of the child are.

This relates to the location of the privileging of interests referenced to at the start of this Chapter. Under a domestic approach, following *Re B*, the interests of the child automatically assume a prioritised status before any article 8(2) balancing exercise can be undertaken. Therefore, a judge need not undertake an article 8(2) analysis because, if they do, the result is inevitable. However, ECtHR jurisprudence dictates that, under article 8(1), the rights of all individuals are first assessed on an equal footing. *If* conflict exists, a court can then continue to balance the interests at play under article 8(2). It is in that process that a child's interests can receive privileged status. Therefore, whilst the interests of the child have the potential to override the rights of the parent, such a conclusion is not inevitable in every case.[190] Following *Elsholz,* there will exist some cases in which the interference is so severe that only the most serious welfare considerations of the child will justify infringement. Whilst, admittedly, this has occurred in the context of public law challenges against the actions of local authorities, the same is true of private family litigation. This domestic approach replicates the earlier *J v C* model of the paramountcy principle analysed in Chapter Two. As a result of appellate court dicta assuring Convention-compliance, this thesis argues lower courts are now failing to undertake the required article 8(2) balancing exercise and thereby falling short of ECHR requirements.

Conclusions

This Chapter has sought to establish requirements under a Convention-compliant model of litigation concerning children. The jurisprudence of the ECtHR can generally be taken to necessitate the balancing of rights under article 8(2). In this process, the interests of the child are to be privileged to an extent. This thesis concluded that, whilst the child's interests have not been expressly approved as automatically prioritised, the ECtHR's dicta in *Yousef* and *Zawadka* have gone some way towards the ECtHR refusing to challenge national decisions based on various domestic understandings of provisions akin to section 1(1) CA.

[189] Herring (172) 5
[190] Bonner, Fenwick and Harris-Short (n1) 581

The Chapter further evidenced an unwillingness on the part of the domestic judiciary to take these requirements seriously in a post-HRA legal framework. Domestic jurisprudence has sought to evade conflict between section 1(1) CA and article 8 ECHR in two ways. The first was to equate requirements under section 1(3) CA to the balancing exercise required under article 8(2). The second was to treat the child's best interests as an automatic justification under the article 8(2) balancing exercise. In recent case law, the courts have cited *Yousef* as authority for this approach being consistent with ECtHR jurisprudence. This approach has justified the courts unwillingness to reference article 8(1) rights in section 8 CA litigation as evidenced previously in Chapter two. The two constructions of the relationship between article 8 ECHR and section 1(1) CA were then contrasted in terms of the starting points for litigation under each approach. The work of Herring was drawn on extensively to evidence the differences therein.

This thesis will now proceed to analyse the various reinterpretations of the paramountcy principle in light of the criticisms outlined in both chapters Two and Three. One of the qualitative criteria applied to these reinterpretations will be the degree of Convention-compliance they achieve in litigation. This is how this thesis will justify adopting, and then developing, the parallel analysis model of litigation in Chapter Five.

Chapter Four

An Examination of Previous Reinterpretations of the Paramountcy Principle in Light of Domestic Non-Compliance with Demands Under the ECHR

As this thesis has demonstrated, the domestic interpretation of section 1(1) CA is incompatible with the demands of both the ECHR and Strasbourg jurisprudence. As Choudhry and Fenwick have stated, the ECHR requires assessment of the litigant's article 8(1) rights on a presumptively equal footing before any balancing exercise can be conducted under article 8(2).[1] It is at this stage that the ECtHR has privileged the interests of the child in the *Johansen* line of case-law.[2]

In response, academics have advanced various theories attempting to reconcile the paramountcy principle with deontological requirements under the ECHR. It will be argued that these theories can be divided into three categories. Some academics have sought to develop *oppositional* reinterpretations of the paramountcy principle. Such theories place the rights of child and parent in direct conflict as a means of identifying individual article 8(1) rights. Others have sought to develop *relationship-based* approaches to the paramountcy principle and, therefore, see the welfare of the child as directly linked to, and contingent on, satisfying the rights of the parent. Other academics such as Fortin, Choudhry and Fenwick, have advanced a *deontological* approach to the paramountcy principle that seeks to reinterpret the wording of section 1(1) CA via the interpretive obligation in section 3 HRA. Such an approach acknowledges the obligations placed on the court by section 6 HRA and seeks to achieve Convention-compliance by reinterpreting section 1(1) CA as the 'primary principle'. This Chapter will suggest such a model of reinterpretation forms the most practically actionable means of reforming application of the paramountcy principle.

This Chapter will proceed by analysing both oppositional and relationship-based approaches to reinterpreting the paramountcy principle. It will critique both these approaches as insufficient when considered in isolation and will instead turn to the deontological model as

[1] Shazia Choudhry and Helen Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 453, 458
[2] *Johansen v Norway (application no. 17383/90)* [1997] 23 E.H.R.R. 33

the basis for this thesis' own methodology in Chapter Five. This Chapter will analyse how, despite forming a theoretically thorough account of Convention-compliance, Choudhry and Fenwick's deontological approach lacks a degree of practical actionability given the complexity of the model they favour. Here, it is important to note that, despite favouring a rights-based model of litigation, Choudhry and Fenwick do not fully dispense with welfare-based considerations and instead recalibrate welfarism to sit in a rights-based approach to litigation.

Differing Approaches to Reinterpreting the Paramountcy Principle

The Oppositional Approach to Reinterpreting Section 1(1) CA

The work of Bainham provides an example of the oppositional approach to reinterpreting the paramountcy principle. Bainham 'rejects the predominance' of the paramountcy principle and instead argues that a model of welfare should exist whereby parents and children accept both duties and responsibilities towards each other in a welfare assessment.[3] Therefore, the balancing of interests between parent and child is of central importance.[4] This is achieved via the categorisation of interests as either primary or secondary. If a child's primary interest clash with an adult's secondary interest the primary interest of the child would prevail.[5] In addition, Bainham adds a third category of 'collective family interests' that are to be considered in any balancing exercise. Therefore, for Bainham, a preferred welfare assessment should account for the interests of all parties to litigation with a court attempting to separate these into primary, secondary and collective considerations. Such an approach, he argues, allows for the balancing of interests and a means of resolving conflict therein.

It is important to note that this theory was developed before enactment of the HRA. Following advent of the HRA, Bainham has subsequently developed his theory, in light of developments in the law of parental responsibility, to place a greater emphasis on children's rights.[6] Whilst his categorisation of interests as primary and secondary remains unaltered, the problem he

[3] Choudhry and Fenwick (n1) 469
[4] Andrew Bainham, 'Honour thy father and thy mother: Children's rights and Children's duties', in Gillian Douglas and L Sebba (eds), *Children's rights and traditional values,* (1st edition, Aldershot: Dartmouth, 1998)
[5] ibid 211
[6] See Andrew Bainham, 'Is anything left of children's rights?' (2016) 24 IJCR 624

seeks to remedy has changed. Instead of focusing on section 1(1) CA, Bainham challenges the rise of parental responsibility as a basis for child law which obscures the focus on children's rights and allows parents to act as they please so long as this lies in the bounds of the law.[7] Given Bainham switches his focus away from section 1(1) CA and towards the field of parental responsibility, his later work lies largely beyond the scope of this thesis.

Whilst Bainham's model is 'simplistic', it does constitute an important contribution to the reinterpretation of the paramountcy principle in that this model provides a means for conceptualising the separation of interests between parent and child.[8] Given the timing of Bainham's writing, his work is grounded in the language of interests as opposed to rights. Therefore, in order for Bainham's work to carry weight in a post-HRA legal framework, one must replace the notion of interests with article 8(1) rights. If such a step is accepted, the oppositional approach to reinterpretation seems more closely aligned to the deontological methodology of Choudhry and Fenwick in weighing competing article 8(1) rights against each other. This will be an important development in the modified parallel analysis presented in Chapter Five that utilises an oppositional approach to identify composite article 8(1) rights of litigants. Therefore, in terms of achieving ECHR compatibility, Bainham's reinterpretation could allow for the identification of independent article 8(1) rights. This would seem to prevent adults aligning their interests with those of the child as per the traditional criticisms of the paramountcy principle.

However, as Eekelaar notes, Bainham's work is procedural in nature and suffers from indeterminacy when applied to litigation. For example, Bainham provides the distinction between primary and secondary interests but does not state how interests are to be characterised as such and by whom. In attempting to apply Bainham's approach, a judge must first make the decision as to which rights are 'primary' and consequently override competing secondary rights.[9] Moreover, Bainham does not provide adequate guidance for resolving conflict between two primary rights. Whilst, his theory may offer scope for delineating independent rights, there is no provision for the balancing of these in the event of conflict.

[7] ibid 627
[8] John Eekelaar, 'Beyond the welfare principle', (2002) 14 CFLQ 237
[9] ibid 238

If contact between a non-resident father and child is taken as an example of a primary right, the shortcomings of Bainham's proposals become evident. Bainham's approach can be mapped onto the dispute in *Re E.*[10] Explored as a case study in Chapter Two, this complex scenario involved a father's challenge to the removal of his child from the jurisdiction by the mother (relying on her rights to move freely and live wherever she chose). In such a case, under Bainham's construction, interests, or article 8(1) rights as we would now term them, would appear to exist in conflict. The father would be said to have a primary right in enjoying a meaningful relationship with his child as part of his article 8(1) right to respect for private and family life. This would require the child to remain in the jurisdiction. Equally, the child would be said to have a primary right to contact with his father as part of their article 8(1) rights. However, the mother would also possess the right to move and reside freely. Given the effect of restricting that ability being severe in this case, a court may legitimately also describe this as a primary right.

Therefore, Bainham's approach has permitted the separate identification of individual rights. However, what this reinterpretation does not allow for is the resolution of the conflict between these primary rights. This is important for this thesis because it must be recognised that, for any reinterpretation to be adopted, it must be realistic and actionable by judges in family courts. Under this approach alone, it is unclear whose primary interest wins out and what reasons a court must provide for this. For instance, the court could protect the father's right to maintain contact with his child (and indirectly the child's right to a relationship with the father) at the expense of the mother's right to live wherever she chose. This would mean the mother's primary rights were overridden. One means of resolving this conflict would be to characterise the mother's rights as secondary in which case the father's primary rights would win out. However, linguistically, it seems inappropriate and artificial to 'downgrade' rights from primary to secondary to ensure resolution; a court would naturally feel uncomfortable with the child's interests suffering as such. If this were to be the case then a court would also be presented with difficult questions surrounding on what basis interests were to be downgraded. Therefore, an adequate means of adjudicating which primary interest prevails in the event of conflict is required.

[10] *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638

However, far from completely dismissing the work of Bainham, it is important to understand the limitations of his project so as to better inform proposals advanced by this thesis. Bainham's work was not seeking to offer a full practical methodology for conflict resolution but was instead an academic attempt to reinterpret the paramountcy principle in light of criticisms identified in Chapter Two. This was in a pre-HRA legal framework and so, naturally, Bainham's work cannot be characterised as deontological in nature. In a pre-HRA legal system, the primary influence for a rights-based model of litigation would have been an unincorporated UNCRC. What Bainham does offer is an appreciation that the rights of adult and child must be separately assessed. This has been subsequently developed in a deontological framework by Choudhry and Fenwick's 'parallel analysis'. For the sake of this thesis, Bainham's work is significant in that it highlights the need for an actionable model of litigation in order to fully accept a reinterpretation of the paramountcy principle.

Relationship-Based Approaches: Contrasting Herring and Eekelaar

In contrast to Bainham, Herring has reconceptualised the paramountcy principle via a focus on what he terms 'relationship-based welfare'.[11] Based on an analysis of Bainham's work, Herring argued recourse should be had to the relationship *between* parent and child to allow a broader consideration of what a child's welfare requirements necessitate.[12] Therefore, for Herring, the paramountcy principle ought to reflect the interests of not just the child but also the adult upon which the child's welfare is dependent. As he argues, to see a child's interests outside of the context of their carers is 'highly artificial' and lacks realism.[13]

To evidence this claim, Foster and Herring draw comparisons between welfare as invoked in family proceedings and medical practice. In the medical context, it is trite law that courts take into account a wide range of factors to determine the best interests of the patient.[14] Herring cites dicta of Thorpe LJ to the effect that a medical best interests determination embraces considerations such as social conditions and the wishes of those closest to the patient.[15] Given this approach will involve consideration of interests beyond the patient themselves, Herring

[11] Jonathan Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (1999) 223 CFLQ 1
[12] ibid 4 (emphasis added)
[13] Jonathan Herring, 'Farewell welfare?' (2005) 27 JSWFL 167
[14] See Lady Butler Sloss in *Re MB (an adult) (medical treatment)* [1997] 8 Med LR 217, [225]
[15] See *Re SL (adult patient) (medical treatment)* [2000] 1 FCR 361

argues this 'supports [his] contention that the necessary determination can include the interests of people other than the child in litigation on the grounds that their best interests cannot be separated from others'.[16] Such a claim is significant in the context of this thesis in that it suggests article 8(1) rights cannot be independently assessed and that the interests of the child are contingent on maximising beneficial relationships with the parent.[17]

In his later work, Herring turns to examining the meaning of 'welfare' to bolster his claim that a welfare model should look to maximising the health and durability of relationships between parent and child in the context of orders under the Children Act 1989.[18] Herring finds that an understanding of welfare must include an element of altruism in that family relationships are inevitably based on mutual compromise; the paramountcy of the child's interests is not an inevitability in such a relationship.[19]

Therefore, there are two central claims discernible in the relationship-based welfare approach pertinent to this thesis. Firstly, domestic judges must recognise that the process of development for a child involves learning to 'suffer sacrifices' alongside claiming benefits.[20] For Herring, society is built on mutual cooperation and, as such, children should be encouraged to be altruistic to the extent they should not expect minimal gain if this requires excessive sacrifice from primary carers. Secondly, judges must recognise that the child's welfare necessitates that relationships are 'just and fair'. He argues that a parental relationship based on 'unacceptable demands' does not enhance welfare and that the mutual respect between family members results in the expectation that children may be expected to make some sacrifices.[21] Therefore, Herring's approach stands in contrast to that of Bainham. For Bainham, key to reinterpreting the paramountcy principle is to separate the interests of parent and child. For Herring, those interests cannot be separated without creating an artificial depiction of the child's welfare requirements.

Critics have challenged Herring's assertion that the interests of parent and child cannot be distinguished. For example, Crisp argues it is uncontroversial to accept that parental interests

[16] Charles Foster and Jonathan Herring, 'Welfare means rationality, virtue and altruism' (2012) 32 LS 480, 487
[17] Jo Bridgeman, 'In the best interests of the child?', in Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law,* (1st edition, CUP, 2007) 132
[18] Foster and Herring (n16) 480
[19] ibid
[20] Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (n11) 4
[21] ibid 5

are connected to those of the child. However, he then states it is not incompatible to argue that a child's rights can be identified independently from those of the parent.[22] Thus, it one thing to argue that an individual's welfare depends on another yet it is another to state it is *constituted* as such.[23] This is an argument echoed by both Harris-Short and Fortin who have pointed to the dangers of assimilating the interests of parent and child in terms of recognising children as independent rights holders.[24] Indeed, following widespread ratification of the UNCRC, it now seems widely accepted that children are capable of bearing individual rights separate from those of their parents.

Crisp's criticisms are pertinent if Herring's proposal is mapped onto the factual matrix of *Re E*. For Herring, a court would resolve the situation by reference to the relationship between the parties. With reference to the specific facts in *Re E,* it is accurate to state that the child's welfare was dependent on the mother given she was the primary carer. Therefore, the mother argued that an inability to relocate would have adversely affected the welfare of the child because she would have been unable to provide for these interests. This reflects dependency. However, it is inaccurate to state the child's welfare was *constituted* by the mother. As Herring himself states, a child's welfare is determined by consideration of their relationship beyond the scope of one individual. To seek to resolve the question of contact by looking to the relationship between mother and child alone ignores the interests of the father as a non-residential parent. This also ignores the web of relationships central to the care of the child.[25] It is that web that constitutes the child's welfare, not the relationship with the mother in isolation. This understanding becomes significant for Chapter Five of this thesis in the development of a cumulative article 8(2) balancing exercise based on a relational-approach to the primary principle.

In order to resolve conflict between the interests of litigants, a court would look to the relationship between mother and child. During this evaluation, the child's interests are not inevitably paramount and the child should not expect an order affecting minimal benefit if this

[22] See Roger Crisp, 'Well-being', available at <plato.stanford.edu/entries/well-being> accessed 5/5/2020
[23] ibid (emphasis added)
[24] See Sonia Harris-Short, 'Family law and the HRA 1998: Judicial restraint or revolution?' in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act,* (1st edition, CUP, 2007) 329 and See Jane Fortin, 'The HRA's impact on litigation involving children and their families', (1999) 11 CFLQ 225
[25] Matthew Kavanagh, 'Rewriting the legal family: Beyond exclusivity to a care-based standard' (2004) 16 YLJF 83

were to cause damage to the interests of the mother. The court would, therefore, have to make a value judgement surrounding the level of sacrifice expected of the child. Similarly, the court would look to the relationship between father and child and the extent to which that would be adversely affected by a reduction or severing of contact. The problem here is that Herring's proposals offer no substantive solution to the question of contact. In the same way that Bainham's proposals were found to be procedural in nature, an approach premised on examining the relationship between parties provides no means of resolving conflict if, and when, it arises.

It is further argued that it is difficult to utilise Herring's thesis in attempting to achieve ECHR compliance. He, like Bainham, provides no process for a court to resolve a conflict of interests bar looking to the 'relationship' of virtue and altruism. This assimilates the rights of the parent and child and makes it virtually impossible to independently assess the article 8(1) rights of each. Given this, it is difficult to see how any court could undertake an article 8(2) balancing exercise guided by only an examination of the relationship between the parties. This would seem to exist in tension with the process outlined by the Strasbourg court in *Johansen* which necessitates the individual identification of composite article 8(1) rights. Procedurally, it seems that neither oppositional nor relationship-based theories, taken in isolation, provide a means of resolving rights-based clashes as required under a Convention compliant model of litigation.

Eekelaar and the Modified Least Detrimental Alternative Method

Given the relationship-based approach fails to provide a means of resolving conflict between the interests of parties, Eekelaar attempted to offer a means of resolving conflict via a modified relationship-based approach. For Eekelaar, this can be achieved without substantively modifying section 1(1) CA. Instead, he argues the paramountcy principle should be reinterpreted in the light of recognising children as independent rights holders.

Eekelaar seeks to advance his theory by dividing a child's interests into three areas: basic, developmental and autonomy.[26] Basic and developmental interests are rights in the strong sense in that these are necessities such as feeding, shelter and basic education.[27] In the event of

[26] John Eekelaar, *Family and personal life*, (1st edition, OUP, 2006) 155
[27] ibid 160

conflict, these interests should take precedence over the third category of autonomous interests. Autonomous interests are complex in nature. These interests necessitate that a child has some ability to participate in decisions affecting their upbringing.[28] Therefore, according to Eekelaar, a reinterpretation is able to retain section 1(1) CA if it allows scope for a child to engage in a process of 'dynamic self-determination'.[29] This, for Eekelaar, is a means to discover what is 'good' for an individual child and implies neither licence nor that the child becomes the only voice in the decision making process.[30] Therefore, a child's views are 'fed into a shifting social matrix and its wants are viewed against the matrix'.[31] If these wants are unrealistic then they will be modified. This theory recognises, like those of Bainham and Herring, that a child's interests should not automatically assume paramountcy and that they must be weighed against other relationships. Through dynamic self-determination, Eekelaar creates the potential for a child's views to be assessed independently and aims to provide children with a weightier role in determining what lies in their own best interests. This, inevitably, will develop as the child grows older.[32]

Eekelaar's later work turns to the question of how to resolve conflict in these situations. The solution proposed is to adopt a course of action that 'avoids inflicting the most damage on the well-being of any individual'.[33] To calculate which result provides this, Eekelaar proposes that a value is assigned to benefit and detriment resultant of a court order. The calculation appears thus, supposing there were three possible orders with the following benefit (+) and detriment (-) ratio:[34]

Solution 1: C+15, X+10, Y-30
Solution 2: C+10, X+10, Y-20
Solution 3: C+5, X-5, Y-10

If a court were to utilise the current interpretation of section 1(1) CA it would be bound to follow Solution One as this maximises the welfare of the child. However, under Eekelaar's

[28] Jonathan Herring, 'Parents and children', in John Eekelaar *Family law issues, debates and policy,* (1st edition, Willian Publishing, 2001)
[29] John Eekelaar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' (1994) 8 IJLF 42
[30] ibid
[31] ibid 2
[32] ibid 2
[33] John Eekelaar, 'Beyond the welfare principle', (2002) 14 CFLQ 237
[34] C stands for Child. X and Y stand for the parents. Similarly, + stands for benefit and – for detriment.

'modified least detrimental alternative' approach, the court should opt for Solution Three given that spreads disadvantage across all parties and minimises the detrimental impact on both X and Y.[35] Whilst C will have marginally less benefit, Solution Three avoids Y suffering disproportionately and minimises any detriment to X. This provides the most 'propitious environment' to develop a child's three interests.[36] To summarise, Eekelaar proposes that the child be afforded a greater role in decisions affecting their upbringing. This is achieved by his focus on 'dynamic self-determination'. However, when these interests come into conflict with the interests of other family members, Eekelaar denies that they should automatically assume paramountcy. Instead, the paramountcy principle should be reinterpreted so as to favour the solution that avoids inflicting the most damage on any individual.

When attempting to apply Eekelaar's theoretical approach to litigation, it appears overly complex in that it is difficult to see how a court would quantify values pertaining to benefit and detriment. Such a finding is significant for this thesis because, no matter which reinterpretation is favoured, it must be remembered that it is to be applied by judges. Taking the facts in *Re E,* it would seem that the only party with a positive outcome in that case would be the mother. The father would seem to have a strongly negative score in that he bore the detriment of losing continued contact with his child. The child would also bear a negative score in that he loses contact with his father. The benefit to the child, in this case, is centred around his mother being able to meet any welfare needs by living where she chose. Therefore, employing Eekelaar's formula, it is difficult to assign a score to the child because there are no tangible benefits for him per se. The court must, therefore, engage in a speculative process of quantifying benefit/detriment that would see the interests of the child aligned strongly with the interests of the primary carer. Thus, drawing on Eekelaar's methodology, the solution in *Re E* may appear as follows:

Solution 1: C-5, X+20, Y-10.

Whilst this is unappealing, given it allocates detriment to the child, it would form a legitimate solution under Eekelaar's theory assuming the solution is not considered 'inappropriate'.[37] This

[35] Eekelaar, 'The interests of the child (n29) and his discussion of J Goldstein, A Freud and A J Solnit, *Beyond the best interests of the child',* (Second edition, New York Free Press, 1979)
[36] Eekelaar, 'Beyond the welfare principle' (n33) 237
[37] ibid 238

test of 'inappropriateness' is introduced by Eekelaar as a means of discounting potential solutions where detriment is attributed as a result of every possible solution. Importantly, as Eekelaar concedes, this term can only be elucidated by examples such as expecting a child to remain and care for a terminally ill parent.[38] Therefore, although Eekelaar clearly attempts to develop a structured model of judicial discretion, his theory fails to provide the guidance judges would require with regards to assigning value to interests and in determining when a situation is deemed 'inappropriate'. Indeed, in order to give effect to such application of the paramountcy principle, judges would necessarily be afforded wider discretion than under the current model. Given the aim of this thesis is to create a structured account of judicial discretion, Eekelaar's proposals cannot be accepted as viable in practice.

Furthermore, this thesis argues that this numerical approach reintroduces the winner/looser dichotomy that the Children Act 1989 and subsequent amendments sought to jettison. Instead, the Children Act 1989 seeks to encourage cooperation between parents to maximise the welfare of the child.[39] It is in this light that Lord Mackay stated, when debating what was to become the Children Act 1989, that: '[t]he overwhelming purpose of parenthood is the responsibility for caring and raising the child'; the Children Act ensures this is a mutual responsibility.[40] Therefore, the Children Act 1989 ensures that parental responsibility does not end, for the father, if it is acquired by other individuals involved in the care of the child.[41] Whilst the unmarried father will not automatically acquire parental responsibility upon the birth of the child,[42] the Act provides multiple avenues to acquire responsibility either via a court order or with the consent of the mother.[43] This emphasis on co-operation is further emphasised by the rise of couples choosing to settle familial disputes via 'collaborative practice'. This is a more transparent method of dispute resolution aimed at keeping parents out of courts and around the negotiating table. [44] Therefore, it is evident that the Children Act 1989 envisages a collaborative approach to maximising a child's welfare that will, following the adoption of section 1(2A) CA, presume involvement with both parents is in the best interests of the child. The addition

[38] Eekelaar, 'Beyond the welfare principle' (n33) 238
[39] See HL Deb, 6th December 1988, Vol.502, 448
[40] HL Deb, 6th December 1988, Vol.502, 449
[41] Section 2(6) CA 1989
[42] Section 2(2)(a) CA 1989
[43]For example, registration on the child's birth certificate with the consent of the mother; s4(1)(a)CA 1989. A Court may grant the father PR via a s4(1)(c) CA order.
[44] See Connie Healy, 'Dispute resolution through collaborative practice: a comparative analysis', (2015) 27 CFLQ 173

of the presumption in favour of continued parental involvement reflects the belief that 'the evidence is clear that children do better with both parents as fully involved in their lives'.[45]

It is argued that envisaging detriment based on a judicial 'scoring' system undermines this collaborative approach. Instead, Eekelaar's thesis creates a looser/winner dichotomy. This places parents in direct competition in a manner that threatens to undermine the centrality of protecting a child's welfare. Therefore, for the purposes of this thesis, Eekelaar's proposals, although they offer a substantive means of balancing the interests of parent and child, are not actionable in practice and cannot assist in achieving Convention-compliance.

However, as Kilkelly notes, Eekelaar's work is an important contribution in terms of 'normalising' the proposition that the child's voice should play a leading role in decisions affecting their wellbeing.[46] This seeks to ensure that a reinterpreted section 1(1) CA operates fairly and serves to advance the rights of children. Therefore, in this thesis seeking to move practice towards a ECHR compliant model, Eekelaar is an important influence in terms of bridging the welfare-rights gap that has been evidenced in domestic litigation. In that sense, it is suggested that Eekelaar's work is actually reflective of the UNCRC position in maximising the child's voice in decisions affecting their wellbeing.

It is argued that the two categories of proposals analysed thus far fail to adequately satisfy the problem of Convention-compliance and do not provide a means of balancing the rights of litigants in a manner that 'reflects the important social and moral value that children must be protected from harm'.[47] However, these theories evidence an attempt to structure the judicial discretion inherent in application of the paramountcy principle. Whether this be through assigning numerical values to certain interests or simply looking to party relationships, both the oppositional and relationship-based approaches attempt to provide guidance and greater clarity to judges in the context of making, varying or discharging section 8 CA orders. For the various reasons provided above, these attempts to structure discretion have proven unsuccessful. Therefore, this thesis will now turn to a deontological method of reinterpreting

[45] Tim Loughton, 'Children's minister clarifies nature of proposals for shared parenting after divorce', < http://www.familylawweek.co.uk/site.aspx?i=ed98501> (accessed 5/5/2020)
[46] Ursula Kikelly, 'Best interests of the child, A gateway to children's rights?', in, Lesley Anne-Barnes Macfarlane, Elaine Sutherland, *Implementing Article 3 of the UNCRC; Best Interests, Welfare and Well-Being*, (1st edition, CUP, 2016), 62
[47] Judith Mason, Rebecca Bailey-Harris, Rebecca Probert, '*Principles of family law'*, (8th edition, 2008, Sweet and Maxwell)

section 1(1) CA that will align itself more closely with the requirements set down by the ECtHR. However, this thesis will identify that such an approach is complex to realise in practice. It will be the purpose of Chapter Five of this thesis to simplify these deontological-based proposals in the light of Dworkinian jurisprudence.

Developing a Deontological Framework for Reinterpreting the Paramountcy Principle

Following the criticisms levelled at previous proposals, academics such as Fortin, Choudhry and Fenwick have sought to amend the statutory construction of section 1(1) CA.[48] These proposals seek to isolate the interests of individual litigants yet differ by utilising a rights-based method of balancing these in the event of conflict. It is important to note that, whilst this thesis will adopt Choudhry and Fenwick's parallel analysis as the basis for its own Convention-compliant model of litigation, it does not do so without developing both the means of achieving reform and methods to be used when balancing the rights of litigants.

Prior to Choudhry and Fenwick's contribution, Fortin proposed a rights-based framework that developed a change in terminology from interests to rights. This was an important progression in light of earlier comments surrounding the adaptation of an oppositional approach to accommodate the language of rights. Fortin initially envisaged a structure similar to the formulation of the paramountcy principle outlined by Lord Oliver in *Re KD.*[49]As discussed in Chapter Three, such an interpretive approach results in the child's interests serving as an automatic justification under article 8(2) ECHR. This provides a 'simple method of retaining the paramountcy principle as currently understood.[50] However, as subsequent ECtHR jurisprudence evidences, Fortin's initial proposal does not achieve Convention-compliance. Here, Chapter Three outlined the inconsistency with applying section 1(1) CA as an automatic justification under article 8(2) ECHR as a matter of *law*. Indeed, such an approach has been described as 'cavalier' in its interpretation of the Strasbourg jurisprudence.[51]

[48] Note Helen Reece made early undeveloped observations surrounding the need to develop a rights-based framework when using section 1(1) CA in Helen Reece, 'The paramountcy principle- consensus or construct?', (1996) 49 LP 303

[49] Jane Fortin, 'See Jane Fortin, 'The HRA's impact on litigation involving children and their families' (1999) 11 CFLQ 225. Citing *Re K.D (A Minor) (Ward: Termination of access)* [1988] A.C 806

[50] ibid

[51] Shazia Choudhry, 'The adoption and Children Act 2002, the welfare principle and the Human Rights Act 1998- a missed opportunity?' (2003) 15 CFLQ 131

In response, Choudhry and Fenwick developed the parallel analysis and this will form the main focus for the remainder of this Chapter. Categorised as a deontological approach, Choudhry and Fenwick sought to reinterpret the paramountcy principle as the 'primary principle'. Therefore, under their proposed methodology, courts would first identify individual article 8(1) rights on a presumptively equal footing before then applying an article 8(2) proportionality exercise to each. In this respect, the rights of the child assume 'primary' importance during this article 8(2) process. The following section will analyse these proposals in greater detail in order to fully outline the expectations on courts when applying the primary principle. Importantly, this Chapter will update the work of Choudhry and Fenwick in light of recent case-law, before critiquing the application of the 'primary principle'.

Interestingly, Choudhry and Fenwick do not fully consider the influence of the UNCRC in assisting domestic practice move towards a rights-based interpretation of section 1(1) CA. They note that the UNCRC may have a role in turning the ECHR into 'workable tool for rights protection' before merely stating this is a process that would have to be undertaken by individual judges.[52] This is surprising in light of their reform proposal (the primary principle) linguistically mirroring the current formulation of article 3(1) UNCRC. As a result, this thesis suggests that article 3(1) UNCRC can assist in structuring a workable reform proposal that is readily applicable in domestic practice.

Employing Section 3 HRA

For Fenwick, the solution to satisfying section 1(1) CA with the demands of the ECHR is to 'bring section 3 HRA to bear against the paramountcy principle'.[53] Section 3 HRA states that, so far as is possible, primary legislation must be read, and given effect to, in a manner compatible with Convention rights. As Sir Steven Sedley argued, by Parliament placing this interpretive obligation at the heart of the HRA, the process of judicial reasoning has been fundamentally altered.[54] Resultant of section 3, domestic courts have '[assumed] a great deal

[52] Choudhry and Fenwick (n1) 490
[53] Helen Fenwick, 'Clashing rights, the welfare of the child and the HRA' (2004) 67 MLR 889
[54] Sir Stephen Sedley, 'The rocks or the open Sea: Where is the Human Rights Act heading?' (2005) 32 JLS 3,9

of constitutional responsibility' for robust domestic rights protection.[55] The aim of this section is provide the basis for Choudhry and Fenwick's use of section 3 HRA to reinterpret section 1(1) CA. However, in Chapter Five of this thesis, their use of section 3 HRA will be challenged as constitutionally inappropriate and, instead, this thesis will propose that a section 4 Declaration of Incompatibility is the more appropriate means of achieving reform.

The extent to which section 3 HRA permits courts to reinterpret legislation to cure non-compatibility with Convention rights is subject to debate. The leading case on the use of section 3 is *Ghaidan v Godin-Mendoza.*[56] *Ghaidan* concerned a challenge to the Rent Act 1977 in that the Act permitted succession to a particular form of tenancy by spouses. As a result, individuals in homosexual relationships, unable to marry at that time, could not succeed to a tenancy under the Act. The appellants challenged this as a breach of article 8(1), taken with article 14, of the ECHR.

The House of Lords began by noting there existed clear discrimination as a result of applying the statutory provision.[57] The question of relevance for this thesis became one of how to remedy the statutory incompatibility. The court had the option of reinterpreting the legislation via the use of section 3 HRA. Lord Nicholls stated that the powers to do so were 'unusual and far reaching' and allowed courts to 'read in' and modify the meaning of primary and secondary legislation.[58] The majority further found that section 3 HRA may require the court to 'depart from unambiguous meaning legislation would otherwise bear'.[59] This resulted in the application of section 3 not depending on the 'particular form of words adopted by the draftsmen' and thus judges could legitimately 'read in' and 'modify' the meaning of primary and secondary legislation to achieve Convention-compliance.[60]

However, this is not to say such powers were without limit. The court stated that section 3 HRA could not be used to give effect to an interpretation contrary to parliamentary intention.[61]

---

[55] Aileen Kavanagh, 'Choosing between section 3 and 4 Human Rights Act: Judicial reasoning after *Ghaidan v Godin Mendoza*', in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act,* (1st edition, CUP, 2007) 142
[56] [2004] UKHL 30
[57] ibid [5]
[58] ibid [30]
[59] ibid [29]
[60] ibid [32]
[61] ibid [33]

Furthermore, judges are limited to a 'sphere of legislative meaning'[62] in that section 3 could not be used to read 'black as white'.[63] This prevents reinterpretation of terms that would prove fundamentally inconsistent with the primary features of the legislation. For Lord Millet, who dissented, an example of such was extension of a provision providing for tenancy succession by mixed-sex to same-sex couples.[64] This said, the majority of the House of Lords found that there was no inconsistency in using section 3 HRA to reinterpret the relevant provision of the Rent Act. As a result, the House of Lords mandated that the relevant provision, instead of stipulating the couple are husband and wife, should read: *as if* the couple were husband and wife.[65] As Bellamy argues, this interpretation of the power contained in section 3 corresponds to the overriding aim of the HRA to 'bring rights home'.[66] It is accurate to describe section 3 HRA as a rights enhancing provision that imbues judges with a discretionary power to provide relief in instant cases via curing non-compliance in domestic legislation. Its use was central to the reinterpretation Choudhry and Fenwick argued was necessary to cure non-compliance in application of the paramountcy principle.

Whilst *Ghaidan* was one of the first cases in which the House of Lords utilised its new powers under section 3 HRA, its assertion that the obligation was powerful and far-reaching has been cited frequently in appellate courts. In a recent piece, Wagner and Barth have stated that, following analysis of contemporary public-law jurisprudence, 'where the legislation leaves room for manoeuvre, a court should use section 3'.[67] Later case law has emphasised that section 3 empowers a court to find a possible, as opposed to reasonable, interpretation to achieve Convention-compliance.[68]

However, recent application of section 3 HRA by family courts would seem to cast some doubt on the strength of the obligation in certain cases. *TT* concerned a transgender man whom had received a Gender Recognition Certificate (GRC).[69] Under section 9(1) Gender Recognition Act 2004, attainment of a GRC had the effect of *TT* becoming a male for 'all purposes of the

[62] Richard Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) 9 IJCL 86, 90
[63] *Ghaidan v Godin-Mendoza* (n56) [70] as per Lord Millet
[64] ibid [78]
[65] ibid [51] (emphasis added)
[66] Bellamy, (n62) 90
[67] Adam Wagner and Gideon Barth, 'Judicial interpretation or Judicial vandalism" Section 3 of the HRA 1998' (2016) 21 JR 101
[68] Helen Fenwick, Gavin Philipson and Alexander Williams, *Text, Cases and Material on Public Law and Human Rights,* (4th edition, Routledge, 2017)
[69] *R (on the application of McConnell) v Registrar General* [2020] EWCA Civ 559

acquired gender'. However, upon *TT* giving birth to a child, and consequently seeking registration as father, the relationship between section 9 GRA and section 12 GRA came into question. Whilst section 9 GRA states that the GRC is valid for all purposes of the acquired gender, this seemed to conflict with section 12 GRA which stated a certificate did not alter the status of a mother following childbirth. On appeal, *TT* argued that denying him the ability to register as the child's father was a breach of his article 8(1) rights. He argued that section 12 GRA was not prospective in effect and, as such, did not restrict the scope of section 9(1) GRA. Therefore, in his submission, parenthood was 'a purpose' of the acquired gender. If the Court of Appeal found against him on this, he argued, in the alternative, that such a construction would breach his article 8(1) Convention rights and so the court was under an obligation to reinterpret section 12 GRA in a compliant manner via use of section 3 HRA.

Whilst the Court of Appeal approved the President's previous analysis of the domestic statutory position in the High Court, it made obiter comments on the obligation to bring section 3 to bear against section 12 GRA.[70] Here, the Court of Appeal was wary of appearing to legislate on what were emotive social questions and it repeatedly drew attention to the 'democratic legitimacy' enjoyed by Parliament that was not shared by the courts.[71] The court held that the proper place of the judiciary, in a post HRA-legal framework, was as a body of review that 'should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament'.[72] Despite the court providing no further elucidation as to how far this 'margin of Parliamentary judgement stretches' it was clearly wary of applying the section 3 obligation in this sensitive area of public policy. Such unwillingness has been evidenced in cases such as *Bellinger v Bellinger* in which the House of Lords refused to use section 3 as a remedial tool to recognise a post-operative transsexual as female under the Matrimonial Causes Act 1973.

Therefore, in this thesis updating the work of Choudhry and Fenwick, one may now say that, whilst the interpretive obligation contained in section 3 HRA is a strong one, the courts have shown a reluctance in applying this to sensitive social and family-based questions. Such considerations are amplified given the fragile political context of the HRA today. However, in the example of *TT*, it is important to remember that the High Court and Court of Appeal found that there was no breach of the litigants Convention rights. This makes discussion of section 3 HRA a secondary issue and, therefore, it becomes unlikely that the court would advocate for

[70] *The Queen (on application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam)
[71] *R (on the application of McConnell) v Registrar General* (n69) [82]
[72] ibid

its application in obiter. In chapters Two and Three, this thesis analysed the contemporary case-law of the family courts to find a modest willingness to engage with rights-based language in contact disputes. However, a highly strained application of the Strasbourg jurisprudence was found to undermine the Convention-compliance these judgments purported to achieve. As Chapter Five will discuss, for Choudhry and Fenwick, writing shortly after *Ghaidan*, it was not unrealistic to envisage the use of section 3 HRA to reinterpret section 1(1) CA in a Convention-compliant manner. Indeed, even today, this would seem to form the most straightforward means of remedying any incompatibility. However, given the reluctance of courts to engage in issues of social policy, alongside continued non-compliance with demands under the ECHR in recent years, this thesis will argue that recourse to section 4 HRA is the more appropriate means of achieving reform at a statutory level.

Application of Section 3 HRA to Section 1(1) CA

For the purposes of reinterpretation, Choudhry suggests that the linguistic reinterpretation of section 1(1) CA need not be radical. She argues that the term paramount connotes ideas of pre-eminence rather than the interpretation adopted under the *J v C* model of application.[73] Therefore, Choudhry and Fenwick argue that the courts should reinterpret the paramountcy principle as the 'primary principle' using their section 3 HRA interpretive powers. In the light of requirements laid down in *Ghaidan,* this does not fundamentally alter the meaning of the legislation given children's interests are still privileged under the 'primary principle'. Such a reinterpretation would ensure that no *rule* of prioritisation could apply automatically to pre-empt the proportionality exercise required under article 8(2) ECHR.[74] As will be analysed shortly, such an approach would necessitate the court first identifying competing article 8(1) rights before proceeding to balance these against each other in an 'ultimate balancing exercise'.

This, according to Ferguson, would still make children a 'special case'.[75] Here, Ferguson creates a distinction between the prioritisation and privileging of children's interests.[76] Prioritisation favours children' rights at the *outset* of any decision-making process in that a

[73] Choudhry (n51) 131
[74] Lucinda Ferguson, 'An argument for treating children as a special case', in Elizabeth Brake and Lucinda Ferguson (eds) *Philosophical foundations of Children's and family law,* (1st edition, 2018, OUP) 227 (emphasis added)
[75] Lucinda Ferguson, 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights' (2013) 21 IJCR 227
[76] Ferguson, 'An argument for treating children as a special case'(n74) 228

child's interests a prioritised as a matter of law.[77] This is contrasted with *privileging* the rights of children. This approach grants greater weight to the interests of the child when contrasted with the interests of an adult.[78] In a balancing exercise, the primary principle would dictate that judges assess the rights of children and adults on a presumptively equal footing. If these rights were to come into conflict, judges should then privilege the rights of the child under article 8(2). Importantly, if this was the case, the rights of the child have not been automatically prioritised as a matter of law. Ferguson's theory is significant for this thesis in that it corresponds to the application of the primary principle that is utilised as a basis for its own reinterpreted model of litigation.

Such an approach is also in accord with the position of the Strasbourg court in constituting a move away from the welfare-centric model of family law. Indeed, Fenwick identifies modest support for such a move in atypical family litigation.[79] For example, the judgment in *Ex Parte Gangadeen* highlights judicial understanding of the disparity between the domestic and Strasbourg positions relating to the paramountcy principle. Here, the judge held that the Convention case law dictated 'the problem involves a simple balancing exercise in which the scales start even and where the weight to be given to the considerations on each side are to be assessed according to the individual circumstances of the case'.[80] Thus, in the context of those proceedings, the paramountcy principle did not automatically guarantee the prioritisation of the child's rights over and above those of the parent.[81]

Here, it is worth briefly considering the similarities between Choudhry and Fenwick's proposal and article 3(1) UNCRC. The UN committee on the Rights of the Child has presented article 3(1) as a principle that gives rise to a substantive right. This is a child's right to have their best interests assessed as a primary consideration when weighted against interests of other parties relevant the issue at stake.[82] Therefore, article 3(1) UNCRC can be described as a rights enhancing principle in that, procedurally and substantively, it seeks to ensure that a child's best interests receive a privileged status in law. This is reflected in debates surrounding adoption of

[77] ibid (emphasis added)
[78] ibid
[79] Choudhry and Fenwick (n1) 465
[80] *R v Secretary of State for Home Department, ex parte Gangadeen and Khan*, [1998] 1 FLR 762 CA as per Hirst LJ
[81] It is important to note Fenwick and Choudhry accept that the case may have been dictated by the result of applying a traditional understanding of the paramountcy principle; the 'radical curtailing' of the Secretary of State's broad discretion to deport. See Choudhry and Fenwick (n1) 465
[82] UN Committee on the rights of the child, *General Comment number 14*, [6]

article 3(1) UNCRC in which contracting states discussed the relative merits of paramountcy and primacy-based models. In terms of how a 'primacy' model would operate, it was argued that 'primacy' implied that other considerations may be taken into account and balanced against the interests of children to find a suitable compromise.[83] In this compromise, a child's interests would be afforded 'high priority'.[84]

It is in this sense that focus on the UNCRC can illuminate what Choudhry and Fenwick are trying to achieve in their model of the primary principle whilst also assisting in bridging from a welfare-centric to rights-based model of domestic litigation. As Kilkelly notes, the line between a child's rights and interests remains 'blurred and increased domestic focus on an international rights-enhancing provision can only assist in both delineating that line and achieving better understanding of a rights-based approach to litigation.[85] Indeed, discussion of the weight attached to a child's interests will inform statutory amendment proposed in Chapter Five of this thesis and serves to provide context to Choudhry and Fenwick's initial reform proposal.

Therefore, for Choudhry and Fenwick, there existed both a constitutional and precedential basis for re-interpretation of the paramountcy principle via the interpretive obligation found in section 3 HRA. However, this thesis will not simply accept the demands of the parallel analysis. Instead, this Chapter will seek to critique the parallel analysis and develop a more simplistic model of litigation that is actionable in domestic family courts. This Chapter will now analyse the methodology Choudhry and Fenwick envisaged as applying when courts utilised the 'primary principle'.

Deriving a Methodology from Media Law Disputes

Choudhry, Fenwick and Fortin all point to the development of jurisprudence balancing rights-claims advanced under article 10 and 8 as demonstrative of the approach the family judiciary would adopt under the parallel analysis. Importantly, regarding the balance between article 10

[83] UN Committee on the rights of the child, *General Comment number 14,* [39]
[84] UN Committee on the rights of the child, *General Comment number 14,* [39]
[85] Ursula Kilkelly, 'Best interests of the child, A gateway to children's rights?', in, Lesley Anne-Barnes Macfarlane, Elaine Sutherland, *Implementing Article 3 of the UNCRC; Best Interests, Welfare and Well-Being,* (1st edition, CUP, 2016)

and 8, section 12(4) HRA dictates that the court must have 'particular regard' to the importance of the Convention right to freedom of expression. This section will now analyse the decision in *Re S* as representative of the approach judges should undertake when applying Choudhry and Fenwick's 'primary principle'.

The Court of Appeal and House of Lords decisions in *Re S* offers a means of interrogating the process of judicial reasoning advocated under the parallel analysis. The case concerned the proposed granting of an injunction surrounding publication of the defendant and victim's identities in a murder trial. This restriction would have served the purpose of protecting the identity of the son who was the subject of ongoing care proceedings. Here, the victim was S's brother and expert evidence suggested that revealing S's identity would have caused considerable harm to his welfare. At first instance it was held that, despite the court having competence to grant the order, it would not do so.[86] Importantly, the court granted pre-eminence to article 10 and, as a result, the rights of the child were only considered as an exception under article 10(2).[87]

On appeal, the Court of Appeal adopted Hale LJ's (as she then was) analysis of the law.[88] The majority found that Hedley J was correct in asserting that the High Court had the jurisdiction to grant the injunction although, in light of the HRA, the court's jurisdiction may now exist to the extent that it becomes the 'vehicle' to conduct the balancing exercise required between article 10 and 8 ECHR.[89] Importantly, in what appears to introduce an element of horizontal effect, Fenwick states that the Convention rights themselves provide this vehicle as opposed to the inherent jurisdiction of the court. If this were correct, it would appear that, in calling for restraint to protect the privacy of the child, it would make no difference if the inherent jurisdiction existed or not given this is now a rights-based assessment. This takes the primary focus of litigation away from the existence of the court's jurisdiction and towards the correct means of balancing competing Convention rights.[90]

[86] *Re S (A child) (identification: restrictions on publication)* [2003] EWCA Civ 963 [1]
[87] *Re S (A child) (identification: restrictions on publication)* [2003] EWHC (Fam)
[88] Note that the majority diverged from Hale LJ on the application of the law to the instant case. Therefore, whilst the court of first instance applied erred in law, this would not have altered the decision it reached.
[89] *Re S (A child)* (n86) [40]
[90] Helen Fenwick, 'Judicial reasoning in clashing rights cases', in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act* (1st edition, 2009, CUP) 278

Hale LJ constructed the conflict of rights as follows. The child's right to respect for private and family life is engaged. Therefore, any interference with that right must be justified by reference to article 8(2). This comes into conflict with the newspaper's article 10(1) right to freedom of expression, including the public's right to freely receive information, and any restriction must be justified by reference to article 10(2).[91] This is, therefore, a situation whereby two qualified rights come into conflict. In what Fenwick terms a 'highly significant break',[92] the Court of Appeal rejected the pre-eminence of article 10 over article 8. Instead, both articles were 'independent elements' that required independent analysis.[93] This was found on the authority of *A v B* in which Lord Woolf stated: '[e]ach article is qualified expressly in a way which allows the interests under the other article to be accounted'.[94] As a result, the High Court had erred in assuming article 10 took priority and it was an error in law to treat article 8(1) rights as mere exceptions under article 10(2).

This gives rise to the 'presumptive equality' between articles 8 and 10 ECHR.[95] It is against this background that the Court of Appeal undertook the proportionality exercise using both articles 8(2) and 10(2). The Court of Appeal first assessed the proportionality of the proposed interference with article 10(1) rights. Here, the court noted the particularly significant aspects of the right engaged; the importance of reporting criminal trials in ensuring public confidence in the law, the corresponding public interest in receiving the information and the controversial aspects of this particular trial.[96] There existed a strong public interest in permitting publication and vindicating the newspapers article 10(1) rights. However, this did not mean that a justification could not be found under article 10(2).[97] For example, the court considered what impact prohibiting publication of photographs and the family name would have on the article 10(1) right. Importantly, the Court of Appeal noted that CS's mother was not yet convicted and reasoned that there was a stronger public interest in publication of already convicted abusers.

The Court of Appeal then proceeded to examine the issue of proportionality from the perspective of CS's article 8(1) right to respect for private and family life. Here, the court identified four relevant considerations when analysing the extent of the interference with CS's

[91] *Re S (A child)* (n86) [45]
[92] Helen Fenwick, 'Clashing rights, the welfare of the child and the HRA' (n51) 891
[93] *Re S (A child)* (n86) [52]
[94] *A v B plc* [2003] QB 195 [6]
[95] Choudhry and Fenwick, (n1) 465
[96] *Re S (A child)* (n86) [55]
[97] ibid [56]

rights. Firstly, the court had to consider the extent to which publication would add to the existing interference and the extent of any further harm that identification would cause. Additionally, the court considered the impact of publication not only on the child but on his family in providing for the welfare of CS and, finally, the impact on the child's relationship with his mother.[98] Therefore, the Court of Appeal found that Hedley J erred in not conducting the 'difficult balancing exercise' required under the Convention.[99] For Hale LJ, given the proposed infringement on the article 10(1) right was 'not so great', it was possible to find justification under article 10(2). She concluded that the case should be sent for rehearing in the High Court in which the complex exercise should be conducted.

In summary, and offering key insights for this thesis, a judge should begin by acknowledging the presumptive equality between article 8 and 10 before identifying each independently. For example, the article 8(1) right should be identified before undertaking the article 8(2) balancing exercise. Here, article 10(1) rights constitute exceptions. The same process should then be undertaken starting with article 10(1). This process constitutes the balancing act required under the ECHR.[100] Such an approach was subsequently affirmed by the House of Lords in which Lord Steyn termed Hale LJ's approach the 'ultimate balancing exercise'.[101] Importantly, Hale's approach was approved in *Angela Roddy* where the court applied the *Re S* approach to proportionality in finding the existence of the court's jurisdiction allows no more than an assessment of presumptively equal Convention rights.[102] *Re S* was further affirmed by the House of Lords in *Campbell v AGM Ltd.* Here, Hale LJ's dictum was found to be 'entirely consistent'[103] with requirements laid down by the ECtHR with Lord Hoffmann asserting that 'there is no question of automatic priority'.[104] Such an approach forms the basis for judicial interpretation Choudhry and Fenwick propose should occur under their reinterpreted 'primary principle'.

[98] ibid [57]
[99] ibid [60]
[100] ibid [60]
[101] *Re S (A child)* (n86) [23]
[102] *Angela Roddy (A minor)* [2004] EMLR 8
[103] *Campbell v AGM Ltd* [2004] UKHL 22 [111]
[104] ibid [55]

The Role of Section 1(1) CA in Re S

Given that presumptive equality between article 8 and 10 has received approval from the House of Lords in both *Re S* and *Campbell*, Choudhry and Fenwick argue it is now the authoritative approach for when qualified Convention rights come into conflict.[105] However, whilst *Re S* provides an indication of how the courts should approach the 'ultimate balancing exercise', its relationship with section 1(1) CA undermines the Convention-compliance it purports to achieve. In *Re S,* in accordance with the first instance court, the Court of Appeal held that publication did not affect the manner in which CS was to be brought up given this was the subject of separate care proceedings. As a result, the case did not fall in the scope of section 1(1) CA. At first instance, Hedley J held obiter that, even if the case had fallen within the scope of section 1(1) CA, this would not have made a material difference to his decision.[106]

In the Court of Appeal holding that the matter did not concern the child's upbringing, it avoided confrontation between the ECHR and section 1(1) CA.[107] However, Hale LJ repeated the domestic *J v C* exposition of the paramountcy principle by stating 'if the child's welfare is the paramount consideration, then when everything else has been taken into account and weighed, it rules on or determines the issue before the court'.[108] The court went so far as to describe the paramountcy principle as a 'trump' card.[109] Evidently, if the paramountcy principle acts as such, it would seem to upset the presumptive equality of articles 8 and 10 as they would only be equal *insofar as* the paramountcy principle does not apply.[110] This reveals the 'logically flawed' aspect of the judgment that renders it non-compliant with demands under the ECHR.[111] This is because, if the paramountcy principle had applied, the result of the balancing exercise would have been predetermined before assessment of the Convention rights on a presumptively equal footing.[112]

In response, Choudhry and Fenwick argue that the methodology in *Re S* should apply to cases in which the paramountcy principle is applied by the courts.[113] This would seem preferable in

[105] Choudhry and Fenwick, (n1) 465
[106] *Re S (A child*) (n87)
[107] Fenwick, 'Clashing rights, the welfare of the child and the HRA' (n51) 889
[108] *Re S (A child)* (n86) [62]
[109] ibid
[110] Fenwick, 'Judicial reasoning in clashing rights cases', (n90) 258
[111] Fenwick, 'Clashing rights, the welfare of the child and the HRA', (n51) 889
[112] Fenwick, 'Judicial reasoning in clashing rights cases' (n90) 258
[113] Fenwick, 'Clashing rights, the welfare of the child and the HRA' (n51) 889 (emphasis added)

that, although its application could be avoided in the Media Law dispute in *Re S*, it would seem more difficult to circumvent in a standard section 8 CA hearing. Furthermore, given presumptive equality applies to clashes between Convention rights, Fenwick asserts it is only logical that it applies to clashes within Convention rights.[114] Therefore, the parallel analysis would apply equally to conflict between qualified Convention rights as to conflict within a singular Convention right (competing rights under article 8(1)). These findings are significant in the context of this thesis because, as is apparent from Chapter Two, the litigation analysed involves singular Convention rights in cases which the application of the paramountcy principle is not disputed. It is only via the extension of the *Re S* methodology to such cases that a Convention-compliant model of litigation can be achieved.

Applying the Parallel Analysis to Litigation

As a means of modelling how the primary principle may operate in practice, this thesis will adopt a fictitious contact dispute envisaged by Herring. Whilst Herring devised the dispute to model his 'relationship-based welfare' approach, the rights-based conflict makes it suitable for highlighting the operation of the parallel analysis.[115] It is argued that, by applying the interpretive process used in *Re S*, we are left with a model of litigation that permits the privileging of children's rights following their identification on a presumptively equal footing.

Herring's hypothetical scenario concerns what were previously termed contact orders sought by a non-residential father. The child, in this scenario, resides with the mother whilst the father is serving prison time for violent offences. As such, the mother must facilitate contact by taking the child to prison and this is something the she opposes given the father has a history of violence against her. This said, expert evidence suggests that contact may be beneficial for the child. Importantly, the Strasbourg court has held that the parental right to family life does not terminate on relationship breakdown and that parents enjoy a continuing right to enjoyment of the child's company.[116] Therefore, to infringe this right, and refuse to grant the section 8 order, the court must find justification under article 8(2) ECHR.

[114] Choudhry and Fenwick (n1) 465
[115] Herring, 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary? (n11)
[116] The question of whether there exists a *right* to contact on the part of a non-residential father is a contested academic point. Whilst such consideration lies outside the scope of this thesis, some academics have used *Hokkanen v Finland (application No.19823/92)* [1995] 19 E.H.R.R. 139 as authority for a parental right to contact.

Here, we are faced with a not uncommon situation whereby a non-resident father seeks a section 8 CA order to facilitate contact with their child. It is important to remember that, as a public authority under section 6(3)(a) HRA, it is unlawful for the court to act in a manner incompatible with Convention rights. Therefore, the father does not need to point to a pre-existing order to establish a breach of his Convention rights. Instead, he is able to advance a rights-based argument from the outset. Realistically, despite the parallel analysis purporting to place the rights of the litigants in a (here) tri-partite analysis that first identifies 8(1) rights, before balancing these against each other under 8(2), the court would begin with the 8(1) rights of the father as he is bringing the application. The following section will demonstrate how such an application would proceed under Choudhry and Fenwick's proposals.

Non-Resident Father

The court would begin by identifying the article 8(1) rights of the non-resident father as comprising his right to a meaningful relationship with the child. The court would have to consider to what extent the refusal to grant a section 8 CA order would infringe that right. The court would look to the individual circumstances of the case and what impact this may have on the strength of the application. Here, this may encompass the desirability of granting contact to individuals with a violent past or the reasons the father has for seeking contact. The latter would be relevant if his motivation was to merely damage the welfare of the child.[117] The court may conclude that the article 8(1) right exists (albeit in a weak form) and, as such, refusal to make a section 8 order constitutes an infringement of his Convention rights. Thus, in an article 8(2) balancing exercise, the court would require less weighty reasons for displacing the article 8(1) rights of the father given their relatively weak nature.[118]

For example see Herring 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (n11) 7. For the sake of this thesis, it will be argued that a parent has a right to a continued relationship with the child derived from the right to respect for private and family life under article 8(1) ECHR.

[117] For example *Yousef v The Netherlands (application No.33711/96)* [2003] 36 E.H.R.R. 20

[118] Under Fenwick's model, she argues that abuse of an emotional or physical nature may lead to the exclusion of the perpetrator from the scope of article 8(1) rights. Less severe abuse would merely ensure that a justification is easier to find under article 8(2). For the sake of this thesis, it is assumed the abuse is not so severe as to remove the father from the scope of article 8(1). See Choudhry and Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act', (n1) 486

The Child

The court would then identify the article 8(1) right engaged on the part of the child.[119] The court would note the child's right to respect for family life exists in relation to both the residential and non-residential parent. Given the identification of article 8(1) rights occurs on an equal footing to other parties, the court can examine any features of the case that may impact the scale of the rights infringement. For example, the court may question the importance of children enjoying contact with violent non-resident fathers or children undertaking contact in public prisons. Using the approach in *Re S,* the court may find that, although the article 8(1) right is present, its manifestation in the welfare of the child dictates that they are not as strong as if the father were a non-violent and supportive figure. Therefore, the justification required to infringe the article 8(1) right need not be necessarily weighty.

The court would then proceed to consider justifications for infringing the right under article 8(2). This is where this scenario must be differentiated from *Re S* in which the Court of Appeal reasoned that the case did not engage the paramountcy principle. Such an approach is not possible here in that section 1(1) CA is clearly relevant to the proceedings. Therefore, in order to afford the children's interests some degree of privilege in the article 8(2) balancing exercise, the court would apply the 'primary principle'. In doing so, as Fenwick argues, the court recognises that children's rights still require independent and robust protection in a post-HRA legal framework.[120]

Resident Mother

Before adjudicating on whether the father's rights have been infringed, the court would consider the article 8(1) rights of the mother. She is a relevant party to the litigation because she would be responsible for facilitating contact with the father. Under article 8(1) the mother would likely argue that, as an aspect of her right to respect for private life, she should not have to endure contact with a previously abusive partner. On the facts, the court may decide this is a relatively severe rights infringement given the history of abuse perpetrated against her.

[119] Choudhry and Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act', (n1) 488
[120] ibid

Granting the Section 8 Order in These Circumstances

Using this example, the court would have identified the various article 8(1) rights of the parties in a tripartite parallel analysis. As a consequence, the proportionality assessment has been applied to each individual set of article 8(1) rights forming the ultimate balancing exercise. In this sense, it is clear that each parties' rights, though assessed independently, are not mutually exclusive. This will prove significant for the cumulative balancing exercise outlined in Chapter Five in which it is argued that a relational approach is central to creating a balancing exercise that recognises the interconnectivity of independent rights in the family unit.

From the perspective of the father, refusal to grant the section 8 CA order is a prima facie infringement of his article 8(1) right to respect for family life. Here, these rights would balance against the already identified rights of the mother and child under article 8(2). In terms of the proportionality assessment, the court would need to decide to what extent the child may be harmed as a result of any contact with the father. If there was a degree of positive harm then it may be proportionate to either limit or prevent contact.[121] The court would further have to examine the extent to which contact with the father would damage the child's relationship with the mother. Again, if contact were to cause significant damage, the proportionality exercise dictates that the article 8(1) right of the father be justifiably infringed.

From the perspective of the child, the court must respect both his right to contact with the father, his relationship with the mother and interest in not engaging with potentially harmful individuals. Under an article 8(2) balancing exercise, the child's welfare would be the primary concern of the court. This necessitates that the child's welfare is subsumed within a rights discourse and the child's rights, manifested in their welfare, are privileged. This, as per the ECtHR jurisprudence in *Johnasen,* affords a privileged status in law and means that a parent cannot pursue a course of action that will actively harm the child.[122] In this case, in treating the child's rights as the primary consideration, a court may well grant the section 8 order in favour of the father given the presence of expert evidence to this effect. However, more importantly, the court would have engaged in a Convention-compliant model of litigation that firstly identified composite article 8(1) rights before balancing these against each other in an article

[121] ibid 490
[122] *Johansen v Norway (application no. 17383/90)* [1997] 23 E.H.R.R. 33

8(2) analysis. In that process, the child's rights are privileged in accordance with the demands of the, now reinterpreted, primary principle. This gives rise to a model of litigation that closely accords with the demands of the ECtHR in *Johansen* in that a child's rights may, dependent on their nature and severity, override those of the parents. In this sense, Choudhry and Fenwick's proposals provide a basis for this thesis' further reinterpretation of the paramountcy principle.

Criticism of the parallel analysis

Lack of Engagement with Application of Legal Principles

This thesis does not intend to adopt the parallel analysis without adaptation. Whilst Choudhry and Fenwick's model provides a Convention-compliant methodology, it does not engage in a theoretical debate surrounding the term 'principle' and this, it is argued, leaves their proposals vulnerable challenge based on the findings of Chapter One and Two of this thesis. In Chapter One, the essential distinction between a Dworkinian rule and principle was established. Chapter Two then applied this to the current application of the paramountcy principle to provide a novel critique of domestic law when viewed through the lens of Dworkinian legal theory. This thesis argues that the consequences of the terms 'paramount' and 'primary' are, in part, dictated by the way in which we understand a legal principle to operate. As has already been shown, the *J v C* model operated as a 'rule' in that it necessitated the automatic prioritisation of the child's interests at law. In response to this, Choudhry and Fenwick devised the 'primary principle' to prevent automatic prioritisation of children's interests in an article 8(2) balancing exercise.

It is the contention of this thesis that, without a basic juristic understanding of how a principle operates in law, it is a simple step for the judiciary to revert back to interpreting the primary 'principle' as granting *priority* to a child's welfare as expressed via their article 8(1) Convention rights. This would correspond to the rule-like application of the paramountcy principle identified in Chapter Two of this thesis. As Ferguson identifies, it is questionable to what extent judges would adopt 'clear reasoning' in relation to the weight afforded to children's rights when viewing litigation through a rights-based lens as opposed to welfarism.[123] It is

[123] Lucinda Ferguson, 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights' (n74) 188

argued that, without a juristic understanding of the term principle, a judge may easily lapse into a rule-like application of section 1(1) CA even after reinterpretation via section 3 HRA. This is because, given the reality of litigation and the pressures of an over-stretched family justice system, it is more time-effective to simply begin with the article 8(1) rights of the appellant before assessing the rights of the child as an exception. If this were to occur, it is only a small step to grant the child's rights priority therein. As will be developed in the following Chapter, although Choudhry and Fenwick provide passing reference to the paramountcy principle's application as a 'rule', they do not develop this in order to protect their own model of litigation from such judicial interpretation.

As Chapter Five will argue, a juristic understanding of principles ensures that the judiciary continue to balance substantive article 8(1) Convention rights against each other on a presumptively equal footing. This is because principles possess many of the characteristics that Fenwick seeks to endow upon article 8(1) rights under the parallel analysis. For example, principles do not necessitate automatic legal consequences and instead enjoy an element of weight that permits balancing to resolve conflict. It is argued that a closer focus on the term 'principle', as opposed to the adjective (primary), allows for robust rights protection in ensuring continued application of the 'ultimate balancing exercise'.

Lack of Structured Guidance when Applying the Parallel Analysis

The danger of the family judiciary simply applying the orthodox model of the paramountcy principle arises because Choudhry and Fenwick do not provide enough guidance to judges in applying their new model of litigation. Their model is an important thought-experiment but lacks an appreciation of how it could be applied in practice. As a result, it is argued that Choudhry and Fenwick's 'primary principle' fails to deliver the structured discretion this thesis seeks to deliver. Choudhry and Fenwick provide only limited discussion of how section 3 HRA would actually be used by appellate courts to reinterpret section 1(1) CA. Instead, they merely reference how section 1(1) CA would 'undergo re-definition' but this need not be radical and would result in use of the term 'primary'.[124] They argue this would accord more closely with the position of the ECtHR and obviate the need for a section 4 Declaration of Incompatibility.

[124] Choudhry and Fenwick, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act', (n1) 480

Whilst, in an academic response to Convention-non-compliance, this grants a full account of actions an appellate court must take, in reality, it is difficult to envisage a judge undertaking this interpretive process in full. Even without discussing the constitutional appropriateness of reinterpretation via recourse to section 3 HRA, Choudhry and Fenwick do not provide an adequate framework out of which an appellate court would reinterpreted section 1(1) CA and, therefore, this thesis argues their works utility in actioning such reform is limited.

Furthermore, this lack of guidance is amplified by the complexity of the process judges are expected to undertake. As has been shown throughout this thesis, section 8 CA order hearings can involve multiple parties each with conflicting claims. The scenario adopted in this thesis saw a judge undertaking a tri-partite analysis. In many section 8 CA applications there may be more parties to the litigation. This would force an already time-pressured family judge to identify every article 8(1) right before applying an article 8(2) balancing exercise to each. This thesis argues that it is unrealistic to expect lower level family judges to undertake this cumbersome process.

Indeed, such a criticism recognises that implementation of the primary principle is subject to individual judges in litigation and they will apply their own conceptions of what the primary principle demands. Even if Choudhry and Fenwick's model were to be adopted by appellate courts, this would simply result in the House of Lords stating that the paramountcy principle is to be reinterpreted as the primary principle and its application requires a model of litigation akin to that in *Re S.* In realistic terms, for a divisional family court, this will take time to filter into judicial reasoning and likely have little to no effect on the manner in which immediate section 8 litigation is conducted. This is because such a finding provides a judge with no structure as to how they are to conduct Convention-compliant litigation aside from the complex and time-consuming process required under the *Re S* model of litigation. The danger then becomes that, accounting for the nature of precedent in the family system, judges simply continue paying lip-service to Convention arguments and justify orders based on a simple welfare analysis. It is argued this is not an unrealistic assertion given the existing inconsistency in the weight attached to Convention-based submissions in the case-law.

Therefore, it is argued that a successful and realisable reinterpretation of the paramountcy principle must be mindful that, whilst academically achieving a compliant methodology is important, this must be *applied* by judges in litigation. Chapter Five of this thesis will attempt

to develop a simplistic and realisable model of Convention-compliant litigation that seeks to respond to the complexity and lack of structure in the original parallel analysis model of litigation.

Conclusions

This chapter has analysed the various reinterpretations of section 1(1) CA and found a deontological approach to be the most actionable Convention-compliant model of litigation. Such an interpretation, in the form of Choudhry and Fenwick's parallel analysis, requires the use of section 3 HRA to reinterpret the paramountcy principle as the primary principle. This reinterpretation seeks to *privilege* the child's rights as opposed to granting automatic priority as a matter of law. These rights are expressed through a child's welfare requirements. Such a model of judicial reasoning was then modelled on a contact dispute to evidence how judicial reasoning would occur when undertaking the 'ultimate balancing exercise'.

However, this thesis does not intend to accept Choudhry and Fenwick's account of the parallel analysis in totality. Instead, in the next Chapter, Dworkinian jurisprudence will be applied to the primary 'principle' to ensure judicial interpretation does not lapse into the language of rules. It is argued that the unique contribution of this thesis is twofold. Firstly, this thesis provides a contemporary account of the relevant jurisprudence in terms of applying rights-based language to contact disputes. This has evidenced an increased willingness to frame section 8 orders in terms of rights but a questionable application of the Strasbourg case-law. This highlights the second unique contribution of this thesis which is the re-evaluation of the parallel analysis in light of the jurisprudence of Ronald Dworkin. This provides Fenwick's theory with both an understanding of the term 'primary' and 'principle' that is so crucial in determining its interpretation. This thesis argues that a well-informed understanding of judicial discretion, as evidenced in Chapter One, will assist when thinking about how to apply Choudhry and Fenwick's primary principle to litigation.

Chapter Five

Developing the Parallel Analysis in Light of the Theoretical Distinction Between Rules and Principles

Having adopted Choudhry and Fenwick's reinterpretation of section 1(1) CA as a basis for achieving compliance with demands in a post-HRA legal framework, this thesis will now look to develop the parallel analysis through a focus on analytical jurisprudence. Choudhry and Fenwick's proposals provide a valuable starting point in terms of identifying a Convention-compliant methodology for the separation, identification and balancing of conflicting article 8(1) rights in child law disputes. However, it is the purpose of this Chapter to re-evaluate the parallel analysis using the theoretical lens outlined in Chapter One to create a structured model of judicial discretion in section 8 CA applications.

Central to this is appreciation of the two critiques advanced in this thesis. These are the application of the paramountcy principle as a Dworkinian-stye rule and domestic non-compliance with obligations under the ECHR. This Chapter will connect these two criticisms by arguing a rule-like application of the paramountcy principle prevents domestic Convention-compliance because, logically and when conceptualised through theoretical jurisprudence, a rule cannot be balanced given it applies in an all-or-nothing fashion.[1] As has been suggested, Choudhry and Fenwick fail to engage directly with this and instead focus solely on reinterpreting 'paramountcy' as 'primary'.

This Chapter endeavours to justify reimagining Choudhry and Fenwick's proposals to create a more coherently structured model of judicial discretion. It is argued that, through a closer focus on the nature of a legal principle, the complexities of the *Re S* model of litigation can be simplified and applied in everyday children's litigation. This Chapter will critique the parallel analysis and conclude that, whilst its use by the judiciary is preferable, realistically, it is unlikely to be followed in lower level family courts. Instead, a basic understanding surrounding the nature of legal principles will automatically lead a judge towards the language of article 8(2) in that, owing to the element of weight a principle enjoys, they require balancing. Whilst

[1] Ronald Dworkin, *Taking Rights Seriously*, (8th edition, Bloomsbury, 2018) 41

this by no means attempts to prevent courts from undertaking the parallel analysis, it seeks to provide a simplistic means of moving lower courts *towards* a Convention-compliant model of reasoning in private family litigation.

Connecting the Taxonomical Critique with ECHR Non-Compliance

This thesis has focussed on two of the main criticisms surrounding application of the paramountcy principle. This section will now briefly review each of these criticisms before assessing the connection between the two and how they relate to the proposed thesis.

Chapter Two of this thesis identified a previously unexplored critique concerning application of the paramountcy principle. Analysis of the domestic case-law was preceded by discussion of the Law Commission documents leading to the adoption of the Children Act 1989. These documents evidenced clear confusion as to the taxonomic status of section 1(1) CA in domestic law. Therefore, even before adoption of the legislation and subsequent application by the courts, Chapter Two concluded that there existed uncertainty as to the precise status of section 1(1) CA which, invariably, affected its application in practice. Such confusion was further evidenced through analysis of both the historical and contemporary case law. Here, *J v C* forms the orthodox approach to the paramountcy principle.[2] Given the recent paucity of academic commentary, Chapter Two contained a detailed analysis the paramountcy principle's application. Recent cases such as *Re H,*[3] evidence the continued application of the *J v C* approach as the comprehensive test to be applied in private law litigation concerning children.

This application of the paramountcy principle was then analysed through the lens of Dworkinian jurisprudence with a focus on the distinction between rules and principles. The prevailing application was found to link closely to the characteristics of a legal rule. This was because, once a case falls in the ambit of section 1(1) CA, a judge possesses no scope for balancing a child's interests against those of other litigants. From a Dworkinian perspective this would seem to suggest that, even today, the paramountcy principle is applied in an all or nothing fashion.[4]

[2] *J v C* [1970] AC 668, 388
[3] *PA v TT, H (A child by way of 16.4 Children's Guardian)* [2019] EWHC 2723
[4] Dworkin (n1) 41

In addition to this previously unexplored criticism, Chapter Three analysed domestic non-compliance with demands under article 8 ECHR. Following analysis of the *Johansen* line of case-law, this thesis concluded that, at the very least, the ECtHR demands that the interests of all parties be independently assessed and weighed against each other under an article 8(2) balancing exercise.[5] It is only in that article 8(2) exercise than any privileged status can be attributed to the interests of the child. This is the position in spite of the recent developments in *Yousef* which were found to form a mere 'aberration' on the court's previously well-established approach.[6]

This was contrasted with the domestic position on Convention-compliance and this was divided into two composite branches. Firstly, as per the House of Lords in *Re B,* judges have presumed divining the best interests of the child, by use of section 1(3) CA, satisfies requirements under article 8(2) ECHR given this forms factually the same process that is undertaken in cases concerning Convention rights.[7] Secondly, judges have treated the interests of the child as an automatic justification under article 8(2) as a matter of law. This finds expression in *Payne* and holds that a factual assessment of the case is unnecessary because the interests of the child will inevitably outweigh those of the parents.[8] Both of these approaches were found to premised on a misunderstanding of the Strasbourg jurisprudence.

Turning to domestic application of the paramountcy principle, contemporary case-law points to the overall rejection of a rights-based discourse in cases falling in the ambit of section 1(1) CA. This is evidenced in the dicta of Mr Justice Keehan in *Re O*: 'The test is, and must always be, based on a comprehensive analysis of the child's welfare'.[9] Such dicta was taken as the basis for characterising the application of section 1(1) CA as rule-like in nature. Whilst it is too far to suggest the Family Division have adopted a deontological approach to litigation, this thesis concluded that the language of rights was beginning to permeate some section 8 CA judgments. Whilst references to rights were largely cursory comments such as: 'In addition to those statutory provisions the court must have *regard to* the article 8 rights of both parents and of G',[10] the jurisprudence seems to suggest that certain judges are more receptive to rights-

[5] *Johansen v Norway (application no. 17383/90)* [1997] 23 E.H.R.R. 33
[6] Shazia Choudhry, 'The adoption and Children Act 2002, the welfare principle and the Human Rights Act 1998- a missed opportunity?' (2003) 15 CFLQ 119
[7] *Re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL 70 [31]
[8] *Payne v Payne* [2001] EWCA Civ 166
[9] *Re L (a Child)* [2019] EWHC 867 (Fam)
[10] *Re G (A child: Intractable Contact)* [2019] EWHC 2984 (Fam) (emphasis added)

based arguments than others. However, as shown above, the overall picture is one of family judges applying a rule-like model of the paramountcy principle that still refers to interests as opposed to rights. Therefore, reference to rights was taken as an indication of judicial personality as opposed to a change in mindset.

This rejection of a rights-based approach has been further noted in domestic reports on implementation of the UNCRC. As has already been noted, article 3(1) states that a child's interests shall be the primary consideration in all actions concerning them. Given the UK operates under a dualist system, Parliament must incorporate the UNCRC for it to have any binding legal affect. At the moment, it has not done so.[11] As such, Taylor described the current welfare-centric model as 'falling far short' of the requirements in article 3(1) UNCRC.[12] This has been noted and criticised in a 2015 JCHR report into UNCRC compliance in the UK.[13] As such, it is clear that both domestic courts and Parliament have rejected a move towards a rights-based model of litigating disputes involving children's interests.

The connection between this rejection and domestic non-compliance is clear if seen through the Dworkinian distinction between a rule and principle. A rule applies in an all or nothing fashion; for example a Baseball player is out after three strikes. Such a rule cannot be balanced against other considerations, outside of those specified in the rule itself, and either applies or is set aside.[14] In contrast, a principle suggests a direction but does not necessitate a course of action as a result of its application.[15] When applied, principles will conflict with other principles and can be said to enjoy an element of weight in that they must be balanced in the resolution of any given situation.

Therefore, given this thesis has established application of the paramountcy principle as rule-like, it is clear why judges cannot conduct an article 8(2) balancing exercise under the current application of section 1(1) CA. This is because rules cannot be balanced in application. If a rule applies, it determines a specific outcome. If that outcome is not reached, the rule is not binding and set aside. Therefore, if the application of the paramountcy principle dictates that

[11] Note, some devolved assemblies have given effect to the language of section 3(1) UNCRC. See Rachel Taylor, 'Putting Children First? Children's interests as a primary consideration in public law', (2016) 28 CFLQ 49
[12] ibid 51
[13] Joint Committee on Human Rights, '*The UK's compliance with the UNCRC',* HC, 1016 (2015).
[14] Dworkin, (n1) 41
[15] ibid

the best interests of the child are determinative then, by definition, these interests cannot be balanced against any other rights . It is in this sense that uncertainty surrounding the terminology employed by the Law Commission assumes significance in the context of this thesis. If the provision within section 1(1) CA is termed the paramountcy rule then Convention-compliance, premised on the balancing of rights, becomes impossible. If termed the paramountcy principle, Convention-compliance becomes possible depending on the correct judicial application of a legal principle.

Therefore, by connecting the taxonomy of the term principle to non-compliance with demands under the ECHR, this thesis can justify the use of a theoretical lens through which to develop the proposals of Choudhry and Fenwick. It is by connecting these two criticisms that this thesis can fully highlight the shortfalls of the parallel analysis. It is argued that, regardless of how paramountcy is reinterpreted, ignoring application of the term 'principle' undermines any Convention-compliance reinterpretation may purport to achieve. It is only by combining the practical aspects of the term 'primary' with theoretical considerations inherent in the term 'principle' that a full account of domestic Convention-compliance can be established.

Adapting the Parallel Analysis

Given this thesis has established a logical connection between the taxonomical critique and ECHR non-compliance, it can now confront adapting Choudhry and Fenwick's parallel analysis. In doing so, this thesis remains mindful of the fact that any reinterpretation must be applied by judges. Therefore, whilst maintaining a commitment to establishing a Convention-compliant methodology, this thesis is cognisant of the realities of litigation and the fact that judges are unlikely to exhaustively apply the *Re S* model of reasoning. Therefore, in order to construct a realisable model of the primary principle, extensive guidance is required to structure the judicial discretion in both the application of section 1(1) CA and subsequent jurisprudence concerning the balancing of rights.

This Chapter will now outline a modified construction of the parallel analysis that places emphasis on a juristic interpretation of a legal principle. Such an approach would involve a judge identifying composite article 8(1) rights on a presumptively equal footing before undertaking a cumulative balancing exercise that begins with the article 8(1) rights of the child.

In this sense, the welfare of the child is the 'primary' consideration in a wider framework that recognises the rights of other litigants.

Judicial Understanding of Legal Principles

It is important to re-emphasise that this thesis does not seek to challenge reinterpretation of paramountcy as the 'primary principle'. This reinterpretation is an important step towards preventing the automatic prioritisation of children's welfare. Instead, in order to develop the Convention-compliant nature of the parallel analysis, domestic judges should be instilled with a juristic understanding of the divergence between applying a legal rule and principle. Judicial understanding need only form a working knowledge. What a judge must comprehend, following this thesis' taxonomic critique, is how principles are balanced against other each other to *indicate* a particular legal result. This gives rise to the balancing of rights in a structured model of judicial discretion.

Under this thesis' re-development of the parallel analysis judges must appreciate why section 1(1) CA requires reinterpretation under section 3 HRA. For Choudhry and Fenwick, reinterpretation was necessitated as a result of domestic case-law failing to satisfy requirements under article 8(2) ECHR. This thesis has developed that critique and argued that domestic non-compliance is, in turn, caused by the misapplication of the paramountcy principle as a rule. It is the latter statement that must now assume greater significance. Judges must appreciate that a legal principle enjoys an element of *weight.* This necessitates its balancing against other competing principles. Linguistically, a judge cannot then afford automatic priority to the interests of a child whilst applying a legal principle. It is the element of weight that will later be identified as ensuring that a fully theoretically-informed application of a legal principle mirrors the process required under article 8(2) ECHR.

This thesis argues that such an understanding can be modelled onto the issuing of a section 8 CA order to simplify the parallel analysis methodology. Through a full understanding of a principles weight, a judge is automatically drawn towards the language of article 8(2) and is, therefore, more likely to follow a process that is Convention-compliant. Such an argument seeks to respond to the reality of family litigation in non-appellate courts. If an appellate court were to carry out the full *Re S* methodology then this would evidently satisfy Convention-compliance but, as this thesis has discussed in the context of lower courts, this is not realisable.

With hindsight, it is clear that family courts have not adopted the deontological approach espoused by Choudhry and Fenwick and, given its complexity coupled with the reality of litigation, it is unlikely they will do so moving forward. What this thesis provides is a means of retaining a modified form of the parallel analysis that is actionable in everyday family litigation.

Simplifying the Re S Methodology

In developing the work of Choudhry and Fenwick, this thesis must first confront the meaning of what has previously been termed the 'privileging' of children's interests in the form of the 'primary principle'. In Choudhry and Fenwick's work, little exposition is provided surrounding how the 'primary principle' would operate in practice or how judges would apply the appropriate weighting to the rights it seeks to protect. In the redevelopment of this thesis, the welfare of the child is primary in that any article 8(2) analysis conducted by the courts must begin with consideration of the child. This will be analysed in greater depth but such provision is an important development of the parallel analysis in terms of judicial actionability.

Taking Herring's hypothetical scenario as an example, this thesis will now model how adaptation of the parallel analysis can produce a Convention-compliant model of litigation that is simplistic and easily applied in everyday family litigation. Under Choudhry and Fenwick's parallel analysis, a judge should begin by identifying the composite article 8(1) rights of each party. This step is not challenged in this thesis. In order to achieve Convention-compliance it is important to identify article 8(1) rights on a presumptively equal footing without attaching any automatic prioritisation. Additionally, a judge would also examine any features of the case that may weigh particularly on the strength of the Convention right. Neither of these exercises differ from the methodology provided in Chapter Four and apply equally to the article 8(1) rights of the resident mother and child.

In addition, it is argued that express recognition of the need to identify article 8(1) rights on a presumptively equal footing would have further benefits in defining the scope of article 8(1) rights. This thesis has already commented on the amorphous nature of article 8(1) and the rights it purports to protect. As has been discussed in Chapter Four, some argue that this incorporates

a right to contact with a child.[16] Others, sceptical of the Strasbourg support for this position, argue that the article 8(1) right merely protects the right to a meaningful relationship with a child. In having to identify article 8(1) rights on a regular basis, domestic courts would inevitably achieve clearer definition of domestic protections under article 8(1). This forces courts to confront the amorphous scope of the right and is a process numerous academics have called on since the advent of the HRA itself.[17]

The Cumulative Balancing Exercise under Article 8(2)

Following this, in this thesis' fictitious scenario, a judge would have identified the three composite article 8(1) rights and found conflict to exist between them. Under the parallel analysis as originally conceived, a Family judge would need to engage in a justificatory analysis for each litigants article 8(1) rights under article 8(2). This would then be repeated in a tri-partite justificatory evaluation. It is argued that this is time-consuming, complex and, given judges may not have an extensive academic grounding in the justificatory analysis required, a potentially easily confused process. It is the purpose of this Chapter to simplify this process.

Before this thesis introduces the utility of Dworkinian principles, it is pertinent to first outline how its reinterpretation of the parallel analysis would seek to operate in practice. Instead of a justificatory analysis applying to each individuals article 8(1) rights, this thesis argues that judges should undertake a cumulative article 8(2) analysis beginning with the rights of the child. In beginning with the rights of the child, a judge is reminded that their rights remain privileged in law under the 'primary principle'. However, as per the requirements in *Johansen,* these are still subject to a balancing exercise alongside the rights of mother and father in this scenario. This simplifies the analysis required under Choudhry and Fenwick's parallel analysis in that only one article 8(2) analysis need be conducted.

Importantly, these proposals are influenced by the attempts of Bainham and Herring to structure discretion in application of the paramountcy principle. In the identification of article 8(1) rights, this thesis adopts an oppositional approach to reinterpreting the paramountcy

[16] Jonathan Herring 'The Human Rights Act and the Welfare Principle- Conflicting or Complementary?' (1999) 223 CFLQ 1, 7
[17] Jane Fortin, 'The HRA's impact on litigation involving children and their families' (1999) 11 CFLQ 225

principle in that, like Bainham, the article 8(1) rights of the three litigants are identified as existing in conflict to each other.[18] If such a claim were left at that stage, then this thesis would be subject to the same criticisms as those made against Bainham's work as such a formulation provides no means for resolving conflict. However, in terms of merely identifying article 8(1) rights, viewing the rights in individualised terms is helpful in assessing the scope and strength of the right therein.

However, in providing a simplified model of the article 8(2) justificatory process, this thesis draws on the relational approaches to the paramountcy principle espoused by academics such as Herring and, later, Eekelaar.[19] In the parallel analysis, Choudhry and Fenwick envisaged a separate justificatory process applying to each individual article 8(1) right. This seems a similar oppositional approach to that adopted by Bainham in the identification of article 8(1) rights. Instead, this thesis argues that, in conducting a cumulative article 8(2) analysis, judges can draw on a relationship-based approach to allow broader assessment of the balancing exercise required in terms of the relationships between parties. This is a relational assessment judges will be used to making in routine findings of facts. Such a cumulative approach requires judges to look to the relationships between the parties when conducting the balancing exercise that begins with the primary rights of the child. This is significant because it prevents judges viewing rights in individualised terms under article 8(2) and, instead, focuses a judge towards the interdependency of the family unit.

Therefore, when faced with the three article 8(1) rights, the judge in this fictitious scenario would conduct a cumulative article 8(2) justificatory analysis. The judge would begin with the article 8(1) rights of the child, manifested in their welfare requirements, and balance these against the rights of other litigants. Here, the domestic judge would weigh the rights of the child against those of the parents, having regard to their nature and severity, before deciding whether an order is justified in that factual scenario. In the hypothetical situation, the child's right to enjoy a meaningful relationship with both parents, alongside their interest in avoiding contact with those who may harm them, would be balanced against the right of the father to a

[18] Andrew Bainham, 'Honour thy father and thy mother: Children's rights and Children's duties', in Gillian Douglas and L Sebba (eds), *Children's rights and traditional values,* (1st edition, Aldershot: Dartmouth, 1998) 211

[19] Herring (n13) and John Eekelaar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' (1994) 8 IJLF 42

relationship with his son and right of the mother to avoid contact with her abuser. Such a situation, with clashing interdependent rights, aligns itself closely with a relationship-based approach. In this sense, as per the requirements outlined in Chapter Three, the rights of the child are privileged in law whilst still subject to a factual enquiry before any order is issued. This forms a methodology that this thesis argues is much more practically realisable in everyday litigation and that provides a structured account of judicial discretion when applying the revised section 1(1) CA.

Realising the Primary Principle in the Domestic Legal Framework

One of the criticisms levelled against the work of Choudhry and Fenwick was that their reinterpretation of the paramountcy principle was an academic response to the critique they advanced. In terms of applying their reinterpretation to a domestic framework, they were content to allow judges to adapt the paramountcy principle through recourse to section 3 HRA and thus concluded that no statutory amendment was required in order to achieve compliance with demands under the ECHR. This thesis will now challenge these findings by arguing statutory amendment to section 1(1) CA is required to ensure judges engage with the process of identifying and balancing rights under article 8(2). Following such amendment, family judges could begin to develop a jurisprudence in terms of applying the primary principle in litigation. This provides for the structured discretion so important to the proper functioning of the primary principle.

Here, it is pertinent to address the continued role of welfare in this thesis' revised deontological approach. Importantly, this thesis does not advocate total abandonment of the welfare assessment in its revised model. In Choudhry and Fenwick's work, they envisaged the welfare of the child becoming primary. Therefore, a welfare assessment became implicitly relevant to the article 8(2) 'ultimate balancing exercise'. Here, competing interests, articulated as article 8(1) rights, could be balanced against each other with the welfare of the child becoming the primary consideration of the court. Therefore, the child's welfare was the means of expressing article 8(1) rights.

In contrast, this thesis will examine welfare, and explicitly rights, at both the article 8(1) and 8(2) stages. This is through a statutory provision stating that exploration of a child's welfare

shall encompass recognition of their rights. Therefore, the link between welfare and rights is made explicit. It is through framing litigation around competing article 8(1) claims, that the 'primary principle' allows litigants to ventilate ECHR-based claims. Given this forms a deontological model of litigation, the traditional welfare assessment will be undertaken as a means of examining the article 8(1) rights of the child. It is in this sense that thesis is able to bridge the gap between welfarism and rights through creating an almost 'hybridised' model of litigation. As will be suggested, this allows domestic courts to retain the traditional welfare analysis they are so used to undertaking whilst framing that process in a Convention-compliant manner.

Statutory Amendment to Section 1(1) CA

When this thesis critiques the work of Choudhry and Fenwick, it is mindful of the legal background against which it was written. Their reinterpretation of the paramountcy principle was proffered shortly after the House of Lords handed down judgment in *Ghaidan v Godin Mendoza* in which it identified the 'unusual and far-reaching' powers granted to the court by virtue of section 3 HRA.[20] It is unsurprising, therefore, that Choudhry and Fenwick chose judicial reinterpretation via section 3 HRA as the means by which to realise the primary principle and parallel analysis methodology.

It is argued that, in order to realise the modified parallel analysis presented in this thesis, recourse to section 3 HRA is unappealing. This is not necessarily because such a reinterpretation would 'go against the grain' of the legislation, although such reinterpretation would require an undoubtedly bold judge, but more that appellate courts have refused to use section 3 in this activist manner in recent years. This was discussed in Chapter Four of this thesis and the domestic position now seems one in which a court is more likely to show 'caution and defence' as opposed to an expansive approach to reinterpreting non-compliant legislation.[21] There are further questions of efficiency surrounding invocation of the section 3 interpretive obligation. If an appellate court were to remedy non-compliance, given the loose system of precedent in often fact-specific and discretionary family law adjudication, there would be uncertainty as to whether lower level family judges would either realise the

[20] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [30]
[21] Adam Wagner and Gideon Barth, 'Judicial interpretation or Judicial vandalism" Section 3 of the HRA 1998', (2016) 21 JR 99

significance of reinterpretation or implement it. Here, analysis of judgments in lower courts evidenced how some judges still refuse to engage with rights in a post-HRA legal system and continue to behave as though advent of the HRA makes no difference to the way in which cases are litigated. Instead, Government intervention, and the consequential media and public attention, would ensure that lower level divisional judges are clearly aware of the changes in practice and the importance of implementation therein.

This thesis argues that a section 4 HRA Declaration of Incompatibility is required in relation to section 1(1) CA. Such a declaration has the constitutional effect of alerting the legislature as to the non-compliant nature of the legislation and then placing an onus on Parliament to remedy this. Importantly, Parliament is not mandated to act in curing the inconsistency. Whilst the constitutional impact of a section 4 declaration lies outside the scope of this thesis, it is nevertheless normal practice for Parliament to respond by bringing forward compliant legislation and there is recent precedent for such. For example, in 2018, the Supreme Court issued a declaration of incompatibility in relation to section 1 and section 3 of the Civil Partnership Act 2004 containing a ban on opposite-sex civil partnerships.[22] This was found to breach article 8, taken alongside article 14 ECHR, and, as a result of the section 4 declaration, the Government has recently brought forward primary and secondary legislation to remedy non-compliance.[23] It is argued that such a process, given its recent success in achieving legislative reform, is a better and more precise means of effecting reinterpretation and creating a system of structured discretion in the reinterpreted section 1(1) CA.

In advocating for statutory amendment, this thesis argues that any reinterpretation to section 1(1) CA must outline the process judges are to follow in both identifying and balancing the rights of parent and child. Without such explanation, courts may simply revert to interpretation akin to application of section 1(2A) CA in that introduction of the presumption does not affect the nature of the paramountcy principle's application to litigation concerning children. Therefore, statutory amendment to section 1(1) CA should take the following form:

[22] *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development* [2018] UKSC 32
[23] See s2(1) Civil Partnership, Marriages and Deaths (Registration etc) Act 2019

Section 1 Welfare of the child

1(1) When a court determines any question with respect to-

(a) The upbringing of a child; or

(b) The administration of a child's property or the application of any income arising from it

The welfare of the child shall be the court's primary consideration and such determination shall encompass full recognition of their rights.

1(1A) When a court is determining any question under section 1, the court must both identify and balance the relevant individual rights of all parties to the litigation.

It is argued that such amendment meets the key aims outlined in this thesis. Notably, this amendment achieves the hybridisation of welfare and rights central to this thesis' argument. This is realised by section 1(1) CA referring to the welfare of the child and this sitting alongside section 1(1A) which directs domestic courts to identify and balance article 8(1) rights in litigation. This combined welfare and deontological approach is significant in that, in light of any statutory reform requiring a 'sea change' in judicial consciousness being unrealisable, this thesis seeks to give effect to a pragmatic model of litigation. Therefore, the revised section 1(1) CA allows a litigant to ventilate rights-based claims whilst retaining focus on the privileged nature of the child's welfare requirements. It is in this sense that the amended section 1(1) CA balances a deontological approach with the existing welfare framework in a manner that structures judicial application of the primary principle. This further prevents any judicial reference to rights being the product of mere judicial personality.

Whilst this reinterpretation of Choudhry and Fenwick's work may not achieve the degree of ECHR-compliance that they believed desirable, it is argued that this methodology provides a manageable process for judges to undertake in litigation. It is in this sense that the reinterpreted section 1(1) CA takes courts *towards* Convention-compliance and provides the basis for further judicial interpretation to bolster the deontological approach it fosters. Indeed, this thesis does not suggest any further structuring of the discretion here aside from the explanatory notes accompanying the revised section 1(1) CA. These would include discussion of why the amendment was made and references to the identification and balancing exercises required

under a Convention-compliant model of litigation.[24] It is argued that judges must undertake the process of further structuring application of section 1(1A) CA through developing a jurisprudence pertaining to the balancing of rights under article 8(2). Such a process is termed 'rule building discretion'. Given the guidance provided by the ECtHR, taken alongside obligations under section 6 HRA and the explanatory notes to section 1(1A) CA, family judges have clear authority for the process required in domestic litigation under article 8(2) ECHR.

Incidentally, such statutory amendment would provide further benefits outside of the Convention-compliant focus adopted by this thesis. In Chapter Two, further criticisms surrounding the application of the paramountcy principle were found to include a lack of transparency, in that parents aligned their own interests with those of the child, and a failure to robustly protect the interests of children. The reinterpretation proposed in this thesis achieves broader improvement of section 1(1) CA in that it prevents the paramountcy principle acting as a smokescreen for protecting the interests of parties other than the child. In courts following the process outlined in section 1(1A), the rights of all litigants are independently identified on a presumptively equal footing. It, therefore, becomes impossible for one party to align their own rights with the child given the oppositional approach adopted. Furthermore, the welfare of the child receives robust protection in that a court is mandated to begin the article 8(2) balancing exercise with the rights of the child. This reaffirms the protections owed to children whilst also acknowledges that their welfare *may* override the rights of the parents dependant on a factual assessment of the case.

Furthermore, statutory amendment has the benefit of moving domestic practice closer to a position that is compliant with demands under the UNCRC. If references to section 3(1) UNCRC are made within the now amended explanatory notes to section 1(1) CA, it is argued judges would begin to engage more actively with developing a practice that is compliant with international law. This, inevitably, would bring consistency to domestic and international practice and go some way to incorporating international child law standards into domestic law.

[24] This would necessarily include references to case law of the Strasbourg Court as analysed in Chapter Three of this thesis.

Subsequent Judicial Development of the Primary Principle

Numerous alternative descriptive accounts of judicial discretion have been discussed in order to evidence its pervasiveness and necessity in the domestic legal system. Following statutory amendment to section 1(1) CA, domestic judges would be granted an element of 'rule-building discretion' to develop a jurisprudence that interprets and applies the revised primary principle. Rule-building discretion occurs when a legislature could have provided exhaustive guidance surrounding the application of a statutory provision but, instead, grants courts a degree of discretion in building a body of case-law. This allows judges flexibility in applying certain provisions to novel scenarios and permits judicial development to achieve greater clarity for its invocation in lower level courts. Chapter One modelled this on section 1(3) CA which imports a degree of discretion in the weight afforded to certain subsections therein; for example granting more weight to the wishes and feelings of the child depending on their age. Importantly, the characterisation of this type of discretion as 'rule building' could import a degree of confusion given this thesis' emphasis on legal principles. Therefore, for clarity, this type of discretion will now be termed 'principle building' discretion.

This thesis argues that such an approach is suited to the development of jurisprudence pertaining to the revised section 1(1) CA. Given that one of the criticisms frequently levelled at the operation of the paramountcy principle is the seeming lack of structure in its application, the revised section 1(1A) CA is appealing in that it creates a clearly structured process for judges to undertake that can be developed in light of any changing requirements at Strasbourg level. Instead of exhaustively spelling out requirements under the balancing exercise, it is argued that permitting the development of a jurisprudence, in light of the section 2 HRA obligations, permits judges to further strengthen the Convention-compliant nature of section 1 CA if appellate courts feel this is necessary. Realistically, this is a process that must be left to the domestic judiciary given both the nature of family litigation and historic hostility to deontological approaches.

Therefore, the amended section 1(1A) CA provides a starting point that is consistent with the approach adopted under the UNCRC. Furthermore, the amended legislation cures the incompatibility identified by the section 4 HRA declaration and is, therefore, broadly consistent with the requirements outlined under article 8(2) by the Strasbourg court in *Johansen.* From this starting point, equipped with a degree of principle building discretion, family judges can

begin to build a Convention-compliant jurisprudence that adopts a deontological focus and balances the rights of parent and child in a cumulative exercise under article 8(2) ECHR.

Why is this Development Necessary?

Under such a model, the interpretive process a judge must follow is clear. This thesis argues that, by adopting a modified form of the parallel analysis, family courts would no longer produce confusing dicta such as that evidenced in Chapter Two. With section 1(1) CA now spelling out the methodology judges must undertake, the inherent tension between welfarism and deontology should no longer be evident in section 8 CA judgments. For example, the comments of His Honour Judge Bellamy in *Re G* would not be possible under a reinterpreted section 1(1A) CA. In *Re G* he stated: 'In addition to those statutory provisions the court must have regard to the article 8 rights of both parents and of G and must endeavour to arrive at an outcome that is both proportionate *and* in G's best interests'.[25] Such comments were identified as creating an uneasy hybridisation of welfarism and rights that did not sit comfortably in the existing statutory framework. However, comments such as these would not be made under the revised section 1(1) CA given that the welfare of the child is now a primary consideration in a rights-based article 8(2) justificatory exercise. In that sense, given this provision achieves a coherent hybridisation between welfare and rights in that the proportionality exercise and primary principle are not separate enquiries but form part of one Convention-compliant methodology.

Here, it is pertinent to contrast the dicta of Mr. Justice Keehan with requirements under the revised model of Convention-compliant litigation. In *Re H*, he asserted the centrality of section 1(1) CA in dictating the order he could grant.[26] However, Mr Justice Keehan then proceeded to state that 'I am satisfied that this order is a necessary and proportionate response to the situation'.[27] Chapter Two critiqued this as a mere throw-away comment to achieve Convention-compliance and that, given the first statement concerning the automatic centrality of the child's best interests, a proper article 8(2) balancing exercise cannot have been undertaken. This, again, evidenced the incoherent hybridisation of welfare and rights in the existing judicial framework.

[25] *Re G (A child: Intractable Contact)* (n10) [32] (emphasis added)
[26] *PA v TT, H (A Child by way of 16.4 Children's Guardian)* [2019] EWHC 2723 [34]
[27] ibid

Under a revised model of the parallel analysis, the first statement pertaining to the centrality of welfarism would not appear given the best interests of the child no longer automatically dictate the making, varying or discharging of an order. Under the revised section 1(1A) CA, family courts would be forced to balance composite article 8(1) rights and, as a result, throwaway comments such as 'this is a necessary and proportionate response' would no longer appear in isolation. Such throwaway comments lead to a lack of transparency and allow judges to shielf behind a cursory nod to Convention-compliance. Under the streamlined reinterpretation of the parallel analysis, the smokescreen that was the paramountcy principle is removed and litigation becomes more transparent in that judges must identify the composite article 8(1) rights of litigants before subjecting these to a balancing exercise. This opens up judicial reasoning and serves to develop confidence in that both litigants and practioners can predict the process a judge will follow in determining a section 8 CA application.

As already stated, on a domestic level, family courts are not utilising a Convention-compliant methodology in litigation. Therefore, since the parallel analysis was conceived in a work written over fifteen years ago, it can now be concluded that its calls for a shift towards a deontological model of litigation have been rejected, or at least not adopted, by the Family judiciary. Whilst the reasons for this have been discussed in this thesis, it is clear that private litigation has not embraced requirements under the post-HRA legal framework in the manner that some areas of public litigation have. Here, as early as 2001, family judges emphasised the centrality of the justificatory exercise to care proceedings resulting in the finding that removal of a child at birth required almost 'extraordinary' circumstances to be established.[28] It is in this light that Harris-Short identifies the trend of public law cases accepting Convention-compliant practices in a line of cases in which Munby J (as then was) highlighted the change required in the judicial mind-set as a result of the HRA.[29] Whilst this applies irrespective of the public/private divide, this thesis has highlighted the relative ignorance of the domestic judiciary to the latter. Whether this be due to public litigation sitting more easily in the 'individual against the state' framework of the Convention or judges simply refusing to change approach in private

[28] *Re C and B (Care Order: Future Harm)* [2001] 1 FLR 611

[29] Sonia Harris-Short, 'Family law and the HRA 1998: Judicial restraint or revolution?' in Helen Fenwick, Gavin Philipson and Roger Masterman, *Judicial reasoning under the UK Human Rights Act*, (1st edition, CUP, 2007). These cases include: *ReG (Care: Challenge to Local Authority Decision)* [2003] EWHC 551 (Fam) and *Re L (Care Assessment: Fair Trial)* [2003] EWHC (Fam).

law hearings, it is clear the family judiciary have acted, and will continue to act, without proper regard to demands under a post-HRA framework. This thesis does not suggest that such an attitude is disingenuous and suggests that judges have acted like this in order to protect procedural simplicity in an under-resourced practice area.

The statutory reform advocated in this thesis responds to that reality. Whilst it is unrealistic to expect divisional family judges to fully comply with an *Re S* model of litigation, it is equally unreasonable to expect a judge to utilise a deontological approach to litigation simply out of an understanding of Dworkinian principles or Strasbourg jurisprudence. Instead, it is argued statutory amendment is required to begin the process of courts developing a Convention-compliant jurisprudence in interpreting the requirements under the new section 1(1) CA.

The Relevance of Legal Principles

Having established how this thesis' development of the parallel analysis would function in practice, it can now evidence how a working knowledge of Dworkinian legal theory can further develop judicial understanding of the process required under article 8(2) ECHR. In the process outlined above, it is argued that emphasis on the term principle takes a domestic judge closer to a position that is Convention-compliant than that evidenced in the contemporary case-law. Again, in the face of a family judiciary reluctant to engage with obligations in a post-HRA legal framework, any reinterpretation of section 1(1) CA may not achieve a fully Convention-compliant model of litigation. What this thesis intends to demonstrate is how an informed understanding of how a principle ought to operate in law can assist in moving the domestic judiciary towards a fully structured account of judicial discretion giving rise to a Convention-compliant domestic practice.

The Primary Principle Operating as a Dworkinian Principle

Starting with proper application of a legal principle, this thesis argues that adopting a Dworkinian lens illustrates how the primary principle *ought* to apply in litigation concerning children. Under Dworkin's theory, a principle enjoys an element of weight and, in the event of conflict with opposing principles, must be balanced by a judge in its application. In this sense,

invoking a legal principle cannot lead to an automatic legal consequence in the manner that applying a legal rule does.

In the proposals of this thesis, the primary principle operates as a Dworkinian legal principle in that its application indicates that the welfare of the child is privileged but this does not necessitate any particular automatic legal result. The extent of this privileging, alongside how this is applied to the factual matrix of the case, are a matter for further judicial interpretation. Therefore, the primary principle forms a legal principle that must be balanced against competing considerations in its application. These considerations would include the rights of other parties to litigation and provisions in the Children Act 1989 such as the no order principle.[30] In a judge only being *guided* by the principle, they are free to balance the welfare of the child against the rights of the adult in a manner that permits analysis of individual facts of a case. It is in this sense that Dworkinian legal theory serves as a useful lens for modelling operation of the reinterpreted parallel analysis.

It is further argued that recourse to theoretical jurisprudence prevents the lapse back to a rule-like application of the reinterpreted section 1(1) CA. As was evidenced in Chapter Two, criticism of the paramountcy principle focused not on its statutory construction *per se*, but on its application in the courts. In this light, this thesis offered a new criticism of the paramountcy principle based on a Dworkinian interpretation of its application as a rule. This thesis argues that the only way to rectify this misapplication is to provide for statutory amendment to the Children Act itself. In granting judicial discretion to develop a jurisprudence surrounding the reinterpreted primary principle there is a risk of reversion to equating the demands of the term principle to those of its previous rule-like application. This is where the Dworkinian lens applied in this thesis assumes important.

Here, when a judge applies a theoretically informed model of the primary principle they cannot automatically prioritise the rights of the child. On a purely linguistic level, the term 'primary' prevents this. However, focus on proper application of a legal principle acts as almost a secondary level of protection in that, if a judge was to interpret the primary principle without conducting any form of balancing exercise, this would form an error in law given they have

[30] S1(5) Children Act 1989

applied a rule and not a principle. As a matter of legal theory a judge cannot revert back to the previous orthodoxy and still be said to apply a principle.

It is in this light that this thesis argues that a proper theoretical understanding of legal principles takes judges *towards* a deontological and Convention-compliant model of litigation. Indeed, legal principles form an important part of Dworkin's focus on 'taking rights seriously' in that arguments of principle are utilised to establish individual rights when such rights are contested in litigation.[31] The objective of Dworkin's theory is to establish a means through which a court can give effect to pre-existing rights established in the context of that legal framework. In this sense, his theory is rights enhancing in nature. Such considerations, in particular the centrality of judicial deliberation, is reflected in the qualified nature of article 8 ECHR. Therefore, it is only via argumentation and judicial deliberation that a court can give effect to the article 8(1) right.

Principles as Part of a Judge's Weak Discretion

It is the objective of this Chapter to provide a structured account of weak judicial discretion pertaining to the reinterpreted primary principle. For Dworkin, judicial discretion formed a residual area permitting the application of rules and principles in a legal system.[32] This was described as structured discretion as a judge is provided with clear guidance in applying their discretion in relation to the individual facts of a case. Given the primary principle now operates as a Dworkinian principle ought, its application can form part of the process Dworkin termed 'discretion as interpretation'. To evidence how this thesis has developed a structured model of weak judicial discretion, the operation of the primary principle will now be applied to the process Dworkin envisaged a judge undertaking when applying legal principles.

If the negative model of judicial discretion is adopted, the judge is seen as occupying the area of discretionary judgement situated at the heart of the Dworkinian 'donut'. In this space, the judge interacts with the encircling ring of principles and rules to enforce pre-existing individual rights. In the context of section 8 CA hearings, one such principle to be applied is the 'primary principle'. This provides that the child's welfare is to be privileged but not prioritised.

[31] Dworkin, (n1) 113
[32] Robert Goodin, 'Welfare, rights and discretion', OJLS, 1986, Vol.6(2) 234

Therefore, when applying the revised primary principle, a judge is bound to first identify the competing article 8(1) rights of litigants before balancing these cumulatively beginning with the child.

However, a judge would also have to account competing principles such as obligations under section 6 HRA and the commitment to take account of ECtHR jurisprudence under section 2(1) HRA. This is alongside other principles in the Children Act 1989 such as the presumption in favour of continued parental involvement and no order principle contained in section 1(2A) and section 1(5) respectively. It is in this sense that the judge would be said to enjoy weak discretion as the order is governed by a statutory framework. Here, application of the primary principle is structured by the process outlined in the new section 1(1A) CA. Furthermore, any subsequent development of the principle, and process required under article 8(2), is structured by both the wording of the statutory provision, juristic understanding of the term principle and Strasbourg jurisprudence relating to the article 8(2) balancing exercise. Therefore, this thesis has structured the process a judge must undertake when applying section 1(1) CA in a manner that is statutorily realisable and achievable in practice.

The obvious response to this development of the parallel analysis is to simply argue that judges are no more likely to engage with a proper article 8(2) justificatory analysis than they are to apply legal principles in the Dworkinian sense. Therefore, some may critique the arguments advanced in this Chapter in the same manner in which this thesis has challenged the practicality of Choudhry and Fenwick's *Re S* methodology.

This thesis would respond by highlighting that it has not suggested that judges require an in-depth understanding of the complexities surrounding Dworkinian jurisprudence. Chapter One of this thesis included such an analysis because it provided an original critique surrounding application of section 1(1) CA. This is largely an academic point but it does have practical implications in that the interests of the child are automatically prioritised and thus, under such a formulation, domestic Convention-compliance cannot be achieved. Whilst such analysis was required to justify adoption of a Dworkinian lens to develop the parallel analysis, it is not particularly important whether judges understand Dworkin's theory of discretion as interpretation. This thesis argues that a judge should be mindful of the fact that, if they are applying a principle, logically it requires balancing against competing principles in the

interpretive process. It is argued that this does not require an unreasonable level of understanding from everyday family judges.

Evidently, the ultimate goal in achieving a Convention-compliant position is adoption of the parallel analysis model of litigation. However, noting that such a model would be adopted by individual judges this seems unrealistic given historic and ongoing hostility to ECHR-based arguments. Instead, a simplistic model of litigation that involves a cumulative article 8(2) exercise takes domestic judges further *towards* the adoption of a deontological approach to litigating section 8 CA order disputes whilst also achieving other incidental benefits.

Conclusions

This Chapter has summarised the previous findings of this thesis and applied them in a manner that develops and simplifies the parallel analysis model of litigation. Whilst it has been emphasised that such a methodology remains the ultimate goal, this thesis has confronted the reality that domestic judges are unlikely to implement such an approach when viewed through a practice-based lens. Instead, it has been argued that a simplified model of litigation would take Family Division judges *towards* a Convention-compliant position by necessitating the balancing of rights privileged by the primary principle. Such an approach seeks to theoretically prevent the automatic prioritisation of a child's welfare in law.

The amended model of the primary principle facilitates structured application of judicial discretion in that it provides clear guidance when undertaking the identification and balancing of rights in litigation concerning children. Returning to the theoretical lens provided in Chapter One, this mirrors a Dworkinian model of discretion as interpretation. This structuring refers to not only the application of the primary principle but also to the subsequent development of a jurisprudence concerning the balancing of rights required under article 8(2) ECHR. Whilst the cumulative article 8(2) exercise may not provide as thorough account of Convention-compliance as the *Re S* model of litigation, it is argued that this forms a more realisable model in practice that takes the domestic judiciary *towards* a compliant methodology for the resolution of section 8 CA hearings.

Conclusion: Moving Towards a Convention-Compliant Model of Litigation

The title of this thesis spoke of a reinterpreted model of section 1(1) CA moving domestic practice *towards* a Convention-compliant position. It has been the view of this thesis that, despite Choudhry and Fenwick's parallel analysis forming an academically sound model of Convention-compliant litigation, such a model is unrealisable in practice. This is because of the sea-change in approach it would necessitate for time pressured lower-level family judges sceptical of rights based submissions in litigation. Instead, this thesis has proposed a modest approach that serves to move domestic practice towards a position that is compliant with demands under the ECHR.

This thesis has advanced a reformulation of the paramountcy principle which draws upon three distinct strategies for reform. Firstly, the cumulative analysis was proposed as a viable alternative to Choudhry and Fenwick's complex proportionality exercise. This modified analysis is informed by a relationship-based approach and seeks to recognise both the interconnected nature of litigants rights and the reality of time-pressured family litigation. Secondly, this thesis proposed statutory reform to section 1(1) CA. This gave effect to a hybridised model of welfare and rights that privileges the welfare of the child in an article 8(2) balancing exercise. It is argued that, far from overhauling domestic practice, such reform constitutes a modest move towards a Convention-compliant position. Finally, Dworkinian jurisprudence was used as a means to highlight how the revised section 1(1) CA results in a system of discretion that structures judicial application of the primary principle. This refers to both interpreting demands under section 1(1A) CA and application of the principle in and of itself.

It is argued that the unique contributions of this thesis are two-fold. Firstly, Chapter Two updated the existing academic commentary on case-law surrounding application of the paramountcy principle to section 8 CA order applications. This found that, despite judges no longer explicitly citing *J v C,* it remains the authoritative interpretation of the paramountcy principle's application. This was despite a modest shift towards the language of rights and 'hybridisation' of a welfare and rights based approach to litigation. It is this hybridisation that the reformed section 1(1) CA seeks to give effect to in a theoretically coherent manner. This thesis then took the novel step of applying theoretical jurisprudence to taxonomically assess the application of the paramountcy 'principle' against the standards of a Dworkinian rule. It

concluded that, far from operating with an element of weight, the paramountcy principle has been applied as a rule. This thesis, therefore, applied traditional analytical jurisprudence to domestic family practice in a manner that previous academics have been wary of.

This taxonomic finding was then utilised to develop the parallel analysis of Choudhry and Fenwick by linking the paramountcy principle's rule-like application to non-compliance with demands under the ECHR. This allowed Chapter Five of this thesis to develop the parallel analysis in light of a Dworkinian critique of domestic law to create a system of discretion that structures both the application and subsequent development of the primary principle in domestic courts. It is argued that this creates a fuller theoretical account of the primary principle both academically and in terms of its application in family courts.

Whilst this redevelopment may not, *prima facie,* establish Convention-compliance to the extent that the original parallel analysis model achieved, it reflects the reality of everyday family litigation. In order for domestic courts to 'take rights seriously' in a manner envisaged in *Justice for Hedgehogs,* we require more than mere statutory amendments to the Children Act 1989. For a rights-based discourse to become properly embedded in domestic practice, a change in judicial mindset is required to a position more akin to public law litigation. Whilst this has not occurred, and in reality will not for some time, it is important that references to rights in private family litigation are based on more than mere judicial personality. Until a time is reached in which family courts are willing to properly reflect Strasbourg case-law and demands under the ECHR in private family litigation, academia must be realistic about the changes that can be achieved on the ground. It is a focus on the reality of the situation, as opposed to a scepticism, that drives the findings of this thesis. Whilst achieving complete Convention-compliance at a faster pace may appear desirable, incremental reform, driven by the Hedgehog's desire for well-reasoned and interconnected thought, will have to suffice.

Bibliography

Cases

Re A and B (Children: Restrictions on parental responsibility: Extremism and radicalisation in private law) [2016] EWFC

AB v CD, EF, GH, IJ [2018] EWHC 1590 (Fam)

Re A (Minors) (Residence Orders: Leave to Apply) [1992] Fam 182

R (on the application of Anderson) v Secretary of State for the Home Department [2002] UKHL 46

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions',[2001] UKHL 23

Re A (Permission to Remove Child from Jurisdiction: Human Rights) [2000] 2 FLR 225

In the matter of B (a child) [2012] EWCA Civ 632

Re B (a child) (residence order) [2009] UKSC 5

Re B (A Minor) (Adoption: Natural Parent) [2001] UKHL 70

C v C [1991] 1 FLR 223.

Re D (Care: Natural Parent Presumption) [1999] 1 FLR 134

Re D [1977] AC 602

Re E (Residence: Imposition of Conditions) [1997] 2 FLR 638

Elsholz v Germany (application No. 25735/94) [2002] 34 E.H.R.R. 58

Re E-R (a child) [2015] EWCA Civ 405

G v M [2019] WL 05624598

Re G (A Child) [2013] EWCA Civ 965

Re G (A child: Intractable Contact) [2019] EWHC 2984 (Fam)

Re G (Children) (Residence: Same-sex partner) [2006] 2 FLR 629

Goodwin v UK [2002] 35 E.H.R.R 18

Gorgulu v Germany (application No.74969/01) [2004] 1 FCR 410

Re H (Contact Order) (No.2) [2002] 1 FLR 22

Handyside v UK (1979-1980) 1 E.H.R.R. 737

Hokkanen v Finland (application No.19823/92) [1995] 19 E.H.R.R.

Hoppe v Germany (application No. 28422/95) [2001] 1 FLR 38

J v C [1970] AC 668

Johansen v Norway (application no. 17383/90) [1997] 23 E.H.R.R. 33

K v Finland (2001) 31 E.H.R.R 18

Kearns v France (application No.35991/04) [2010] 50 E.H.R.R. 04

Kopf v Austria (application no.30141/04) [2012] 1 WLUK 255

Re K [1977] Fam 179

Re KD (Minor) (Ward: Termination of Access) [1988] 1 All ER 577

L v Finland (application No. 25651/94) [2001] 31 E.H.R.R. 30

LA v M, ME, The children (Minors acting thorough their children's guardian) [2018] WL 04208000

LA v M, F, A, C (Minors acting through their Children's guardian) [2018] WL 04211878

Re L (a Child) [2019] EWHC 867 (Fam)

Re L (A child) (Contact: Domestic Violence) [2001] Fam 260

MK v CK [2011] EWCA Civ 793

NP v BR, T (Through her Guardian) [2019] EWHC 3854

Northamptonshire CC v AB, CD [2019] EWHC 1807 (Fam)

Olsson v Sweden (application no. 10465/83) [1992] ECHR 75

Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124

Re O and another (Minors) (Care: Preliminary Hearing) [2004] 1 AC 523

Ro v A local authority and others [2013] EWHC B31 (Fam)

Payne v Payne [2001] EWCA Civ 166

PA v TT, H (A child by way of 16.4 Children's Guardian) [2019] EWHC 2723

Re P (Contact: Supervision) [1996] 2 FLR 314

PM v CF [2018] EWHC 2658 (Fam)

Re R (Care: disclosure: Nature of proceedings) [2002] 1 FLR 755

Riggs v Palmer 115 N.Y 506 (1889)

Salgueiro da Silva Mouta v Portugal [2001] FCR 653

Schneider v Germany (application No.17080/07) [2012] 54 E.H.R.R. 12

Suss v Germany (application No. 40324/98) [2006] 1 FLR 522

TE v SH, S (By his guardian ad litem, the National Youth Advocacy Service), [2010] 2010 EWHC 192 (Fam)

TP and KM v UK (application No.28945/95) [2001] 2 FLR 54

Re W (Children) [2012] EWCA Civ 999

R (on the application of Williamson) v Secretary of State for Education and Employment [2005] UKHL 15

Yousef v The Netherlands (application No.33711/96) [2003] 36 E.H.R.R. 20

Zawadka v Poland (application No.48622/99) [2007] 44 E.H.R.R. 9

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4

Books

Austin J, *The province of jurisprudence determined* (2nd edition, CUP, 1995)

Aquinas T, '*On law, morality and politics'* (2nd edition, Hackett Publishing, 2002).

Bainham A, *Children the modern law,* (4th edition Jordan Publishing, 2013)

Barak A, *Judicial Discretion,* (1st edition, Yale University Press, 1989)

Berlin I, *The Hedgehog and the Fox: An essay on Tolstoy's view of History,* (2nd edition, Princeton University Press, 2013)

Beatson J, Duffy P and Grosz S, *The 1998 Act and the European Convention,* (1st edition, Sweet and Maxwell, 2000)

Bridgeman J, *Parental Responsibility, Young Children and Healthcare Law,* (1st edition, CUP, 2007)

Brix B, *Law, Language and Legal Determinacy,* (2nd edition, Clarendon Press, 1995)

Cretney S, *Family law in the twentieth century,* (1st edition, OUP, 2003)
--- *Principles of family law,* (Eight edition, Sweet and Maxwell, 2008)
---*'Essays for the new millennium',* (1st edition, Jordan publishing, 2000)

Culver K, Guidice M, *Legalities borders,* (1st edition, OUP, 2014)

Davis K, '*Discretionary justice: A preliminary Enquiry',* (1st edition, 1977, University of Illinois Press)

Dworkin R, *Justice for hedgehogs* (1st edition, Harvard Press, 2013)
---*Taking Rights Seriously,* (8th edition, Bloomsbury, 2018)
--- *The philosophy of Law,* (1st edition, OUP, 1977,)

Eekelaar J, *Family law issues, debates and policy,* (1st edition, Willian Publishing, 2001)
--- *Family and personal life,* (1st edition, OUP, 2006)

Fenwick H, Philipson G and Masterman R, '*Judicial reasoning under the UK Human Rights Act',* (1st edition, CUP, 2007)

Fenwick H, Philipson G, Williams A, *Text, cases and materials on public law and human rights,* (4th edition, OUP, 2015)

Ferguson L, 'An argument for treating children as a special case', in Elizabeth Brake and Lucinda Ferguson (eds) '*Philosophical foundations of Children's and family law',* (1st edition, 2018, OUP)

Finnis J, '*Natural law and Natural rights',* (2nd edition, OUP, 2011)

Follesdal A, Peters B and Ulfstein G, '*Constituting Europe, The ECtHR in a National, European and Global context',* (1st edition, CUP, 2013) 106

Fortin J, '*Children's rights and the developing law',* (3rd edition, CUP, 2012)

Fuller L, *The morality of law,* (1st edition, Yale University Print, 1964) 46

Galligan D, '*Discretionary Powers: A legal study of official discretion',* (1st edition, Clarendon Press,1968)

Gillian Douglas G and Sebba L (eds), '*Children's rights and traditional values',* (1st edition, Aldershot: Dartmouth, 1998)

Gilmore S and Glennon L, '*Hayes and Williams' Family Law',* (6th edition, 2018, OUP)

Gilmore S, Herring J and Probert R, '*Landmark cases in Family law',* (1st edition, Hart Publishing, 2011)

Hart H, *The Concept of Law,* (3rd edition, OUP, 2012)

Hawkins K, *The Uses of Discretion,* (1st edition, 1992, OUP)

Lowe N and Douglas G, *Bromley's Family Law,* (11th edition, 2015, OUP) 419

Macfarlane L, Sutherland E, *Implementing Article 3 of the UNCRC; Best Interests, Welfare and Well-Being,* (1st edition, CUP, 2016)

Matcher F, Macdonald R, Petzold H, '*The European system for the protection of Human Rights',* (1st edition, Brill, 1999)

Moeckli D, Shah S and Sivakumaran S, *International Human Rights Law,* (3rd edition, OUP, 2018)

Probert R and Harding M, *Cretney and Probert's family law,* (10th edition, Sweet and Maxwell, 2018)

Schutter O, *International Human Rights Law* (2nd edition, CUP, 2017)

Waluchow W, 'Mixed Blessings' in *A Common law theory of Judicial Review: The Living Tree,* (1st edition, CUP, 2006) 194

Articles

Bissell S, 'Overview and Implementation of the UN Convention on the Rights of the Child, (2006) 25 The Lancet 689

Bainham A, 'Can we protect children and their rights?' (2002) 279 FL 1
---'Is anything left of children's rights?' (2016) 24 IJCR 624

Bellamy R, 'Political constitutionalism and the Human Rights Act' (2011) 9 IJCL 86, 90

Blanchard J, 'Honesty in corporations' (1996) 14 CSLJ 10

Bonner D, Fenwick H and Harris-Short S, 'Judicial approaches to the HRA' (2003) 52 ICLQ 580

Bridge C, '*Human Rights- Zawadka v Poland (application No.48622/99)* [2007] 44 E.H.R.R. 9', (2005) 774 FL 436

Brozek B, 'Analogy in legal discourse' Archives for philosophy of law and social philosophy (1990) 94 APLSP

Choudhry S, 'The adoption and Children Act 2002, the welfare principle and the Human Rights Act 1998- a missed opportunity?' (2003) 15 CFLQ 119

Choudhry S and Fenwick H, 'Taking the rights of parents and children seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 OJLS 453, 458

Culver K, ‘Leaving the Hart-Dworkin debate’ (2001) 51 UTLJ 367

Dewar J, ‘The normal chaos of family law’ (1998) 61 MLR 467

Eekelaar J, ‘Beyond the Welfare Principle’ (1992) 237 CFLQ 1
---‘The interests of the child and the child’s wishes: the role of dynamic self-determinism’ (1994) 8 IJLF 42
Fortin, ‘Accommodating Children’s Rights in a post Human Rights Act Era’, (2006) 69 MLR 1
---‘The HRA’s impact on litigation involving children and their families’ (1999) 11 CFLQ 225
---‘Rights brought home for children’, MLR, 1999, Vol.62(3), 350

Goodin R, ‘Welfare, rights and discretion’ (1986) 6 OJLS 233

Greenawalt K, ‘Discretion and Judicial Decision: The quest for the fetters that bind judges’ (1975) 75 CLR 359

Parker S, ‘Rights and Utility in Anglo-Australian Family law’ (1992) 55 MLR 311

Herring J, ‘The Human Rights Act and the Welfare Principle- Conflicting or Complementary?’, (1999) 223 CFLQ 2
---‘Farewell Welfare?’, (2005) 27 JSWFL 159

Healy C, ‘Dispute resolution through collaborative practice: a comparative analysis’, (2015) 27 CFLQ 173

Herring J and Foster C, ‘Welfare means rationality, virtue and altruism’ (2012) 32 LS 480, 487

Herring J and Powell O, ‘The rise and fall of presumptions surrounding the welfare principle’ (2013) 43 FL 553

Kearns T, ‘Rules, Principles and the law’, (1973) 18 AJJ 118

Jennex D, ‘Dworkin and the doctrine of Judicial Discretion’ (1992) 14 DLJ 473

Kavanagh M, ‘Rewriting the legal family: Beyond exclusivity to a care-based standard’ (2004) 16 YLJF 83

Kilkelly U and Lundy L, ‘Children’s rights in action: using the UNCRC as an auditing tool’ (2006) 331 CFLQ
---‘Protecting children’s rights under the ECHR’, 2010, NILQ, Vol.61(3) 247

Mahoney J, ‘Objectivity, Interpretation and rights: A critique of Dworkin’, (2004) 23 LP, 2004 190

Marmor A, ‘Coherence, Holism and interpretation: The epistemic foundations of Dworkin’s legal theory’ (1991) 10 LP 383

Masterman R, ‘Section 2(1) of the HRA 1998: binding domestic courts to Strasbourg?’, PL, 2004, Win, 728

Murphy J, ‘Rules, responsibility and commitment to children: the new language of morality in family law’ (1999) 60 UPLR 1125

O’Mahony C, ‘Child protection and the ECHR’, 2019, ICJR, Vol.27, 662

Philipson G, ‘Transforming Breach of confidence? Towards a common law right of privacy under the Human Rights Act’ (2003) 66 MLR 726

Pocar F, ‘Some thoughts on the Universal Declaration of Human Rights and the ‘generations of rights’, (2015) 10 IHRLR 43

Post R, ‘The Management of Speech: Discretion and Rights’ (1984) Supreme Court Review 169

Prest C, ‘The right to respect for family life: obligations of the state in private law children cases’ (2005) 124 FL 100

Reece H, ‘The paramountcy principle: Consensus or Construct?’ (1996) 267 CLP 303

Rosenberg M, 'Judicial Discretion of the trial court, viewed from above' (1971) 3 SLR 638

Schneider C, 'The tension between rules and discretion in family law: a report and reflection' (1993) 27 FLQ 229

Sedley S, 'The rocks or the open Sea: Where is the Human Rights Act heading?' (2005) 32 JLS 3,9
Wagner A and Barth G, 'Judicial interpretation or Judicial vandalism" Section 3 of the HRA 1998' (2016) 21 JR 101

Taylor R, 'Putting Children First? Children's interests as a primary consideration in public law', (2016), 28, CFLQ, 49

Law Commission and Parliamentary Reports

Cleveland Report Inquiry into child abuse in Cleveland 1987 (1988) *Report of the inquiry into child abuse in Cleveland 1987* Cm 412 London:

Law Commission, '*Review of Child Law- Guardianship',* (Law Com No. 91, 1985),

Law Commission, '*Review of Child law- Custody',* (Law Com No.96, 1986),

Law Commission, '*Review of Child law- Care, supervision and interim orders',* (Law Com No.100, 1987)

Law Commission, '*Review of Child Law- Wards of Court',* (Law Com No.101, 1987)

Law Commission, '*Review of Child Law- Custody and Guardianship',* (Law Com No. 172, 1988)

Joint Committee on Human Rights, '*The UK's compliance with the UNCRC',* HC, 1016 (2015).

Hansard Records

HC Deb, 27th April 1989, Vol.151, col 1135

HL Deb, 6th December 1988, Vol.502, col 490

Statutory Law

Guardianship of Minors Act 1971

UN Convention on the Rights of the Child, United Nations, Treaty Series, Vol.1577,

Children Act 1989

Family Law Act 1996

Human Rights Act 1998

European Convention of Human Rights 1950

Online Resources

Ronald Dworkin on Justice for Hedgehogs, NYU School of Law
< https://www.youtube.com/watch?v=5UFVkRGViMc> accessed 27/6/2020

Tolson R, 'The welfare test and Human rights- where's the beef in the sacred cow?', < https://www.familylawweek.co.uk/site.aspx?i=ed307> accessed 6/4/2020

English R, ‘The adoption dilemma: the rights of parents v child’s interests’, <https://ukhumanrightsblog.com/2011/06/02/the-adoption-dilemma-the-rights-of-parents-v-childs-interests/> accessed 2/4/2020