



CHILDREN and the
EUROPEAN COURT
OF HUMAN RIGHTS

CLAIRE FENTON-GLYNN

OXFORD

Children and the European Court of Human Rights

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*To Nuala Mole and the AIRE Centre,
who have done so much to advance the rights of all people in Europe*

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Convention for the Protection of Human Rights and Fundamental Freedoms (Extracts)

Article 1 Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I Rights and freedoms

Article 2 Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term 'forced or compulsory labour' shall not include:

- a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- d. any work or service which forms part of normal civic obligations.

Article 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the

exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

PROTOCOL 1

Article 1 Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

1

Introduction

1.1 Introduction

The European Convention on Human Rights (ECHR) was not drafted with children, still less children's rights, in mind. At the time of drafting, the child rights movement was in its infancy, with children predominantly seen as objects of benevolence and recipients of special protection, rather than subjects holding individual legal rights.¹ Nevertheless, over the past 60 years the European Court of Human Rights (ECtHR) has developed a substantial and ever-growing body of case law concerning children, covering issues ranging from juvenile justice and physical integrity to immigration, education, and religion. Moreover, in the sphere of private and family life the Court has developed a 'whole code of family law',² significantly expanding the Convention's scope and influence.

The aim of this book is to provide a detailed overview of the jurisprudence of the Court in relation to children, from its humble and essentially paternalistic beginnings to its recent (though still evolving) recognition of children's individual agency. It is hoped that it will provide a foundation for academics, practitioners, and civil society to better understand the position of the Court in relation to children's rights, and be a helpful tool in advancing their protection under the Convention, both domestically and in Strasbourg.

1.2 Background to the European Convention on Human Rights

On 4 November 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature. Intended to reflect the 'common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy',³ the European Convention on Human Rights, as it came to be known, came into force three years later upon the tenth ratification.⁴

¹ See the 1924 League of Nations Geneva Declaration on the Rights of the Child, which included such 'rights' as the 'the right to be among the first to receive relief' and the 'right to understanding and love by parents and society'.

² *Marckx v Belgium* (6833/74) 13.06.1979, dissenting opinion of Judge Sir Gerald Fitzmaurice, para. 15.

³ M. Teitgen, 'Report on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights' (Consultative Assembly of the Council of Europe, 05.09.1949), para. 2.

⁴ By Denmark, Germany, Greece, Iceland, Ireland, Luxembourg, Norway, Saarland (which later became part of Germany), Sweden, and the United Kingdom.

The Convention was drafted in response to twin concerns on the part of the Allied Powers. First, in the aftermath of the Second World War, the instrument was intended to provide a ‘collective guarantee of essential freedoms and fundamental rights,’⁵ to ensure that such atrocities would never again occur. Second, and related to this, it was a response to the growing influence of communism in Central and Eastern Europe—a statement of values to represent a sense of common identity and to act as an early warning system should a state move towards authoritarianism.⁶ As Guido Raimondi, later President of the Court, stated, ‘an undemocratic state could not participate in the ECHR system: the protection of democracy goes hand in hand with the protection of rights.’⁷

The text of the Convention was based, ‘as far as possible,’ on the Universal Declaration of Human Rights,⁸ proclaimed by the newly formed United Nations two years earlier.⁹ It did not directly transpose the provisions of the Declaration, but instead chose those rights that the founding states viewed as most ‘fundamental,’ capable of inclusion in ‘an immediate international guarantee.’¹⁰ As a result, the Convention incorporates a tradition of civil liberties and is primarily focused on civil and political rights, which have conventionally been seen as more easily measurable and enforceable.¹¹

Notably, the provisions of the Universal Declaration which focus on children—for example, requiring the provision of special care and assistance—were not included. Children are mentioned only twice in the main text of the Convention. First, under Article 5(1)(d)—the right to liberty and security—an exception is permitted for the detention of a minor for the purpose of educational supervision or for bringing him or her before a legal authority. Second, Article 6(1)—the right to a fair trial—allows for the exclusion of the press or public from a trial where the interests of a juvenile so require. Two further provisions relating to children were added in subsequent Protocols to the Convention: Article 2 of Protocol 1, which protects the right to education, and of parents to educate their children in accordance with their philosophical and religious beliefs; and Article 5 of Protocol 7, which protects equality between spouses, with the exception that the state may take such measures ‘as are necessary in the interests of children.’¹²

⁵ M. Teitgen, ‘Report on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights’ (Consultative Assembly of the Council of Europe, 05.09.1949), para. 1.

⁶ S. Greer, ‘What’s Wrong with the European Convention on Human Rights?’ (2008) 30(3) *Human Rights Quarterly* 680, 681.

⁷ G. Raimondi, ‘Immunita Parlamentari e Diritti Umani’ (2016) 1 *Dritto Pubblico Europea Rassenga online* 2, 5.

⁸ (1948) GA Res 217A.

⁹ M. Teitgen, ‘Report on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights’ (Consultative Assembly of the Council of Europe, 05.09.1949), para. 1.

¹⁰ *ibid.*, para. 11.

¹¹ Although these have been interpreted by the Court to incorporate some social and economic dimensions, as is discussed in Chapter 7.

¹² This Article is not discussed further in this book, given the dearth of case law in this area. It has only been discussed by the Court on one occasion—the case of *Chepelev v Russia* (58077/00) 26.07.2007—in which the Court simply stated, in two sentences, that the measures taken were in accordance with the best interests of the child and that having regard to the assessment made under Article 8, there had been no violation of Article 5, Protocol 7. There have been further cases in which the Commission and Court have declared an application under this section inadmissible, but none in which it has been subject to any substantive examination.

The lack of consideration of children's rights in this respect is hardly surprising—it would take another 40 years before such rights were recognised on an international level. Nevertheless, it has meant that the majority of cases that protect the rights of children have in fact fallen under other, broader, *adult*-focused rights—for example, the right to respect for private and family life under Article 8. This has had an inevitable impact on the way in which children's rights have been conceptualised and enforced by the Court. The purpose of Article 8 is to insulate the family unit from outside interference, subjugating children within this private sphere. It has been a long, slow road for the Court to recognise children as their own autonomous beings with separate rights against the state—independent from, and sometimes in conflict with, their parents. This is still a work in progress, as can be seen throughout this volume, but it is at least now a journey the Court (mostly) recognises it is necessary to take.

1.3 The European Court of Human Rights

The success of the European Convention on Human Rights lies not in its provisions, which can be described as conservative rather than radical, but in its enforcement through the European Court of Human Rights. The intention of the drafters was to create an independent judicial body to act as a collective enforcement mechanism of guaranteed rights. This was expected to function primarily as an independent body to adjudicate inter-state complaints; however, provision was also made for individuals to bring a complaint, very much as a secondary apparatus.¹³ In reality, only approximately 20 inter-state cases have been brought before the Court in its 60-year history, in contrast to the hundreds of thousands brought by individuals.

It has been this right of individual petition which has distinguished the Convention from other human rights instruments. While today the right of an individual to challenge state practice is a central feature of a large number of regional and international human rights instruments (for example, the African Court on Human and People's Rights, the Inter-American Court of Human Rights, and the majority of United Nations (UN) treaty bodies)¹⁴ this was a significant innovation in 1950, and has been central to the success of the Convention. It has established human rights not solely as obligations between states—as in traditional international treaties—but as obligations towards individuals, facilitating the Convention's status as 'hard, enforceable law'.¹⁵

Initially, the supervisory function of the Convention was carried out by two bodies. The Commission, which acted as a filtering body, would first evaluate whether the

¹³ This was initially optional, but was a de facto requirement for membership of the Council of Europe for some time, before becoming mandatory in 1998, following the coming into force of Protocol 11.

¹⁴ Human Rights Committee; Committee on the Elimination of Discrimination against Women; Committee against Torture; Committee on the Elimination of Racial Discrimination; Committee on Enforced Disappearances; Committee on Economic, Social and Cultural Rights; Committee on the Rights of the Child. The individual complaint mechanism under the Committee on Migrant Workers has not yet entered into force.

¹⁵ Sir Humphrey Waldock (President of the Court), as quoted by E. Myjer, L. Berg, P. Kempees et al. (eds), *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Strasbourg: Council of Europe, 2010), 25.

petition was manifestly ill-founded or whether it should be permitted to proceed for judicial determination before the Court. Following the ratification of Protocol 11, the Commission was abolished, and in 1998 the Court was established as a full-time, permanent institution. Further changes were instituted in 2010 to deal with the significant increase in the Court's workload, allowing admissibility decisions to be made by a single judge,¹⁶ who can forward the case to a Chamber of the Court for further examination on the merits.¹⁷ In addition, following a Chamber judgment, the parties can request that a case be referred to the Grand Chamber for re-hearing—often incorrectly described as an 'appeal'. However, this will only be accepted in cases that are suitable for the development or clarification of the case law, in cases concerning 'new' issues or 'serious issues of general importance', or in 'high-profile cases' in which an authoritative judgment is required.¹⁸

In the first 30 years of its existence, the Court was a very minor player in the international arena—indeed, between 1960 and 1975 it only delivered 12 judgments on the merits. However, its workload has since grown exponentially, and over the past ten years has averaged over 50,000 applications and 1,000 judgments per year.¹⁹ In this way, and despite its regional nature, it has established itself as arguably the most influential international court in existence in terms of scope, impact, and jurisdiction.

1.4 Principles of interpretation

Throughout its 60-year history, the Court has developed a number of tools and principles to guide its interpretation of the Convention. In doing so, it must walk a fine line between judicial independence and political necessity. On the one hand, the Court must ensure that the Convention guarantees rights that are 'practical and effective', and not merely 'theoretical or illusory'.²⁰ On the other, it must recognise its role as a supranational body, which gains its legitimacy from the continued adherence and acquiescence of states.

There are four primary principles of interpretation used by the Court: positive obligations; the principle of subsidiarity; the margin of appreciation; and the 'living tree' principle. I provide a brief outline of each below, in order to give a background to the jurisprudence of the Court detailed in later chapters.

¹⁶ Although in cases of doubt, the judge can refer the application to a three-judge committee to decide on admissibility (Protocol 14, Article 7, amending Article 27 of the ECHR).

¹⁷ An exception to this is in cases where a decision can be made on the basis of well-established case law, in which case the judge can refer the case to a three-judge committee, which is empowered to make a decision on the merits (Protocol 14, Article 8, amending Article 28 of the ECHR).

¹⁸ The Grand Chamber will also accept referrals in cases that concern case-law consistency and cases in which it may be called upon to re-examine a development in the case law endorsed by the Chamber. (European Court of Human Rights, 'The General Practice Followed by the Panel of the Grand Chamber When Deciding on Requests for Referral in Accordance with Article 43 of the Convention' (Council of Europe, 2011), https://www.echr.coe.int/Documents/Note_GC_ENG.pdf)

¹⁹ European Court of Human Rights, 'Statistical Overview 1959–2018' (Council of Europe, 2019), https://www.echr.coe.int/Documents/Overview_19592018_ENG.pdf.

²⁰ See, for example, *Airey v Ireland* (6289/73) 09.10.1979.

1.4.1 Positive obligations

Traditionally, human rights law was considered as giving rise only to negative obligations—that is, individual freedoms that states must *refrain* from interfering with. However, the recognition of positive obligations—i.e. obligations requiring states to *take* action—has been one of the cornerstones of the Court's success.²¹ As Starmer has observed, '[i]n many respects, positive obligations are the hallmark of the European Convention on Human Rights'.²²

Positive obligations are not explicitly set out in the text of the Convention, which is largely framed in proscriptive, rather than prescriptive, language.²³ Rather, they have been carved out by the Court through purposive interpretation. In doing so, it has intentionally declined to establish a comprehensive account of the scope of positive obligations under the Convention, preferring instead to evaluate these on a case-by-case basis.²⁴ Nevertheless, there are certain broad principles that can be identified.

First, the doctrine of positive obligations involves a recognition that in order to 'secure' the Convention rights to all individuals within their jurisdictions—as is required under Article 1—it is not enough to refrain from acting, but states must also take certain positive steps to ensure their effective enjoyment. This involves both substantive and procedural obligations, including the obligation to provide effective mechanisms for the prevention, detection, and reporting of abuses of Convention rights, as well as to conduct effective investigations in response to any such allegations.

Second, and most importantly, the Court has used the doctrine of positive obligations to provide the Convention with horizontal effect. The state not only has to refrain from violating individual rights itself, but must also put in place appropriate safeguards to protect individuals from infringement on the part of private actors. This principle is of particular importance for children, as it acts as a limit on the action of parents, teachers, and other individuals who may control their day-to-day lives.²⁵

While the drafters of the Convention had no intention of creating such positive obligations—focusing purely on the freedom of the individual from 'fascist and communist inquisitorial practices' and state 'horrors, tyranny and vexation'²⁶—the Court has clearly rejected an originalist method of interpretation, opting instead for a purposive approach to ensure the Convention's ongoing efficacy and relevance.

²¹ For a comprehensive discussion of the doctrine of positive obligations under the European Convention on Human Rights, see K. Starmer, 'Positive Obligations under the Convention', in J. Lowell and J. Cooper (eds), *Understanding Human Rights Principles* (Oxford: Hart, 2001); L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge: Intersentia, 2017); A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

²² K. Starmer, 'Positive Obligations under the Convention', in J. Lowell and J. Cooper (eds), *Understanding Human Rights Principles* (Oxford: Hart, 2001), 159.

²³ With the exception of certain rights in Articles 5 and 6: for example, the right to be informed promptly of the reasons for arrest (Article 5(2)); the right to free legal assistance in criminal proceedings where the interests of justice require (Article 6(3)(c)).

²⁴ See, for example, *Plattform 'Ärzte für das Leben' v Austria* (10126/82) 21.06.1988.

²⁵ See, for example, the jurisprudence of the Court in the area of corporal punishment, as discussed in Chapter 2.

²⁶ *Marckx v Belgium* (6833/74) 13.06.1979, dissenting opinion of Judge Sir Gerald Fitzmaurice.

1.4.2 The Convention as a living instrument

In the 70 years since the drafting of the Convention, Europe—and European society—has seen dramatic changes. Advances in technology, changing demographics, and evolving social norms mean that the Court is having to apply the Convention to an ever-expanding range of situations. To respond to these changes, the Court has adopted a dynamic approach to interpretation that recognises the Convention as a ‘living instrument’, which must be read in light of present-day conditions.²⁷

This means that the Court’s interpretation of the Convention will change as law and society progresses, with the recognition that the ‘failure ... to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.’²⁸ Thus, even where an issue has been decided previously, the Court is willing to reassess its prior judgments in light of domestic and international developments. A notable example of this is the characterisation of same-sex relationships under the Convention—once considered as constituting only ‘private life’, now recognised as ‘family life.’²⁹ Furthermore, treatment that may have constituted ‘inhuman and degrading treatment’ in the past might cross the threshold into torture in the future, as increasingly high standards are enforced.³⁰

As can be seen throughout this volume, for children this has meant that the Court has shifted from a patriarchal understanding of their place in the family and society to a recognition of their individual rights, updating the Convention in line with newly adopted international standards.

1.4.3 The principle of subsidiarity

Despite these expansive interpretative techniques, which have broadened the scope of the Convention beyond the original intention of the drafters, at the heart of the Convention system lies respect for national sovereignty. This respect manifests itself in two separate but interrelated interpretative principles: the principle of subsidiarity and the margin of appreciation.

The principle of subsidiarity requires that the role of the Court be conceived narrowly, only intervening with state practice where necessary. As evidenced by Article 13 (the right to an effective domestic remedy) and Article 35(1) (exhaustion of domestic remedies), the primary responsibility for implementing and enforcing the Convention is placed on states within their domestic legal system. The Court will intercede only when it has failed in this task.³¹

Moreover, subsidiarity requires the Court to adopt a cautious approach to the adjudication of cases. It does not operate as a tribunal of fourth instance, with jurisdiction

²⁷ *Tyrer v the United Kingdom* (5856/72) 24.04.1978 (Court).

²⁸ *Stafford v the United Kingdom* (46295/99) 28.05.2002 (GC), para. 68.

²⁹ See *Schalk and Kopf v Austria* (30141/04) 24.06.2010.

³⁰ See *Selmouni v France* (25803/94) 28.07.1999 (GC).

³¹ *Scordino v Italy* (No. 1) (36813/97) 29.03.2006 (GC).

to review any errors of law or fact alleged against the domestic judgments,³² but only has the power to review whether the decision was made ‘in disregard of fundamental rights.’³³ In doing so, the Court will not re-try the case: it will not investigate the facts, nor hear witnesses and evidence afresh. Nor will it interfere with the interpretation and application of domestic law. Rather, it will accept the determination of the domestic authorities on these issues, unless there is clear evidence of arbitrariness.³⁴

These rules are important for the functioning of the Court—it allows this body to focus on its role as a guarantor of fundamental rights, rather than having to undertake a fresh investigation of the entirety of the case, while also ensuring that it does not overstep the boundaries of the powers delegated to it by states.³⁵ It also recognises that the role of the Court is not to harmonise European laws, but to set common minimum standards. As Lord Hoffman has argued, ‘at the level of abstraction, human rights may be universal’, but at the level of application they require ‘trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system.’³⁶

1.4.4 The margin of appreciation

A corollary of the principle of subsidiarity is the doctrine of the margin of appreciation, which governs the interpretation of the substantive rights of the Convention. This phrase, from the French ‘*marge d’appréciation*’, might be more appropriately translated as ‘margin of discretion’,³⁷ and provides leeway to national authorities in how they choose to implement Convention rights according to the particular needs, circumstances, and resources of their state. Underlying this doctrine is the recognition of the cultural, social, and legal variety amongst member states,³⁸ and the understanding that national authorities should be given a certain degree of latitude when resolving conflicts between individual rights and national interests.³⁹

³² See, for example, *Belgian Linguistic Case* (1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64) 23.07.1968; *Strand Lobben and others v Norway* (37283/13) 10.09.2019 (GC).

³³ M. Teitgen, ‘Report on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights’ (Consultative Assembly of the Council of Europe, 05.09.1949), para. 26.

³⁴ *Sisojeva and others v Latvia* (60654/00) 15.01.2007.

³⁵ Jurisconsult of the European Court of Human Rights, ‘Interlaken Follow-Up. Principle of Subsidiarity’ (2010), http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf. This is particularly the case following the Brighton Declaration of the High-Level Conference on the Future of the European Court of Human Rights, and Protocol 15 which resulted from it.

³⁶ Lord Hoffmann, ‘The Universality of Human Rights’ (Judicial Studies Board Annual Lecture, 19.03.2009), https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf, 9.

³⁷ Greer suggests this could be translated as ‘margin of assessment/appraisal/estimation.’ (S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000), 5)

³⁸ See F. Matscher, ‘Methods of Interpretation of the Convention’ in R.S.J. MacDonald, F. Matscher, and H. Petzold, *The European System for the Protection of Human Rights* (Dordrecht: Kluwer, 1993).

³⁹ See E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *International Law and Politics* 843. For a critique of this principle, see Chapter 12.

This principle is used primarily (though not exclusively) in relation to complaints arising under Articles 8–11—the so called ‘qualified rights’.⁴⁰ These rights—to respect for private and family life (Article 8), to freedom of religion (Article 9), to freedom of expression (Article 10), and to freedom of assembly (Article 11)—all contain a limitations clause allowing an interference with the right if it is in accordance with the law, pursues a legitimate aim, and is ‘necessary in a democratic society’; that is, where there is a relationship of proportionality between the aim and the interference. It is in determining this relationship of proportionality that the Court allows national authorities room for manoeuvre through the doctrine of the ‘margin of appreciation’.

The scope of the margin of appreciation is not identical in each case and cannot be reduced to a simple or predictable scientific formula.⁴¹ Indeed, it has been described by Lord Lester as ‘slippery and elusive as an eel’.⁴² It will depend on a number of factors, including the nature of the right in issue and the object pursued by the interference.⁴³ Thus, the margin of appreciation will be narrower where the case concerns an intimate aspect of the individual’s existence or identity or is crucial to the effective enjoyment of a ‘core’ value;⁴⁴ however, it will be more extensive where the aim of the restriction relates to the protection of morals or invokes social and economic policies.⁴⁵ In such cases, the Court considers that national authorities’ knowledge of their society and its needs mean that they are better placed to determine what is in the public interest and to decide whether a measure is indeed necessary in the particular circumstances.⁴⁶ The Court will also look at whether a consensus exists within the contracting states, either as to the relative importance of the interest at stake or regarding how best to protect it.⁴⁷

The result of this is that the margin of appreciation is an amorphous concept: as Greer has argued, ‘its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature’.⁴⁸ As is seen throughout this volume, the margin of appreciation often comes into play in areas concerning children and the family, where a large degree of discretion is given to states in the formulation of social policy. This can have its advantages, particularly in securing the ongoing legitimacy of the Court, but it can also have significant drawbacks for a progressive interpretation of children’s rights, as is discussed in the substantive chapters.

⁴⁰ See J. Kratochvil, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011) 29(3) *Netherlands Quarterly of Human Rights* 324.

⁴¹ S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000), 5.

⁴² A. Lester, ‘Universality versus Subsidiarity: A Reply’ (1998) 1 *European Human Rights Law Review* 73, 75.

⁴³ See *Dudgeon v the United Kingdom* (7525/76) 22.10.1981.

⁴⁴ See *ibid.*; *S and Marper v the United Kingdom* (30562/04, 30566/04) 04.12.2008 (GC).

⁴⁵ *Handyside v the United Kingdom* (5493/72) 07.12.1976; *Buckley v the United Kingdom* (20348/92) 25.09.1996.

⁴⁶ *Handyside v the United Kingdom* (5493/72) 07.12.1976; *Dickson v the United Kingdom* (44362/04) 04.12.2007 (GC).

⁴⁷ See, for example, *Dickson v the United Kingdom* (44362/04) 04.12.2007 (GC).

⁴⁸ S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000), 5.

1.5 The use of international instruments

International instruments play an important role in the interpretation of the Convention. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, the Court has held that

in defining the meaning of terms and notions in the text of the convention, [the Court] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.⁴⁹

The United Nations Convention on the Rights of the Child⁵⁰ has been particularly influential in this regard, recognised by the Court as constituting ‘the standards to which all governments must aspire in realising ... rights for all children’⁵¹ Moreover, the Court has also referred frequently, if not consistently, to other regional and international instruments such as the Hague Conventions on Child Abduction and on Intercountry Adoption,⁵² and the European Social Charter,⁵³ which have thus played a crucial role in its jurisprudence. Importantly, however, the Court has held that it is not necessary for the state in question to have ratified all the international instruments being referred to by the Court,⁵⁴ but only that the instruments ‘denote a continuous evolution in the norms and principles applied in international law’⁵⁵ and that there is common ground in modern societies. In undertaking an analysis of the Court’s protection and advancement of children’s rights, this book also refers to these applicable standards, examining where they have been noted, affirmed, rejected, or simply ignored by the Court.

1.6 Structure of the book

As stated in the introduction to this chapter, the aim of this book is to provide an overview of the case law of the Court in relation to children. For reasons of space, I do not undertake an extensive analysis of every case that has come before the Court in this area—instead, I attempt to draw out the main threads of the jurisprudence, showing the evolution of the Court’s position throughout time and explaining and critiquing its current position. In doing so, I have tried to walk a fine line between breadth of coverage and depth of analysis. I wanted this book to be as comprehensive as possible, so

⁴⁹ *Demir and Baykara v Turkey* (34503/97) 12.11.2008, para. 85.

⁵⁰ (1989) 1577 UNTS 3.

⁵¹ *Sahin v Germany* (30943/96) 08.07.2003 (GC), para. 39.

⁵² Hague Convention on the Civil Aspects of International Child Abduction 1980, Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption 1993.

⁵³ European Social Charter (revised) (1996) CETS 163.

⁵⁴ For example, in *Marckx v Belgium* (6833/74) 13.06.1979, the Court relied on the European Convention on Legal Status of Children Born out of Wedlock as evidence of emerging consensus, despite the fact that Belgium had not signed or ratified it.

⁵⁵ *Demir and Baykara* (34503/97) 12.11.2008, para. 86.

that academics, practitioners, and civil society could understand at a glance what the Court has—or has not—said on a topic. At the same time, I did not wish this to be a purely descriptive volume, and have tried to highlight for readers some of the key criticisms that have been levelled at the various cases or lines of jurisprudence.

The book comprises ten substantive chapters, and is organised thematically, rather than by Convention article. Not all issues fall neatly into one section, however, and there is inevitable overlap, particularly where a case has been examined from a number of different perspectives. Nevertheless, I have tried to provide a coherent and logical categorisation of the jurisprudence in a way which will be useful for all readers, whatever their aim in consulting this text.

Following this introductory chapter, Chapter 2 goes on to examine the child's right to freedom from violence and exploitation, including protection from corporal punishment, child abuse, and sexual violence, as well as child marriage, forced labour, and modern slavery. Chapter 3 then analyses the right to respect for private life in the context of privacy, the right to receive information, and the right to individual identity.

Chapter 4 considers the rights of the child in relation to the juvenile justice system, and Chapter 5 the immigration system, including deportation and expulsion, family reunification, and the detention of accompanied and unaccompanied minors. Chapter 6 then examines the jurisprudence in the area of education, and in particular the form and content of schooling, as well as school uniform and religious symbols, followed by an analysis of the Court's approach to social and economic rights in Chapter 7.

The final four substantive chapters relate to the child within the family unit: family life and the establishment of parenthood (Chapter 8); disputes concerning custody and access (Chapter 9); child protection (Chapter 10); and adoption (Chapter 11). Finally, Chapter 12 presents some conclusions of this analysis, highlighting the fields where the Court has made significant advances for children's rights and areas where there remains work to be done.

1.6.1 A note on language

Throughout the book, I refer collectively to the position or jurisprudence of the 'Court' generally to include that of both the European Court of Human Rights and the previous European Commission on Human Rights. However, when discussing individual cases, I make a distinction between the decisions of the Commission and judgments of the Court.

In addition, there are a number of jurisdictions which have changed names, or even formed new countries, during the life of the Convention—notably the Federal Republic of Germany joining with Eastern Germany to become the new country of 'Germany' and the Former Yugoslav Republic of Macedonia ('FYROM') being renamed North Macedonia in 2019. For reasons of consistency and ease of reference, I refer to these jurisdictions by the name they held at the time the case came before the Court.

2

Freedom from Violence and Exploitation

2.1 Introduction

The right of the child to physical integrity is a right that is slowly but surely gaining recognition. While the protection of adults from interpersonal violence is enforced in all societies,¹ when it comes to children, this protection is still a work in progress. Until recently, violence against children was permitted not only by parents, but by teachers and the state for the purposes of discipline, and it still remains socially (and legally) acceptable in many jurisdictions.² Moreover, it is only in recent decades that child abuse and mistreatment—both inside and outside the home—has been recognised as a legal, rather than purely social problem.

The jurisprudence of the European Court of Human Rights is also undergoing a gradual, yet encouraging evolution in its approach to the protection of children's physical integrity. It has been recognised as a core element of the child's private life under Article 8, and depending on its severity, an infringement of the prohibition against inhuman and degrading treatment and punishment under Article 3. Moreover, the Court has started to take a child-centred approach to sexual violence, recognising children's vulnerability and the need for enhanced protection. Nevertheless, there is still some way to go before the Convention can be said to truly provide adequate protection for children against all forms of violence, and in all settings.

Cases on physical integrity—and particularly the failure to protect from parental abuse—often overlap with the area of child protection, which is covered in Chapter 10. The reason for providing these cases with their own individual chapter here, and not simply incorporating them into the later chapter, is that the jurisprudence on state responsibility with regard to parental abuse overlaps significantly with issues relating to protection from violence outside the home. Given the approach of the Court to these areas, to separate the cases of violence and abuse involving third parties from cases concerning such practices in a familial setting would be an artificial, and indeed confusing, divide. As such, this chapter considers the issues of corporal punishment, parental child abuse, and sexual violence together, examining the positive and negative obligations placed on states by the Court's growing body of jurisprudence in this area.

¹ Albeit to a greater or lesser extent.

² See Global Initiative to End All Corporal Punishment of Children, <https://endcorporalpunishment.org>.

2.2 Corporal punishment

Corporal punishment—which includes any punishment in which physical force is used and intended to cause pain or discomfort to a child—has been recognised by the UN Committee on the Rights of the Child as a violation of human dignity, physical integrity, and children's equal protection before the law.³ From the early 1990s, the UN Committee has taken a strong stance against this practice, reading into the United Nations Convention on the Rights of the Child an obligation on all states to implement an immediate and complete prohibition, with no exceptions.⁴

The jurisprudence of the European Court of Human Rights in this area has been more equivocal, resting as it does on a margin of appreciation and consensus amongst member states. At the time the Convention was drafted, corporal punishment was legal in all states of the Council of Europe; however, in 1966 Sweden became the first country in the world to prohibit it in all settings, which has since been followed by 33 other European states.⁵ It has thus been an important test case for an evolutionary reading of the Convention—starting with *Tyrer v the United Kingdom*.⁶

2.2.1 Judicial corporal punishment

Tyrer concerned a 15-year-old boy sentenced by a juvenile court to 'three strokes of the birch'. The birching raised, but did not cut, his skin, and he was sore for about a week-and-a-half afterwards. The child alleged that this punishment was 'inhuman and degrading', in violation of Article 3 of the Convention.

This was a landmark case from a procedural perspective, as it established the 'living instrument' doctrine, requiring that the Convention be interpreted in a dynamic manner.⁷ The Court rejected the originalist argument of the government: that the Convention was intended to protect only such rights as had been 'long accepted by democratic countries', and therefore could not confer a right to immunity from corporal punishment, which had been widely practised at the time of drafting. Instead, it emphasised that the Convention 'must be interpreted in the light of present-day conditions', and the Court's judgment 'influenced by the developments and commonly accepted standards ... of the member States of the Council of Europe in this field'.⁸

While this doctrine has obvious implications for the protection of all individuals under the Convention, it is of particular importance for children. Given their almost complete subjugation within the family unit in the 1950s, an originalist interpretation

³ United Nations Committee on the Rights of the Child, *General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (CRC/C/GC/8, 02.03.2007).

⁴ *ibid.*

⁵ Global Initiative to End All Corporal Punishment of Children, 'Progress Towards Prohibiting All Corporal Punishment in Europe and Central Asia' (January 2020), <http://endcorporalpunishment.org/wp-content/uploads/legality-tables/Europe-and-Central-Asia-progress-table-commitment.pdf>.

⁶ (5856/72) 25.04.1978 (Court).

⁷ See Chapter 1.

⁸ *Tyrer v the United Kingdom* (5856/72) 25.04.1978 (Court), para. 31.

would have severely restricted the Convention's ability to respond to violations of children's rights, limiting its reach to the public sphere only. As such, this case must be recognised as one of the most significant judgments of the Court's 60-year history.

From a substantive perspective, the judgment was a somewhat pyrrhic victory for children. On the one hand, it recognised that judicial corporal punishment is inherently degrading: it involves the infliction of institutionalised physical violence, where one human being is treated as an object in the power of the authorities. As such, it constitutes an assault on the dignity and physical integrity of the individual, which goes to the heart of the protection of Article 3. Moreover, this degradation could not be mitigated by assumptions concerning its 'efficacy'. The Court made clear that just because a punishment is, or is perceived to be, 'effective' does not remove it from the scope of Article 3, finding 'it is never permissible to have recourse to punishments that are contrary to Article 3, whatever their deterrent effect may be'.⁹

However, this judgment was based on a generalised discussion of the impact of such treatment: the majority did not discuss the fact that the applicant was a juvenile, nor the implications that this had for its severity. The focus was on the abuse of power by the state, rather than the vulnerability of the individual, which had the (perhaps intended) effect of narrowing the applicability of the judgment to only state punishment, leaving corporal punishment in schools and in the home untouched.¹⁰ Thus, the debate surrounding corporal punishment in these settings continued before the Court for another 30 years—and even now is not finally settled.

2.2.2 Corporal punishment in schools

The issue of corporal punishment in schools has been considered in a line of four cases emanating (again) from the United Kingdom. In three of the four cases, the applicants were successful on the facts, but none managed to achieve a universal ban on corporal punishment in this setting. Instead, the nature, extent, and circumstances of the punishment have simply been progressively narrowed through incremental litigation, while waiting for politics to catch up with new understandings of children's rights.

The first case was *Campbell and Cosans v the United Kingdom*,¹¹ in which the parents had requested a guarantee that their children would not be subjected to corporal punishment as a disciplinary measure in the state schools they attended. As neither child had been subjected to corporal punishment, there was no violation of Article 3.¹² The

⁹ *ibid.*

¹⁰ *cf.* the dissenting opinion of Judge Sir Gerald Fitzmaurice, who did focus on the applicant's age—finding, however, that this was a mitigating, rather than an aggravating, factor. He noted that, 'throughout the ages and under all skies, corporal methods have been seen as the obvious and natural way of dealing with juvenile misbehaviour', and 'assuming that corporal punishment does involve some degree of degradation, it has never been seen as doing so for a juvenile to anything approaching the same manner or extent as for an adult'. Relying on a familiar trope, he described his own education, where corporal punishment was regarded as the normal sanction for misbehaviour, and viewed as a matter of 'pride and congratulation' rather than debasement. See also the dissenting opinion of Mr Kevin Mangan in the Commission Report. ((5856/72) 14.12.1976 (ComRep))

¹¹ (7511/76, 7743/76) 25.02.1982.

¹² The Court also considered whether the threat would be sufficient, but found in this case that it would not.

Court therefore shifted away from an analysis of the children's rights, and considered the matter under the parents' right to have their children educated in line with their philosophical convictions, under Article 2, Protocol 1.¹³ The Court found that an objection to corporal punishment could constitute a 'philosophical conviction' as it related to a weighty and substantial aspect of human life and behaviour, specifically the integrity of the person and the distress which the risk of such punishment entails. The authorities have a duty to respect these convictions, and must allow parents to object to corporal punishment by the school.¹⁴ In this way, this case provided protection for parents from state interference with their philosophical beliefs, but provided no independent protection for children from physical violence.

The second case of *Warwick v United Kingdom*¹⁵ went one step further. Here, a 16-year-old had been given one stroke of the cane by the headmaster, in the presence of the deputy head, which caused large bruises on her hand. In this case, the Court distinguished institutional violence by the state—as prohibited in all circumstances following *Tyrer*—from violence by individual school authorities, which must be decided on a case-by-case basis. On a positive note, the Court looked at the particular circumstances of the applicant—inflicted on a young woman by a man, in the presence of another man. Unfortunately, however, rather than noting that the girl was a minor, the Court based its finding of humiliation on the fact that at 16 the girl was 'a woman of marriageable age', therefore reducing her to a sexual object whose humiliation must be traced back to her desirability to the opposite sex. Nevertheless, this case was an important landmark as it recognised that corporal punishment at school could, in certain circumstances, violate Article 3.¹⁶

Third, in *Y v the United Kingdom*¹⁷ a 15-year-old boy was caned at school, causing wheals to appear, as well as swelling and bruising. The Commission found that such injuries were unacceptable no matter who inflicted the punishment—be that parent or teacher—and thus there was a violation of Article 3. This created an important precedent on the limits of adult power over children, even if inflicted for disciplinary purposes, but still fell short of achieving a total prohibition of corporal punishment in schools: it depended on the seriousness of the violence, rather than the characterisation of the child as a human being deserving of protection of physical integrity. The fact that the case was decided under Article 3 was positive as it recognised the seriousness of the conduct, but it nevertheless meant that the Court failed to grapple with the deeper issue of whether adults should be permitted to exercise physical power over children in *any* circumstances.

¹³ Although the Court considered the applicant Cosans's own claim that he had been denied the right to education because he was suspended until he accepted punishment, the Court held that return to school could only be secured if his parents acted contrary to their convictions, thus bringing the matter back within an adult-focused lens.

¹⁴ This aspect of the case is discussed further in Chapter 6.

¹⁵ (9471/81) 18.07.1986 (ComRep).

¹⁶ Though see the partially dissenting opinion of Messrs Schermes, Batliner, Vandenbergh, and Sir Basil Hall, where it was argued that the school was acting 'in loco parentis' and therefore had not violated the child's rights.

¹⁷ (14229/88) 08.10.1991 (ComRep).

It wasn't until the final case in this line—*Costello-Roberts v the United Kingdom*¹⁸—that the Court was in fact forced to confront this issue head on, with disappointing results. This case involved a seven-year-old child given three 'whacks' on his bottom by a teacher, through his shorts and with a rubber-soled gym shoe. There was no visible bruising, as the physical force was moderate, but instead the case was brought on the fact that there had been an assault on the child's dignity and physical integrity. That is, the applicants argued that it was irrelevant whether there was any physical harm to the child; the very fact of violence inflicted by an adult was a violation of his rights.

The Commission accepted this argument, finding that corporal punishment constitutes an interference with physical integrity, and a lack of respect for private life under Article 8(1). While parents could give consent to corporal punishment, thus removing the practice from Article 8, the scope of consent could not be unlimited, and the state was under an obligation to provide safeguards. Turning to Article 8(2), the government was not able to give any social, educational, health, or moral justification, and thus the Commission held that there was a violation of the Convention.

On referral to the Court, however, the majority fell back on a requirement of a minimum level of severity to invoke the protection of the Convention, and the comprehensive protection given to children by the Commission was overturned. The Court found that as there was no evidence of severe or long-lasting effects, the punishment did not pass the minimum threshold to fall within the scope of Article 3. Moreover, although it acknowledged that there was an interference with the moral and physical integrity of the child, there were not sufficient adverse effects to bring it within the scope of Article 8.

The dissent of Mr Loucaides in the Commission judgment is notable for progressive understanding of children's rights, and worth quoting at length:

In principle I believe that any school corporal punishment amounts to a breach of Art 3 bearing in mind present day values regarding human dignity and human personality. Corporal punishment is nothing less than a deliberate assault on a person's dignity and physical integrity in an organised manner. Beating any person as a method of punishment for whatever wrong doing on his part, be that a criminal offence or otherwise, is nowadays generally an unacceptable form of punishment and it amounts, in my view, to inhuman and degrading treatment. This is all the more so when such punishment is applied to children by adults in authority like in the present case. The inferior and helpless position of children in such circumstances, as well as their sensitivity, aggravates the inhuman and degrading elements of this kind of punishment. The number, intensity or hardness of the strokes, or the fact that they do or do not cause physical injuries are, in my view, immaterial factors in determining whether corporal punishment amounts to inhuman and degrading treatment.¹⁹

Despite these strong words, almost 30 years on from *Costello-Roberts* the Court has still not found that corporal punishment in schools is, absolutely and without

¹⁸ (13134/87) 25.03.1993 (Court).

¹⁹ (13134/87) 08.10.1991 (ComRep).

exception, contrary to children's rights under the Convention—although prohibition has now been achieved across Europe in this setting in any case. While it is laudable that the jurisprudence has evolved with time to provide greater protection in this field, the focus on the physical effects of the treatment, rather than the right to physical integrity, exposes a weakness in the Court's understanding of children's rights.

2.2.3 Corporal punishment in the home

As with corporal punishment in schools, the Court's jurisprudence on corporal punishment within the home is imperfect. While it has upheld the prerogative of states to prohibit corporal punishment, and to remove children from the home where this occurs, where a child has complained of a violation of their physical integrity the Court has failed to take a robust approach. Instead, it has only stopped violence from going 'too far', leaving the infliction of corporal punishment as a permissible practice—at least in so far as it does not reach the levels of Article 3.

Importantly, two of the key cases in this area have been brought by parents who wished to continue to practice corporal punishment, against the restrictions placed by the state. In *7 Individuals v Sweden*,²⁰ the Swedish government had introduced a clause in the Code on Parenthood stating that 'the child shall not be subjected to corporal punishment or any other form of humiliating treatment'. This was not accompanied by any criminal sanctions, nor were there any other legal implications for the family. The applicant parents argued that this interfered with their rights under Article 2, Protocol 1, as they practised a 'traditional' means of bringing up their children, and as an aspect of their religious doctrine, believed in the necessity of physical punishment.

The Commission examined the case from an adult-focused perspective, stating that the evaluation 'must start from the premise that parental rights and choices in the upbringing and education of their children are paramount as against the state'.²¹ However, they concluded that this right was not infringed upon, as the applicants had not been directly subjected to any enforcement or other procedure arising from their disagreement with the Code. Furthermore, the Commission noted 'that the actual effects of the law [were] to encourage a positive review of the punishment of children by their parents, to discourage abuse and prevent excesses which could properly be described as violence against children'.²²

On a positive note, the Commission also rejected the argument that a violation arose as the law gave parents no greater immunity from criminal sanction in inflicting physical chastisement on their own children than they would have if the same acts were committed on an adult stranger. The Commission found that there was no interference with the right to respect for private and family life in this respect, noting that the Swedish law of assault and molestation was a normal measure for the control of violence. Its extension to apply to the physical chastisement of children by their parents was simply intended to protect potentially weak and vulnerable members of society.

²⁰ (8811/79) 13.05.1982 (dec.).

²¹ *ibid.*, para. 111.

²² *ibid.*, para. 113.

The Court returned to this issue—albeit in a slightly different context—in the recent case of *Tlapak and others v Germany*.²³ In this case, the applicants *had* been directly subjected to legal proceedings: their children were removed into state care, and their parental authority removed, based on their use of physical punishment (caning and physical restraint). The parents complained that the decision to withdraw their parental authority was disproportionate, and a violation of their right to raise their children in compliance with their religious beliefs.

The Court in this case spoke out strongly against corporal punishment. Noting that the UN Committee on the Rights of the Child has stated clearly that ‘all forms of violence against children, however light, are unacceptable’,²⁴ the Court considered it ‘commendable’ if states prohibited in law all forms of corporal punishment of children. In doing so, it described corporal punishment as ‘a form of institutionalised violence against minors’, and endorsed the children’s removal as being based on a risk of inhuman or degrading treatment, as prohibited by Article 3.

While these were strong statements from the Court, the protection that this case provides for children’s rights is limited. It affirmed that the Convention *permits* state interference with parental authority on this basis, but does not *require* it, leaving children at the continued mercy of domestic decision-making in this respect. Moreover, when the Court has been asked to consider an application brought by a child who had been subjected to corporal punishment, the protection provided by the Court has still fallen short of absolute prohibition.

*A v the United Kingdom*²⁵ was a challenge to the English law allowing a defence of ‘reasonable chastisement’ to a charge of assault. The child in question had been beaten by his stepfather with a garden cane with ‘considerable force’, leaving bruises that were deemed sufficiently serious by the authorities to merit the initiation of criminal proceedings. Nevertheless, the stepfather was acquitted, with the judge stating that ‘it is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent ... provided that the correction be moderate in the manner, the instrument and the quantity of it.’²⁶

The Court considered that the treatment suffered by the boy at the hands of his stepfather reached the level of severity prohibited by Article 3, and in permitting such treatment under domestic law, the authorities had failed to provide adequate protection for the child’s rights. Having dealt with the issue under Article 3, the Court did not consider it necessary to discuss the applicability of Article 8. And this is where the case does not go far enough. While it established that children must be protected from corporal punishment which reaches the level of torture, or inhuman or degrading treatment or punishment, it left unclear whether corporal punishment that does not meet this standard is nevertheless contrary to the Convention. The Commission—which had also found a violation under Article 3—went so far as to emphasise in the final paragraph of its judgment that its finding ‘does not mean that Article 3 is to be

²³ (11308/16, 11344/16) 22.03.2018.

²⁴ *ibid.*, para. 86.

²⁵ (25599/94) 23.09.1998 (Court).

²⁶ *ibid.*, para. 10.

interpreted as imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child.²⁷

This finding overlooks the fact that any corporal punishment inflicted by an adult on a child is inherently degrading. As Judge Loucaides pointed out so early in the jurisprudence, it is its nature, not its severity, which infringes the child's rights. But it was not until 2017, in the case of *DMD v Romania*,²⁸ that the Court finally accepted this, bringing the Convention in line with international standards:

It is also to be noted that the overriding concern in the 1989 United Nations Convention on the Rights of the Child is dignity. Such a value is consistent with both evolving international law on human rights and the developing psychological perspective in jurisprudence. Respect for the dignity of children is consonant with provision of those elements important to their growth as full members of the community. Assuring basic dignity to the child means that there can be no compromise in condemning violence against children, whether accepted as 'tradition' or disguised as 'discipline'. Children's uniqueness—their potential and vulnerability, their dependence on adults—makes it imperative that they have more, not less, protection from violence, including from domestic corporal punishment, the latter being invariably degrading. It is thus clear that respect for children's dignity cannot be ensured if the domestic courts were to accept any form of justification of acts of ill-treatment, including corporal punishment, prohibited under Article 3.

It is thus clear that respect for children's dignity cannot be ensured if the domestic courts were to accept any form of justification of acts of ill-treatment, including corporal punishment, prohibited under Article 3. In this context, the Court considers that Member States should strive to expressly and comprehensively protect children's dignity which in turn requires in practice an adequate legal framework affording protection of children against domestic violence falling within the scope of Article 3, including a) effective deterrence against such serious breaches of personal integrity, b) reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge, and c) effective official investigations where an individual raises an arguable claim of ill-treatment.²⁹

This firmly places *any* form of corporal punishment as contrary to Article 3, as a violation of physical integrity, and thus basic human dignity. In addition, the Court criticised the decisions of the lower domestic courts for the finding that 'isolated and random' acts of violence could be tolerated within the family, making clear that this was not compatible with the Convention.³⁰

However, as Judges de Gaetano, Pinto de Albuquerque, and Motoc suggested in their joint concurring opinion, the obligation placed on member states in this respect was rather weak. They argued that the Court

²⁷ *A v the United Kingdom* (25599/94) 18.09.1997 (ComRep), para. 55.

²⁸ (23022/13) 03.10.2017.

²⁹ *ibid.*, paras. 50–51 (citations omitted).

³⁰ See also *OCI and others v Romania* (49450/17) 21.05.2019 discussed in Chapter 9.

should have stated, in more principled and clearer terms, that member States of the Council of Europe have a positive obligation under the European Convention on Human Rights to prohibit all forms of violence against children in all settings, and to effectively investigate, prosecute and punish those responsible for such violence.³¹

For these judges, the expression ‘should strive’ used by the majority did not adequately reflect states’ obligations, which must be held to a higher standard in light of current understandings of children’s rights.

Moreover, when the Court considered *Tlapak* the following year, it described the prohibition of corporal punishment by states merely as ‘commendable’, rather than as a requirement under Article 3. This leads us to question whether the Court remains somewhat hesitant to take a strong and principled stand against corporal punishment, particularly in light of social practices still prevalent in many member states. As such, while *DMD* brings hope of a new era of child rights jurisprudence under the Convention, it remains two steps forward, one step back.³²

2.3 Protection of children from parental abuse

In Chapter 10, the jurisprudence of the Court regarding the obligations on states when removing children from their families is discussed in detail. However, this section examines the converse of these obligations—the positive duty to act to protect children from abuse where they know, or ought to know, it is occurring.

As minors, children fall within the group of ‘vulnerable individuals’ entitled to especial state protection.³³ This protection extends beyond the physical to sexual and psychological abuse also, and like corporal punishment, may fall within the scope of Article 8 (right to respect for private life) or Article 3 (freedom from inhuman or degrading treatment), depending on its severity.

The threshold to trigger Article 8 is quite low—all that is required is interference with physical or psychological integrity, which is clearly the case in situations of child abuse.³⁴ Article 3, however, requires a higher degree of severity. In relation to physical abuse, the applicant will have to show that the treatment is inhuman or degrading either because of its severity (severe or long-lasting effects)³⁵ or the circumstances in which it was inflicted (institutionalised violence, or causing humiliation or debase-ment of the individual).³⁶ Sexual abuse, on the other hand, is more firmly entrenched as a violation of Article 3, and the Court has rightly accepted, without further examination, that this falls within the protection against inhuman or degrading treatment.³⁷

³¹ *ibid.*, joint concurring opinion of Judges de Gaetano, Pinto de Albuquerque, and Motoc, para. 5.

³² On this point, see C. O’Mahony, ‘Is Time Running Out for Corporal Punishment under the ECHR?’ (2019) 24(1) EHRLR 55.

³³ *A v the United Kingdom* (25599/94) 23.09.1998 (Court).

³⁴ Although see *Costello-Roberts v the United Kingdom* (13134/87) 25.03.1993 (Court).

³⁵ *ibid.*

³⁶ *Tyrer v the United Kingdom* (5856/72) 25.04.1978 (Court); *Warwick v the United Kingdom* (9471/81) 18.07.1986 (ComRep).

³⁷ *DP and JC v the United Kingdom* (38719/97) 10.10.2002; *E and others v the United Kingdom* (33218/96) 26.11.2002; *MC v Bulgaria* (39272/98) 04.12.2003.

The most difficult of all are allegations of psychological abuse, where the question asked by the Court is whether the treatment causes its victims feelings of fear, anguish, or inferiority, or if it humiliates or debases them.³⁸ In determining the severity of the interference, the effects of the abuse—of whatever kind—will not be taken in isolation, but instead viewed cumulatively, to evaluate the totality of the situation. The Court will take into account all the circumstances of the case, including the nature and context of the treatment; its duration; its physical and mental effects; and the sex, age, and state of health of the victim.³⁹

2.3.1 The positive obligation to protect against harm

The landmark case which established the positive duty on the state in relation to child abuse was *Z v the United Kingdom*,⁴⁰ brought by four children who had suffered severe neglect at the hands of their parents. Health professionals, teachers, and neighbours all expressed concerns to the authorities over a period of several years, and when visiting the house, police had reported that the conditions were ‘not fit for [the] children to live in’. Even the mother herself had informed social services that the children would be better off living in care. Despite this, the authorities initially concluded that as the parents were not wilfully neglecting their children—and were indeed doing the best they could—the children should remain within the family. It was not until some time, and many complaints, later that the children were eventually removed, by which time they had suffered many years of severe neglect.

Before the Commission, they argued, inter alia, that the state was responsible for the inhuman and degrading treatment they had suffered at the hands of their parents, as the authorities had known that it was occurring, but had failed to act. The Commission accepted this argument, finding that the state has a positive obligation to protect children from abuse and neglect, not just from strangers, but also from parents. Relying on Article 19 of the UN Convention on the Rights of the Child, and the obligation to take all appropriate measures ‘to protect the child from all forms of physical and mental violence, injury or abuse’, the Commission concluded:

[T]he protection of children who by reason of their age and vulnerability are not capable of protecting themselves requires not merely that the criminal law provides protection against Article 3 treatment but that, additionally, this provision will in appropriate circumstances imply a positive obligation on the authorities to take preventive measures to protect a child who is at risk from another individual.⁴¹

As such, the Commission concluded that the state had a duty ‘to take those steps that could be reasonably expected of them to avoid a real and immediate risk of ill-treatment

³⁸ *M and M v Croatia* (10161/13) 03.09.2015.

³⁹ *Ireland v the United Kingdom* (5310/71) 18.01.1978 (GC).

⁴⁰ (29392/95) 10.05.2001 (GC).

⁴¹ *Z v the United Kingdom* (29392/95) 10.09.1999 (ComRep), para. 93 (citations omitted). This does not necessarily mean removing the child from the home—in some circumstances, it may oblige the state to remove the perpetrator: see, for example, *ES and others v Slovakia* (8227/04) 15.09.2009.

contrary to Article 3 of which they knew or ought to have had knowledge.⁴² While the authorities were initially justified in taking steps to maintain the family unit by giving support to the family, the Commission found that the gravity of the circumstances required that effective steps be taken to safeguard the children's welfare when the situation failed to show 'a significant and reasonably timeous improvement'.⁴³

This case was a watershed moment for children's rights, substantially extending the obligations on states in this area. While previously the Convention had only required that the state impose appropriate penalties on parents who breach the Article 3 rights of the child,⁴⁴ *Z* now extended this to a duty to prevent abuse happening in the first place—at least where they knew, or ought to have known, about it.⁴⁵

2.3.2 Constructive knowledge and causation

When determining the extent of the state's liability in this respect, the Court has been careful not to place too great a burden on the authorities. This is obviously a difficult balance to strike—authorities are at risk of violating the children's (and parents' rights) by removing the children from the home too early, but likewise are liable if they are left in the home too long. The Court has acknowledged the 'difficult and sensitive' decisions facing authorities in this area, and will not impose this duty lightly.⁴⁶

This was seen in the case of *DP and JC v the United Kingdom*,⁴⁷ where the social services were heavily involved with a family for many years concerning a multitude of issues, including chronic financial problems, housing problems, family violence, one of the applicants soiling himself on a regular basis, and concerns about truancy. However, during this time, they failed to identify that sexual abuse was ongoing within the household. Based on the case of *Z*, the applicants complained that the authorities should have identified this, and acted to protect the children.

The Court took a cautious approach to this case. It noted that, unlike *Z*, there were no facts that revealed a clear pattern of victimisation or abuse, or which should have led social services to suspect a deeper, more insidious problem in the family. Because the mother had covered for the father, and the children were silent

⁴² *Z v the United Kingdom* (29392/95) 10.09.1999 (ComRep), para. 94 (citations omitted).

⁴³ *ibid.*, para. 97. The finding on Article 3 was not contested before the Grand Chamber, which focused on Articles 6 and 13: see section 2.3.4 below.

⁴⁴ See *A v the United Kingdom* (25599/94) 23.09.1998 (Court).

⁴⁵ Having said this, the Court has acknowledged that there are limits to the measures they can take to protect children, especially if they do not desire assistance. In *Ivison v the United Kingdom* (39030/97) 16.04.2002 (dec.), a mother expressed concern that her daughter was involved in sexual relationships with two men who had criminal records. The authorities had worked with the girl to emphasise the risks regarding her behaviour, but the police were unable to bring criminal proceedings against the men as she was not prepared to cooperate with any prosecution. At age 17 she began working as a prostitute on the instruction of the men, and was subsequently killed by a client. The Court dismissed the mother's complaint under Article 2 as manifestly unfounded, emphasising, *inter alia*, the limits of the measures the state could take in relation to a teenage child: 'Though she was under age and thus vulnerable, this did not give the authorities carte blanche with regard to coercive or more draconian care measures. Considerations of her own individual autonomy cannot be excluded'. (para. 4)

⁴⁶ See, for example, *VC v Italy* (54227/14) 01.02.2018.

⁴⁷ (38719/97) 10.10.2002.

despite constant contact with professionals, there were no grounds upon which constructive knowledge could be imposed on the authorities. Importantly, the Court emphasised that any obligation to protect the child from abuse must be balanced against the countervailing principle of respecting and preserving family life. Taking the 'draconian' step of permanently removing the children from the family would have required convincing reasons, which were not apparent at the time.

This can be contrasted with the case of *E and others v the United Kingdom*,⁴⁸ where the mother's partner was found guilty of sexual assault of her daughters, but spared prison on the condition that he move out of the family home. Despite this, he continued to live there, and committed further sexual assaults. In this case, the Court found that the social services had failed in their duties towards the children: even if they were not aware that he was inflicting abuse at the time, they were under an obligation to monitor an offender's conduct, and should have been aware that the children remained at potential risk. In this way, the authorities had failed to take steps which would have enabled them to discover the exact extent of the problem, and to potentially prevent further abuse taking place.

E and others v the United Kingdom also importantly discussed the issue of causation in attributing liability to the authorities. The government had argued that it had not been shown that the situation would have been any different if they had fulfilled their duty—they would not necessarily have either uncovered the abuse or prevented it. The Court, however, found that Article 3 does not require it to be shown that 'but for' the failing or omission the ill-treatment would not have happened: 'A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.'⁴⁹

2.3.3 Investigation and prosecution

The obligation of states under Article 3 relates not simply to the prevention of abuse, where possible, but also to the adequate investigation of allegations of ill-treatment. The Convention itself does not contain an express provision requiring a 'prompt and impartial' investigation, as can be found in Article 12 of the UN Convention against Torture;⁵⁰ however, the Court has emphasised that such a requirement is implicit in the notion of an 'effective remedy' under Article 13 of the European Convention on Human Rights, and the positive obligations under Article 3.⁵¹

To trigger the procedural obligation under Article 3, the abuse does not have to be proven to have occurred: it is sufficient that there is an allegation of *possible* ill-treatment, the severity of which, if proven, would violate Article 3.⁵² The relevant

⁴⁸ (33218/96) 26.11.2002.

⁴⁹ *ibid.*, para. 99.

⁵⁰ (1984) 1465 UNTS 85.

⁵¹ *Aydin v Turkey* (23178/94) 25.09.1997 (GC).

⁵² *MP and others v Bulgaria* (22457/08) 15.11.2011.

threshold that has been given by the Court is that the allegations be ‘credible’,⁵³ ‘arguable’,⁵⁴ or ‘raise a reasonable suspicion’.⁵⁵

Once the obligation is triggered, domestic authorities must undertake a speedy and effective investigation. The investigation must be independent, impartial, and subject to public scrutiny, and it must be undertaken promptly, and with reasonable expedition.⁵⁶ It must be capable of leading to the establishment of the facts of the case, and to the identification and punishment of those responsible.⁵⁷

The obligation on states in this respect is not one of results, but of means:⁵⁸ an investigation is judged by the procedure undertaken, not the outcome achieved. To be deemed ‘effective’, the conclusion reached by the authorities does not have to accord with the claimant’s account of events, nor is there any right to obtain the prosecution or conviction of any particular person.⁵⁹ When investigating allegations of child abuse, the Court has recognised that the ascertainment of the truth can be particularly difficult: the accusations often concern situations occurring behind closed doors, and the authorities may be presented with two irreconcilable versions of the facts and inconclusive evidence.⁶⁰ This is compounded by the fact that where victims are young children, their testimony must be treated with caution, on account of their age and understanding, but also because of possible influence by adults.⁶¹ However, the Court has emphasised that the obligation on states is not the establishment of the truth, but on an effective investigation. This requires that the authorities take reasonable steps to secure evidence concerning the incident—including inter alia, eyewitness testimony and forensic evidence⁶²—and must keep an open mind when assessing this.⁶³

Finally, an effective investigation requires that the authorities act with speed in investigating complaints. In *DMD v Romania*,⁶⁴ the child’s mother complained to

⁵³ *Durđević v Croatia* (52442/09) 19.07.2011.

⁵⁴ *Afet Süreyya Eren v Turkey* (36617/07) 20.10.2015.

⁵⁵ *ibid.*

⁵⁶ *Ay v Turkey* (30951/96) 22.03.2005.

⁵⁷ See *Durmaz v Turkey* (3621/07) 13.11.2014; *Mikheyev v Russia* (77617/01) 26.01.2006.

⁵⁸ See, for example, *MP and others v Bulgaria* (22457/08) 15.11.2011, para. 111.

⁵⁹ *BC v Slovakia* (11079/02) 14.03.2006 (dec.). For example, in *Szula v the United Kingdom* (18727/06) 04.01.2007 (dec.), a young boy was sexually abused by his teacher as part of a wider culture of violence at that school. When this came to light almost 40 years later, a decision was made not to prosecute this particular perpetrator based on his age, the age of the offences, and the state of the evidence. The Commission found that there was no violation of the Convention, as there was nothing to indicate that the authorities failed to take the allegations seriously, nor any lack of diligence or expedition. The criminal law did prohibit the acts in question, and there was no systemic deficiency that prevented prosecution—merely a decision, reviewed on several occasions, that it would not be appropriate to do so given the circumstances and evidence available.

⁶⁰ *MP and others v Bulgaria* (22457/08) 15.11.2011.

⁶¹ *ibid.*

⁶² *Tanrikulu v Turkey* (23763/94) 08.07.1999 (GC); *Gül v Turkey* (22676/93) 14.12.2000. In the context of sexual violence against adults, the Court has found that a competent, independent medical examination may be necessary, which must be undertaken by medical professionals who have an expertise in this area. (*Aydin v Turkey* (23178/94) 25.09.1997 (GC)) This obligation would no doubt also extend to child victims, with the added requirement that the professionals have expertise in examining children.

⁶³ *Durmaz v Turkey* (3621/07) 13.11.2014. In assessing the acceptability of medical reports, the Court has referred to the standards set out by the Council of Europe Committee for the Prevention of Torture, as well as the Istanbul Protocol. (*Dilek Aslan v Turkey* (34364/08) 20.10.2015)

⁶⁴ (23022/13) 03.10.2017.

the police on five occasions that her husband was abusing her son, before the authorities launched a criminal investigation. Three-and-a-half years later, the father was indicted, and overall the investigation and court proceedings took eight years and four months. The Court noted that this length of time was excessive according to the Court's standards under Article 6 (the right to a fair trial), but this would not be sufficient, in and of itself, to render the investigation ineffective for the purposes of Article 3. Under Article 3, the length of proceedings is merely one element that must be considered in a holistic analysis of whether the investigation was effective. On the facts of the case, the Court found that there *were* shortcomings in the proceedings which undermined its overall effectiveness, noting in particular the fact that the domestic courts had taken into account the length of proceedings when sentencing the father, but failed to offer comparable compensation to the child himself. Thus the lengthy proceedings contributed to the finding of a procedural violation under Article 3.

Judges de Gaetano, Pinto de Albuquerque, and Motoc issued an important joint concurring opinion in this case, which emphasised the vulnerability of child victims of abuse, and suggested that states should be held to a higher standard in such cases. They argued that any proceedings, civil or criminal, which directly involve minors must automatically attract not so much a 'special diligence' requirement as an 'exceptional diligence' requirement.⁶⁵

Having said all this, it is important to remember that the European Court of Human Rights is not a court of appeal, but an international body. It cannot substitute its own findings of fact for that of the domestic courts, nor can it re-examine the evidence presented. Its role is supervisory, with states given a margin of appreciation: the question is not whether the authorities did the best job possible, but whether it was deficient to such an extent as to violate the state's human rights obligations.⁶⁶

2.3.4 The right to an effective remedy

The final procedural right for children who have suffered parental abuse is the right to an effective remedy. Article 13 of the Convention requires the availability of a domestic mechanism for establishing the liability of state authorities for acts or omissions involving a breach of Convention rights. This obligation applies whether or not it is eventually determined that there has been a violation of the Convention: if there is an arguable claim, there must be the prospect of a procedure that can establish the facts and determine the conduct that could be reasonably expected of the authorities.⁶⁷

For example, the Court in *Z v the United Kingdom*⁶⁸ found a violation of Article 13 where domestic law shielded social welfare authorities from claims by children to whom they were providing services. The Court found that the inability to bring a negligence complaint against the authorities deprived the children of a domestic remedy,

⁶⁵ *ibid.*, joint concurring opinion of Judges de Gaetano, Pinto de Albuquerque, and Motoc, para. 2.

⁶⁶ See, for example, *MP and others v Bulgaria* (22457/08) 15.11.2011.

⁶⁷ *DP and JC v the United Kingdom* (38719/97) 10.10.2002.

⁶⁸ (29392/95) 10.05.2001 (GC).

as there were no appropriate means available of obtaining a determination of their allegations that the authorities had failed to protect them.

In addition to imposing an obligation that children have access to an adequate procedure, Article 13 also requires—in principle at least—that compensation be available as part of the range of available remedies. This was discussed in *ES and others v Slovakia*,⁶⁹ where the Constitutional Court had held that a finding of a violation of the children's rights in itself provided just satisfaction, and therefore awarded no compensation. Moreover, the state argued that the criminal conviction of the father, and the subsequent amendment to the law, provided adequate redress. The Court rejected these arguments, and made clear that such measures were not adequate to address the failure to offer the children protection from an abusive parent for almost two years. In such a case, financial compensation was necessary.⁷⁰

This does not mean, however, that compensation must be made available for every victim of abuse. This requirement rests on the (in this case, indirect) responsibility of the state for the damage inflicted, and is not a general obligation applicable to all victims. In *Stuart v the United Kingdom*,⁷¹ the applicant had suffered repeated and systematic sexual abuse at the hands of her stepfather. There was no suggestion that the state was in any way liable for the abuse, but the United Kingdom had available a general governmental scheme that provided compensation to victims of crimes, to which she applied. Her claim under this scheme was rejected, however, as she did not meet the necessary criteria. She complained under Articles 3 and 8 that the state's positive obligation to provide effective protection against abuse extended to the provision of compensation where it could not be obtained from the perpetrator.

The Court rejected this argument as manifestly ill-founded. It held that deterrent sanctions were in existence—in the form of criminal penalties—and civil remedies were also available. Article 8 does not require states to provide unlimited civil remedies where criminal sanctions are in operation, and nor is there an obligation on the state to provide compensation to victims of ill-treatment perpetrated by private individuals where the state has no additional responsibility.

2.3.5 Conclusions on protection of children from parental abuse

The recognition of a positive obligation on states to protect children from parental abuse has been one of the most progressive, and important, contributions of the European Court of Human Rights. It is a significant obligation to impose on states: on the one hand, they cannot remove children from their family precipitously, as this would breach their rights under Article 8 (as discussed in Chapter 10), but nor can they leave children in a home where they are at risk of suffering harm without careful consideration and close monitoring of the situation. Nevertheless, this strict duty is to be applauded: children are in an incredibly vulnerable position vis-à-vis their parents,

⁶⁹ (8227/04) 15.09.2009.

⁷⁰ See also *Kontrova v Slovakia* (7510/04) 31.05.2007.

⁷¹ (41903/98) 06.07.1999 (dec.).

subject to their power behind closed doors. If child rights are to mean anything, the state must be willing and able to breach this private sphere in order to ensure adequate protection of their physical and emotional integrity.

2.4 Protection from sexual violence

As with parental child abuse, the state has a positive obligation to protect children against sexual violence perpetrated by private individuals. Cases concerning sexual violence are generally brought under Articles 3 and 8 jointly, and the Court often does not draw a clear distinction between the two.⁷² This is to be regretted, as the provisions encompass complementary, but separate, aspects of the child's rights. As Judge Tulkens has pointed out, '[r]ape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8'.⁷³

The obligations in this area mirror those discussed in section 2.3 above in relation to child abuse under Article 3—an adequate legal framework, effective investigation and prosecution, and adequate legal remedies—although their interpretation inevitably differs due to the different nature of the offence. Although much of the jurisprudence in this area has built on principles already derived from adult cases, the contribution of cases concerning minors has nevertheless been significant. Importantly, the Court has taken a child-sensitive approach in this area, recognising the particular vulnerability of certain classes of victims—including children, and those with a disability—as a source of additional accountability, and requiring special measures by the authorities.

2.4.1 The need for an adequate legal framework

The first, and foremost, obligation on states is to have in place an adequate legal framework for the protection of individuals from third-party violence. The Court has made clear that in cases of rape and sexual violence, this protection must involve the criminal law—civil penalties will not be sufficient. This was established in the seminal case of *X and Y v the Netherlands*,⁷⁴ involving a 16-year-old girl suffering from a mental disability. She was living in a group home for children with such disabilities when she was forced to have sex with the son of the Director of the institution. Her father filed a complaint, asking for criminal proceedings to be instituted, and since his daughter was not able to sign the complaint herself because of her mental condition, he did so on her behalf. The prosecutor decided not to open proceedings, finding that a charge of rape would only be possible if the victim herself had taken action. The father's

⁷² Connor O'Mahony provides an excellent analysis of this issue in 'Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations' (2019) 27 *International Journal of Children's Rights* 660.

⁷³ *MC v Bulgaria* (39272/98) 04.12.2003, concurring opinion of Judge Tulkens, para. 1.

⁷⁴ (8978/80) 26.03.1985.

complaint could not be regarded as an acceptable substitute, even if the child herself was incapable.

The applicant complained (through her father) that the impossibility of having criminal proceedings instituted against her rapist violated her rights under Article 8. Although civil remedies were available, for a young girl like the applicant, the requisite degree of protection against such wrongdoing could only be provided by the criminal law. The Court agreed. It found that ‘in a case where fundamental values and essential aspects of private life are at stake,’ effective deterrence is indispensable.⁷⁵ Only the criminal law can provide sufficient protection.

2.4.2 Consent

2.4.2.1 The age of consent

From an early stage of its jurisprudence, the Court has made clear that a person’s sexual life is part of their private life protected by Article 8, and cannot be interfered with without sufficient justification. Nevertheless, it has recognised that states may legitimately set an age of consent to sexual activity for the protection of the child’s sexual autonomy.⁷⁶

Originally, such cases were argued in the context of homosexual activity: the ‘sexual autonomy’ referred to related to the protection of children from ‘undesirable and harmful pressures and attentions’ and the risk that children would be influenced into the development of homosexual tendencies.⁷⁷ The Court found that not only were states justified in setting age limits for participation in sexual activity—for example, 19 in Austria,⁷⁸ or even 21 in the United Kingdom⁷⁹—but the authorities could also legitimately distinguish between homosexual and heterosexual sexual activity in setting such limits. In *X v the Federal Republic of Germany*, the Commission justified this difference in treatment on the basis of the increased vulnerability of young men, drawing on studies of ‘psychologists, sociologists and specialists in social protection,’ which they claimed demonstrated

the existence of a specific social danger in the case of masculine homosexuality. This danger results from the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytise adolescents and that the social isolation in which it involves the latter is particularly marked.⁸⁰

Thankfully, this position was revised—albeit not until two decades later—in *Sutherland v the United Kingdom*,⁸¹ where the Commission found that there was no

⁷⁵ *ibid.*, para. 27.

⁷⁶ *X v the Federal Republic of Germany* (5935/72) 30.09.1975 (dec.).

⁷⁷ *ibid.* See also *X v the United Kingdom* (7215/75) 12.10.1978 (ComRep); *Dudgeon v the United Kingdom* (7525/76) 22.10.1981.

⁷⁸ *Zukrigl v Austria* (17279/90) 13.05.1992 (dec.).

⁷⁹ *X v the United Kingdom* (7215/75) 12.10.1978 (ComRep).

⁸⁰ *X v the Federal Republic of Germany* (5935/72) 30.09.1975 (dec.), p. 56. See also *X v the United Kingdom* (7215/75) 12.10.1978 (ComRep).

⁸¹ (25186/94) 01.07.1997 (ComRep).

objective and reasonable justification for differentiating between homosexual and heterosexual relationships in this respect.

Despite this unsavoury backdrop, some important principles can be salvaged from this line of cases: namely that some degree of control over sexual activity is legitimate in a democratic society in order to safeguard children against exploitation. Moreover, it falls to the national authorities in the first instance to fix the age under which young people should have the protection of the criminal law.⁸²

This issue has not been directly addressed by the Court in relation to heterosexual sexual activity. The closest that the Court has come was the recent case of *MGC v Romania*,⁸³ concerning an 11-year-old girl who alleged that she had been raped by her 52-year-old neighbour. He was charged with sexual intercourse with a minor, but not rape, as the authorities concluded that she had consented. The applicant argued that by permitting the possibility that an 11-year-old child could express valid consent to sex, the Romanian law failed to effectively protect her against rape.

As is discussed further in section 2.4.2.2 below, the Court made clear that the law must take a child-sensitive approach to the evaluation of consent, and in particular, should have considered the age difference between the victim and the accused and the impact this would have on the child's possible reactions to the assault. Nevertheless, the Court failed to engage with the underlying question concerning the protection of children from exploitation through the imposition of an appropriate age of consent. By tacitly accepting that an 11-year-old child can ever give valid consent to sex with an adult, the Court failed to take a vital opportunity to provide real and significant protection to children who are victims of sexual violence.

2.4.2.2 The definition of consent

While the Court has been equivocal about setting an age of consent of children to intercourse, where it has excelled is in the imposition of strong obligations on states to interpret consent in a child-friendly manner.

This was seen in the landmark case of *MC v Bulgaria*,⁸⁴ where the Court made clear that authorities cannot impose a requirement of force or physical resistance for cases of rape, and must instead focus on the existence of consent. While this case has wider significance for sexual offences against adults, it is of particular importance for children, as it recognised the different ways in which they might react to sexual violence.

The applicant in this case was a 14-year-old girl, who alleged that she had been raped by two men. Although the authorities acknowledged that the young age of the applicant and lack of experience in life meant that she was unable to firmly demonstrate her unwillingness to have sex, they concluded that there could be no prosecution for rape unless she had shown resistance. The applicant complained that the requirement of physical resistance left certain acts of rape unpunished—and particularly those against children, where the majority displayed passive psychological reactions of panic—in violation of Articles 3 and 8 of the Convention.

⁸² See *Dudgeon v the United Kingdom* (7525/76) 22.10.1981.

⁸³ (61495/11) 15.03.2016.

⁸⁴ (39272/98) 04.12.2003.