

# International, Regional and National Instruments Governing the Rights of the Child

By ELC Research Unit ©

The history of the present day rights for children can be traced as follows:

## A) Universal

- 1 General Rights for all emanate from the UDHR 1848;

With gender based rights for women, female children had rights under

- 2 Convention on the political rights of women 1952;
- 3 Declaration of the elimination of discrimination against women 1967
- 4 Convention on the elimination of all forms of discrimination against women 1979

The first Declaration on the rights of a child irrespective of gender was:

- 5 UN Declaration on the Rights of child in 1959.
- 6 UN Convention on the Rights of the Child was implemented in 1989 followed by:

- i) The optional protocol to the Convention on the rights of a child on the involvement in armed conflicts, 2000.
- ii) Optional protocol to the Convention on the sale of children, child prostitution and child pornography

- 7 Worst forms of child labour convention 1999

## B) EU Regional instruments

- 8 ECHR 1950 – although there is no specific article on the right of child, the convention has evolved as can be seen in the discussion below.
- 9 European Convention of the exercise of children's rights 1996
- 10 Charter for fundamental rights of the European Union 2000.

## C) America

There is no Convention rights protecting the rights of the child specifically but for female children there is:

- i) inter-American convention on the prevention, eradication and punishment of violence against women.

## D) Africa

- 11 There is an African Charter on the rights and welfare of the child 1990.

## D) Commonwealth of independent States – there is no specific rights for children

E) **Arab States** - There is no specific rights for children

F) **United Kingdom(In depth)**

**Children Act 2004 in section 10 states;**

10 Co-operation to improve well-being

(1) Each children's services authority in England must make arrangements to promote co-operation between"

- (a) the authority;
- (b) each of the authority's relevant partners; and
- (c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area.

(2) The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to;

- (a) physical and mental health and emotional well-being;
- (b) protection from harm and neglect;
- (c) education, training and recreation;
- (d) the contribution made by them to society;
- (e) social and economic well-being.

Section 58 on Reasonable punishment states;

(1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in subsection (1) are;

(a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);

(b) an offence under section 47 of that Act (assault occasioning actual bodily harm);

(c) an offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).

(3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

(4) For the purposes of subsection (3) actual bodily harm has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.

(5) In section 1 of the Children and Young Persons Act 1933, omit subsection (7).

Section 47 of the children's act relies on the definition of significant harm. This is not strictly defined in the Children's Act or Working Together under the Children's Act but is defined within the children's act as: **Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.**

The procedures to be carried out in undertaking any assessments are given in the guidance: Working together under the Children's Act.

In the Children and Adoption Act 2002, section 120 amended the Children's Act 1989 and the definition of harm as;

Meaning of "harm" in the 1989 Act. In section 31 of the 1989 Act (care and supervision orders), at the end of the definition of "harm" in subsection (9) there is inserted "including, for example, impairment suffered from seeing or hearing the ill-treatment of another".

There is not a definition of harm in the Children and Adoption Act 2002, 2004 and we take this definition to apply. It cannot be correct to give protection under the 1989 Act that do not apply to children covered by other and/ or alternative regulations.

**Section 31 of the Children's Act 1989 states;**

31. (2) A court may only make a care order or supervision order if it is satisfied -
- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
  - (b) that the harm, or likelihood of harm, is attributable to -
    - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
    - (ii) the child's being beyond parental control.

**Section 17 Children's Act 1989 states:**

Provision of services for children in need, their families and others.

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) -

- (a) to safeguard and promote the welfare of children within their area who are in need; and
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

(10) For the purposes of this Part a child shall be taken to be in need if -

- (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
- (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled, and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part

"development" means physical, intellectual, emotional, social or behavioural development; and "health" means physical or mental health.

**Section 22 Children's Act 1989 states:**

22. General duty of local authority in relation to children looked after by them.

(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is - (a) in their care; or (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970 [apart from functions under sections 23B and 24B].

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.

(3) It shall be the duty of a local authority looking after any child -

(a) to safeguard and promote his welfare; and (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.

(4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of -

- (a) the child;
- (b) his parents;
- (c) any person who is not a parent of his but who has parental responsibility for him; and
- (d) any other person whose wishes and feelings the authority consider to be relevant, regarding the matter to be decided.

(5) In making any such decision a local authority shall give due consideration -

- (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
- (b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain; and
- (c) to the child's religious persuasion, racial origin and cultural and linguistic background.

(6) If it appears to a local authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise their powers with respect to a

child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so.

(7) If the Secretary of State considers it necessary, for the purpose of protecting members of the public from serious injury, to give directions to a local authority with respect to the exercise of their powers with respect to a child whom they are looking after, he may give such directions to the authority.

(8) Where any such directions are given to an authority they shall comply with them even though doing so is inconsistent with their duties under this section.

**Section 31 Children's Act 1989 states:**

**31. Care and Supervision:**

- (1) On the application of any local authority or authorised person, the court may make an order:
  - (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
  - (b) putting him under the supervision of a designated local authority.
- (2) A court may only make a care order or supervision order if it is satisfied:
  - (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
  - (b) that the harm, or likelihood of harm, is attributable to:
    - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
    - (ii) the child's being beyond parental control.
- (9) In this section:

"authorised person" means;

  - (a) the National Society for the Prevention of Cruelty to Children and any of its officers; and
  - (b) any person authorised by order of the Secretary of State to bring proceedings under this section and any officer of a body which is so authorised;

"harm" means ill-treatment or the impairment of health or development;

"development" means physical, intellectual, emotional, social or behavioural development;

"health" means physical or mental health; and

"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.
- (10) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

Local Authority is also covered by the Fostering Services Regulations 2002. In particular Regulations 12 and 13 specifically concerned with child protection and with managing behaviour. Regulation 13(2) states that no form of corporal punishment is used on any child with a foster parent.

## Significance of ECtHR (European Court of Human Rights)

It is significant to note that the ECtHR is the only regional player in a forum that has the powers to transcend national court authority for adjudication of issues where human rights as guaranteed by the ECHR convention are violated. This ability to transcend national laws and compel revision of such laws to comply with rights guaranteed by the convention in a broad range of areas which until now have been within the exclusive purview of national and local courts is of historic significance in the context of protection for children. When discussing the evolving protection of children within the context of the European Convention on Human Rights it is important to note that the only reference made to children comes under Article 5(1) (d) <sup>1</sup>, which refers to unlawful detention of minors, and to a lesser extent Article (6) (1)<sup>2</sup> i.e. rule of publicity to the trial. It would however be erroneous to assume that the children's rights cannot be defended under the convention. The ECHR in attempting to develop protection for children developed an evolving concept termed as "in the best interest of the child". It is also taking into account protections provided under other international treaties or covenants such as Convention on the Right of Children.<sup>3</sup>

The rights of a child have always been indivisible from the rights of families. This indivisibility between the right of children and the family was first illustrated in the case of *Johnston v Ireland* (1986)<sup>4</sup> where the family's application under Article 8 for the protection of normal family relations was unsuccessful. However, the child's claim succeeded and the ECHR ruled that the states obligations under Article 8 required that marital and non-marital children should have the same social and legal protection. In this instance the court paid particular attention to the social development in the child's claim whilst ignoring similar arguments put by the adults. This is interesting in that the court's finding, on the same arguments put forward by the child and parents, felt it was able to distinguish on the rights of children. It can be argued the court by doing so opened itself to criticism.

It could however be argued that the children's rights vicariously protect the rights of other members of the family. This novel concept of using this children's rights argument is demonstrated in *Berrehab v Netherlands* (1989)<sup>5</sup>. In this instance the ECHR acknowledged that although the convention does not guarantee aliens rights to reside in a particular country, it also ruled that it does not give the right for an alien to be expelled based on the fact that the marriage to a citizen of that particular country had broken down. The court in so deciding was of the opinion that the daughter's right to continuing ties with her father were paramount. If this judgement is analysed it shows the court imposed a duty on the Netherlands government to preserve a child's family ties and rejected any perceived needs of the state to protect its economic well being. This decision taken by the ECHR was no different to a similar decision undertaken by the Human Rights Commission in

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<sup>1</sup>Convention for the Protection of Human Rights and fundamental freedoms as amended by Protocol No.11 "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"

<sup>2</sup> *ibid* "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."

<sup>3</sup>The Convention on the Rights of the Child was adopted and opened for signature by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49.

<sup>4</sup> ref: Series, No. 112; Judgement of December 18, 1986; 9 E.H.R.R. 203

<sup>5</sup>The case number 3/1987/126/177

Australia where the courts found the rights of family ties outweighed any other consideration in 1995.

The Court will not tolerate any derogation in the prohibition of torture, inhuman or degrading treatment or punishments (T and V v UK (2000))<sup>6</sup>. In this case the applicants aged eleven years old had been sentenced to detention 'at Her Majesty's pleasure' for having abducted and brutally murdered a two year old child. The applicants complained that despite the fact that they were constantly assisted by their parents and social workers and play areas had been arranged in the court that the hearings had been held in public in front of an adult crown court with accusatorial features over a length of time surrounded by massive publicity. They argued that Articles 3 and 6 were infringed as a result. It was further argued that the minimum age for liability adopted by the British criminal law (ten years) amounted in itself to a breach of Article 3 and that their sentence was disproportionate with their young age. The application also stated that in view of the initial tariff of imprisonment being quashed with no new tariffs set, the applicants were put under further stress due to the considerable uncertainty as well as the risk of being transferred to an adult prison later on. The court reasserting the general principles of Article 3 stated that prohibition of torture and inhuman and or degrading treatments is absolute, irrespective of the applicants conduct. The court accepted that the formalities adopted at the trial were not motivated by any intention to humiliate the two boys nor to cause them anguish. On the question of minimum age the court scrutinised whether a common standard existed within the Council of Europe member states. With a wide variation existing in the member states the British age limit was found to be sufficiently proportionate to the rules followed by the other member states and the court therefore concluded that no infringement had occurred under Article 3. Interestingly despite the punitive and preventative nature of the court it did not find it contrary to Article 3. The court however did accept the complaints under Article 6. The findings of this case with regard to Article 3 have remained controversial and the judges giving the dissenting opinion stated that the uncertainty of the imprisonment tariff did amount to a violation of Article 3.

Children's cases to date most frequently evoke Article 3 in their arguments. Established case law relevant to Article 3 in Ireland v UK (1978)<sup>7</sup>, states that ill-treatment must attain a minimum level of severity. The court in Warwick v UK (1986)<sup>8</sup> by taking this view allowed itself a wide margin of appreciation by taking varying factors such as effects suffered by victims, his or her sex, age, or state of health into account.

This concept of relativity has allowed Strasbourg to interpret provisions under Article 3 in a developing way. The court in Fadele v UK (1991)<sup>9</sup> further took the concept of Article 3 on the psychological effects on children of inhuman or degrading treatment. The court looked at whether giving a child the choice of separation from his or her parents and or leaving the country of birth would amount to cruel treatment, bearing in mind the cruelty standard is omitted from Article 3 of the convention. This did not however stop the court finding such state actions as degrading.

Most of the cases invoking Article 3 have been against the judiciary or schools; however the court has further developed child rights against individuals. A far reaching development was in A v UK (1998)<sup>10</sup>, where the nine year old applicant complained about violation of Article 3 and or subsidiary Article 8 as a result of the state's failure to protect him against ill treatment inflicted by his

<sup>6</sup> ref(2000) 30 E.H.R.R. 121, para. 67

<sup>7</sup> ECHR Series A , No 25 (1979-80) 2 EHRR 25 18 JANUARY 1978

<sup>8</sup> ref(1986) 60 DR 5

<sup>9</sup> ref (No. 29569/95) Judgment of September 16, 1999, Vol. VI, Section II

<sup>10</sup> ECHR (100/1997/884/1096)

stepfather. The son argued that he was beaten with a garden cane and although the stepfather had been arrested and charged he was acquitted by the UK judiciary because under UK law the punishment was considered reasonable and legitimate in the context of a child's upbringing. The court took the view it was incumbent on the child to provide the burden of proof as the legitimacy presumption can only be rebutted by the state. In this instance the ECHR looked at the states liability in a scenario whether a state can be held responsible for a crime committed by a private person. The court approached this question by taking Article 1 of the ECHR<sup>11</sup> in combination with Article 3 which requires that states take the necessary steps in order to prevent within their jurisdiction a child from being subjected to inhuman and degrading treatment. It further stated that this duty on the state is incumbent even when the violations are committed by individuals. In line with previous judgements (X&Y v Netherlands 1985<sup>12</sup>; Stubbings & Others v UK 1996<sup>13</sup>) the court reiterated its view that children being vulnerable subjects need preventive and effective protection. This decision by the court is in conformity with the CRC. This development shows the court willing to take a horizontal effect doctrine to family relationships thus establishing that the states liability can even be engaged by the conduct of parents whenever such conduct is not restrained by state intervention.

This horizontal doctrine the court so stated also applied to statutory bodies as in the case of Z & Others v UK (2001)<sup>14</sup> which concerned five siblings between the ages of five and two years of age. The statutory body was aware as far back as 1987, that the children were kept in appalling sanitary conditions by their parents and there were also episodes of physical abuse and abandonment on numerous occasions resulting in the children suffering from serious psychological and behavioural problems. Despite all these facts known by the statutory body no action was taken until 1992. The applicants, in this case the children, were placed in emergency foster care and full care orders were granted by the county court in 1993. The solicitor appointed by the court took legal proceedings for negligence and breach of statutory duty. The local council on this occasion evoked the immunity clause under the 1989 Children's Act. In the case before the Commission the court relied on the criteria established in A v UK 1998<sup>15</sup>. Further also applying *mutatis mutandis* established in the Osman case (1998)<sup>16</sup> the Commission reaffirmed the extent of obligations of the state to adopt preventive measures.

On the question of right to family life the most extensively used and interpreted is Article 8 of the convention. The court has until recently interpreted family life as basically between parents and children. In an attempt to broaden the scope of Article 8 the court has progressively expanded and extended these rights to grandparents (Marckx v Belgium 1979)<sup>17</sup>, siblings (Moustaquim v Belgium 1992)<sup>18</sup>; and relatives by collateral line (Boyle v UK 1994)<sup>19</sup>. Undoubtedly the development of Article 8 not only entails negative obligations on behalf of the states i.e. not to interfere with the enjoyment of guaranteed rights but equally imposes positive obligations upon the states so that effective respect can be ensured. Whilst not imposing what these obligations consist of, leaving it up to states to choose the most suitable measures to comply with the convention, the major achievement of the ECHR has been the reaffirmation of the positive obligation on the states when

<sup>11</sup> States "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

<sup>12</sup> March 26, 1985, A No. 91

<sup>13</sup> October 22, 1996, Reports 1996 -IV

<sup>14</sup> Judgement of 10 May 2001, No. 29392/95

<sup>15</sup> *ibid*

<sup>16</sup> Judgment of October 28, 1998, Reports 1998 – VIII at 116

<sup>17</sup> Series A, No 31; Judgment of June 13 1979; 2 E.H.R.R. 330

<sup>18</sup> Series A, No.193; Judgement of February 18 , 1991; 13 E.H.R.R. 802

<sup>19</sup> Series A, No. 282-B; Judgment of February 28, 1994; (Resolution DH (94) 65 of 21 September 1994)

the enjoyment of one's rights may be hindered by the conduct of individuals (X & Y v Netherlands (1995))<sup>20</sup>.

The ECHR in developing the rights of children has given a variety of opinions in many cases concerning diverse situations. The majority of these judgements refer to cases arising from children in public care (O & H, W, B & R v UK (1987)<sup>21</sup> Olsson v Sweden (1988)<sup>22</sup> Eriksson v Sweden (1989)<sup>23</sup>; Johansen v Norway (1996).<sup>24</sup>

The court has similarly given important decisions on matters of divorce (Hendricks v Netherlands (1982)<sup>25</sup>, Hoffman v Austria (1993)<sup>26</sup>, TP & KM v UK (2001),<sup>27</sup> P, C & S v UK (2002)<sup>28</sup>). In the case of TP and KM the ECHR concluded that the UK government failed to observe procedural safeguards which are inherent in Article 8 (right to respect of family life), the court contended that the local authority had wrongly identified the mother's partner as having abused the child. Although in this instance it did not find that the original emergency order based on factual error was itself a violation, but in a subsequent case K & T v Finland (2000)<sup>29</sup> the court did find that the making of the emergency care order based on factual error was itself a violation of Article 8 in addition to Articles 6 and 13.

The ECHR further developed its protection of children as illustrated in the case of P, C & S<sup>30</sup>, where P was charged for a felony offence under Section 273A (a) of the Californian Penal Code of cruelty towards B (a minor). In 1996 in breach of a probation order P came to the UK to visit C and in 1997 they were married. P shortly discovered that she was pregnant. The local authority was informed by the district attorney in the USA of P harming her son B. When the new child to P and C was born the child was taken away by the social services. P contended that the actions of the local authority and subsequently the judiciary violated Article 6 of the convention, as the judge in the matter could have granted P an adjournment when P's legal team withdrew at the last minute. Whilst the ECHR accepted that there is no automatic right under the convention for legal aid or representation the court expanded the interpretation of Article 6 to state that there were two interrelated aspects which were 1) the right of access to court for the determination of civil rights and obligations as defined in Golder v UK (1975)<sup>31</sup> and 2) the key principle governing Article 6 i.e. fairness as defined in *McVicar v UK* (2002)<sup>32</sup>.

The court found that the parents did not have a fair and effective right to court as set out under Article 6. P also argued that her rights under Article 8 were breached and the measure taken by the council deprived P and C of any further family life without S, the new baby. The court reaffirmed the mutual enjoyment by parent and child of each others company constitutes an fundamental element of family life, and hindering of such enjoyment amounts to interference to the rights protected under Article 8 (Johansen v Norway (1996))<sup>33</sup>. P and C further contended that the actions of the state and

<sup>20</sup> March 26, 1995, A No. 91

<sup>21</sup> Series A, No.120; Judgement of July 8 1987; 10 E.H.R.R. 95

<sup>22</sup> March 24, 1988, A No, 130. para. 68

<sup>23</sup> Series A, No. 156; Judgment of June 22, 1989; 12 E.H.R.R. 183

<sup>24</sup> August 7, 1996; Reports 1996-III )

<sup>25</sup> March 8, 1982, D & R 29, 5

<sup>26</sup> June 23, 1993, A No. 255-C

<sup>27</sup> No. 28945/95(GC)

<sup>28</sup> Judgment of 16 July, 2002, No. 56547/00

<sup>29</sup> (N° 25702/94)27 April 2000 [Section IV]

<sup>30</sup> *ibid*

<sup>31</sup> Series A, No.18; Judgement of February 21, 1975; 1 E.H.R.R., 524

<sup>32</sup> Judgment 7 May 2002, No. 46311/99

<sup>33</sup> *ibid*

the judiciary were a violation of Article 12 of the convention, and they argued that having children was an essential part of the right guaranteed under this provision. The court in deciding found that the removal of S and lack of legal representation disclosed violations of Article 8 of the convention, noting that Article 12 relates to the right to found a family and does not warrant interference between parents and existing children, Article 8 on the other hand may be being regarded as *lex specialis*.

The court has also dealt with cases arising out of hereditary dispute (*Vermeire v Belgium* (1991));<sup>34</sup> immigration (*Berrehab v Netherlands* (1988),<sup>35</sup> (*Gul v Switzerland* (1996),<sup>36</sup> *Ahmut v Netherlands* (1996);<sup>37</sup> equality of treatment ((*Marckx v Belgium* (1979),<sup>38</sup> *Johnston v Ireland* (1986));<sup>39</sup> and acknowledgment of paternity (*X, Y & Z v UK* (1997),<sup>40</sup> *Mikulic v Croatia* (2002).<sup>41</sup>

In *Mikulic v Croatia* (2002)<sup>42</sup> the court took the view that whilst there were other issues in the matter the paternity of the child was most important as it would be a violation of the child's right growing up in uncertainty. The court expanded its interpretation of Article 8 from *Niemitz v Germany* (1992)<sup>43</sup> where it said 'private life' must also comprise a certain degree of right to establish a relationship with other human beings, the court in this instance further clarified 'private life' to include that everyone should be able to establish details of their identity as individual human beings and concluded that an individuals entitlement to such information is importance because of its formative implications for his or her personality. Unlike in the case of *Gaskin v UK* (1989);<sup>44</sup> the applicant was born out of wedlock and she had the right to determine her relationship with HP (her father). In reaching the decision the court not only introduced biological truth needed (DNA) but also established a direct link between establishment of paternity and the applicant's private life. The facts of the case so the court stated fall accordingly within the gambit of Article 8. This is a further demonstration of how the court has approached Article 8 and developed its significance in relation to the protection of the child.

The ECHR has also given a number of innovative judgements in the case of mental and obsessive health implications that were detrimental to the well being of children. In the case of *E & P v Italy* (1999)<sup>45</sup> as well as in *K & T v Finland* (2000)<sup>46</sup> the children were taken into public care as a consequence of their parents' mental disorder. The court found in the case of *E & P* that the Italian court had pursued a legitimate aim, namely the protection of the child's rights and freedom. The court concluded the 'necessity test' applied by the Italian court was based on a 'fair balance' principle, i.e. relevant and sufficient reasons to intervene not lacking any consistency with the ultimate aim of reunification. The mother had however contended that the contact between her and her daughter had been abruptly interrupted notwithstanding that the mother's declaration in the course of a civil action that she was willing to see her daughter on neutral grounds and in the presence of a social worker. Despite this the court felt it was in the interest of the child that the decision to keep the child in care by the authorities was reasonable, having taken into account

<sup>34</sup> Series A, No 214-C; Judgment of November 29, 1991; 15 E.H.R.R. 488

<sup>35</sup> Series A, No. 138; Judgemtn of June 21, 1988; 11 E.H.R.R. 322

<sup>36</sup> February 19, 1996, Reports 1996 - I

<sup>37</sup> November 28, 1996, Reports 1996 - VI

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> Judgment of April 22, 1997, No. 21830/93

<sup>41</sup> Judgemnt of February 7, 2002, No. 53176/99

<sup>42</sup> *ibid*

<sup>43</sup> Series A, No 251-B; Judgment of December 16, 1992; 16 E.H.R.R. 97

<sup>44</sup> Series A, No. 160; Judgment of July 7, 1989; 12 E.H.R.R. 36

<sup>45</sup> (No. 31127/96) Judgment of November 16, 1999, Section II

<sup>46</sup> (N° 25702/94) Judgement of April 27, 2000, Section IV

several expert reports and also the wish of the child to stay with the foster family. However, the court noted that the father had not seen his son for over eight years other than intermittent meetings. The applicants violent behaviour (mother) and uncooperativeness and the authorities serious efforts for reunification of the family meant that there was no infringement of Article 8. In the two above cases the key elements that the court considered was violation and non violation role played by the applicant in decision making. The court was of the opinion that the more an applicant was enabled to participate less violation was likely to occur.

In the court's attempt to protect what is best for the child in cases where a child had been removed and placed in a foster home is best illustrated in *L v Finland* (2000).<sup>47</sup> In this case the applicant's daughters were taken into provisional care because of suspected sexual abuse by the father and the grandfather. The national courts later issued a definite care order as they considered the parents were incapable of ensuring the proper development of the children. In the course of these hearings the parents had divorced. The applicant complained violation of Article 8, namely that the measures adopted by the state were not aimed at reuniting a family. The ECHR took several factors into account, these were i) whether the care order was based on valid reasons, ii) the family's overall hardship situation, iii) initial sexual abuse suspicions and iv) the authority's refusal to terminate the care order in light of the changing of the family's situation, i.e. the parents had been divorced. What played a major part in the court decision was the girls' stated view that they did not wish to see their father often. The court dismissed the application on the grounds that Article 8 had not been violated and the national authorities had struck a fair balance between the various interests in question.

In continuing with the development for the protection of children in the area of international child abduction by one parent the court set a precedent in *Ignaccolo-Zenide v Romania* (2000).<sup>48</sup> The applicant, a mother, has residence of her two daughters living with her in France. The Father, who is Romanian, had taken the daughters on holiday to Romania, refusing to return them. The national court initially ordered that the children should be returned to the applicant, but later issued another order saying the children should not be returned to their mother in accordance with the children's wishes. The Mother contended that this aforementioned injunction by the Romanian authorities was in breach of Article 8. The ECHR stressed that in addition to other obligations Article 8 imposes on the States positive obligation to take measures in order for the parent to be reunited with his or her children, taking into account the child's rights and interests. The court further stressed any coercion from the principle should be limited. In reaching its decision the Court looked at the positive obligations in light of the Hague Convention (1980) on the civil aspects of international child abduction. In deciding, the question the Court asked was whether the national authorities had taken reasonable measures which could be reasonably expected from them for enforcement purposes. The Court also observed that whilst the first attempts were promptly made not much was done afterwards, and the State could offer no satisfactory explanation. The Court also noted there were no preparations made for the children's return nor were there any coercive measures adopted by the father. The Court's view was that despite the State margin of appreciation the national authorities had not made sufficient efforts to guarantee the return of the children to the applicant, thus breaching Article 8. The Court also underlined the importance of taking into account the children's preferences in conformity with the UN CRC.

In a further interpretation of Article 8 the Court ruled that Article 8 had not been violated in the cases of *Elsholz v Germany* (2000)<sup>49</sup> and *Glaser v UK* (2000).<sup>50</sup> In *Elsholz* the Court examined the

<sup>47</sup> (N° 25651/94) 27 April 2000 [Section IV]

<sup>48</sup> (N° 31679/96) 25 January 2000 [Section I]

<sup>49</sup> (N° 25735/94) 13 July 2000 [Grand Chamber]

applicant's involvement in the decision making process and also the child's wishes. The Court concluded that on these two counts the applicant had been insufficiently involved in the civil action and also with his child. In *Glaser* the Court based its decision on the fact that steps been taken to facilitate contact with the children, in the light of his wife's obstructionist behaviour to keep the children away. Having accepted with the lapse of a certain period of time, executing orders had become very unlikely and therefore the Court took the view that on the whole the authorities had not failed unreasonably, nor were the delays caused by the actions of his wife attributable to them. The criterion of sufficient degree of involvement was also used in the case of *Buscemi v Italy* (1999).<sup>51</sup> In a sense contrary to a violation, considering the applicants possibility to express his views and to vision the relevant documents in the proceedings engaged on his right to accede to his daughter. Whilst the Court acknowledged no experts were called in, it took the view that the overall proceedings had not been estimated as unfair.

In line with its long tradition of ignoring the significance of the father's role the Court in *Nuutinen v Finland* (2000)<sup>52</sup> reaffirmed the precedence that the child's best interest equated with the mother's interest. In this instance the mother had expressed persistent fear of the applicant without requiring any proof. She further alleged that any contact between the child and the father would cause distress and confusion to the child. The applicant under Article 8 had complained of the authority's failure to make sufficient efforts to enforce his access rights, notwithstanding the mother's obstructionism. The Court repeated its stated view that in any such situation coercion should be limited in virtue of the child's best interest. It is interesting to note this is exactly the opposite view and conclusions reached in the *Ignaccolo-Zenide*<sup>53</sup> case where the Court had insisted upon the use of coercion. This is in line with the Court's decisions to-date where the Court has always equated the right of child with that of the right of mother.

In the Court's far reaching development on the protection of the child, in *Salgueiro da Silva Mouta v Portugal* (1999)<sup>54</sup> the Court looked at the respect for parental rights interlinked with discrimination on the grounds of sexual orientation. The national court of appeal had on this occasion transferred the applicant's responsibility for his daughter to the mother on the grounds of the applicant's homosexuality. The ECHR took the view that there had been interference in the meaning of Article 8 but then sought to examine whether it could be justified under Article 14. From the national court of appeal reasoning in its judgement the father's sexual orientation stood out as the conclusive element in the awarding of custody to the mother. The difference in treatment was plain to the ECHR and unacceptable under the convention since there was not a reasonable proportionality relationship between the means employed and the legitimate aims pursued i.e. the protection of the health and rights of the child. The Court concluded that Article 8 taken together with Article 14 was violated.

In an unprecedented development the ECHR for the first time took into account the significance of the role of the father when equating the best interest of the child. Up to this point the father's role has been ignored by the ECHR and is still being ignored in the UK national courts. Unlike *Nuutinen v Finland* (2000)<sup>55</sup>, where the Court had ignored the right of the father and the right of the child to have access to his father, the case of *Sommerfeld v Germany* (2001)<sup>56</sup> is significant. The applicant was denied access to his daughter by a lower court in Germany. The regional court took the view

<sup>50</sup> (N° 32346/96) Judgment of September 19, 2000, Section III

<sup>51</sup> No. 29569/95 Judgment of September 16, 1999, Vol. VI, Section II

<sup>52</sup> (N° 32842/96) 27 June 2000 [Section I]

<sup>53</sup> *ibid*

<sup>54</sup> Judgement of 21 December 1999, No. 33290/96

<sup>55</sup> *ibid*

<sup>56</sup> No. 3187/96

that the father could only be granted the right of access if it was deemed in the interest of the child, and the court's finding in particular the daughter's statement of 1992 and 1994 that these conditions were not met. This was reinforced by the Federal Constitutional Court. The applicant, father, complained that the German court's decision dismissing his request for access to see his daughter born out of wedlock amounted to breach of Article 8 of the convention. The ECHR recalls the notion of family not necessarily confined to marriage based relationships may comprise of other *de facto* 'family' ties. It considers a child born of such a relationship is *ipso jure* part of that 'family' unit. In this case the applicant had lived with his child from birth and the decisions of the lower German courts in refusing access to his child interfered with the exercise of his right guaranteed by Paragraph 1 of Article 8 of the convention. The Court then asked whether these interferences by the national courts were justified. Having regard to precedence set in the cases mentioned above the Court concluded that the national authorities had in fact over stepped their margin of appreciation by violating the applicant's rights under Article 8 of the convention. The Court also found that Article 14 taken together with Article 8 had been breached. In its final decision the ECHR found that taking the proceedings as a whole the requirements of Article 6 (1) had been breached.

The ECHR has developed further novel interpretations of Articles 3 and 8 when dealing with the protection of the child in a number of areas such as family, heritage, sexual orientation, and immigration amongst others. The dynamic interpretation of Articles, when looking at the protection of child has been carried out, creating clear and solid precedence issued with jurisprudence and importantly binding for the states.

The European Court of Human Rights was organised in 1950 in Strasbourg. Its purpose was to address alleged violations of the European Convention on Human Rights. On November 1 1998, it became a fulltime court replacing the prior two tier system of a part-time commission and court.

### **Further Reading - "Actors" in practice:**

#### **Universal Declaration on Human Rights. (UDHR).**

The Universal declaration of Human Rights was a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

##### **Article 1**

All human beings are born free and equal in dignity and rights.

##### **Article 2**

Everyone is entitled to all the rights and freedoms...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

##### **Article 3**

Everyone has the right to life, liberty and security of person.

##### **Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

##### **Article 5**

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

##### **Article 6**

Everyone has the right to recognition everywhere as a person before the law.

**Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9**

No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11**

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence and no-one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed.

**Article 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**Article 13**

Everyone has the right to freedom of movement and residence within the borders of each State and everyone has the right to leave any country, including his own, and to return to his country.

**Article 15**

Everyone has the right to a nationality and no-one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

**Article 16**

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution and the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 17**

Everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.

**Article 18**

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 teaching, practice, worship and observance.

**Article 19**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**Article 20**

Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.

**Article 21**

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives, everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 24**

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

**Article 25**

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. **All children, whether born in or out of wedlock, shall enjoy the same social protection.**

**Article 26**

**Everyone has the right to education.** Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit....Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27**

**Everyone has the right freely to participate in the cultural life of the community.**

**Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29**

**Everyone has duties to the community in which alone the free and full development of his personality is possible.** In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

**The UN Declaration of the Rights of the Child:**

- The right to a name and nationality.
- The right to affection, love, and understanding and to material security.
- The right to adequate nutrition, housing, and medical services.
- The right to special care if disabled, be it physically, mentally, or socially.

- The right to be among the first to receive protection and relief in all circumstances.
- The right to be protected against all forms of neglect, cruelty, and exploitation.
- The right to full opportunity for play and recreation and equal opportunity to free and compulsory education, to enable the child to develop his individual abilities and to become a useful member of society.
- The right to develop his full potential in conditions of freedom and dignity.
- The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, peace, and universal brotherhood.
- The right to enjoy these rights regardless of race, colour, sex, religion, political or other opinion, national or social origin, and property, birth, or other status.

### **International Covenant on Civil and Political Rights (ICCPR).**

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. The States Parties ...recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

#### Part 1 Article 1

All peoples have the right of self-determination.

#### Part 2 Article 2

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### Article 5

No State, group or person has any right to engage in any activity aimed at the destruction of the rights in the Covenant.

#### Part 3 Article 6

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

#### Article 7

[www.elc.org.uk](http://www.elc.org.uk)

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited and no one shall be held in servitude.

Article 9

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 12

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 17

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19 holds;

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

**Article 23 on the family states;**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

**Article 24 goes on to say:**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

**Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**The European Convention on Human Rights**

The Convention gives the rights below. For children and families in the UK most but not all of the rights are enshrined in the Human Rights Act 1998. The Human Rights Act 1998 omits article 13 which deprives a UK citizen of effective redress in his own country.

Article 1

Governments are obliged to secure the rights to the citizens of their country and to ensure those rights are protected.

Article 2

Right to life is protected by law

Article 3

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

Article 4.

[www.elc.org.uk](http://www.elc.org.uk)

No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour.

Article 5

Everyone has the right to liberty and security of person save for lawful arrest and detention as provided for by law.

Article 6

Everyone is entitled to a fair and Public hearing. Presumption of innocence until proven guilty. Comprehensive rights if charged with a criminal offence, and cannot be found guilty of an offence that did not constitute an offence at the time of the act.

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence. 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

Everyone has the right to freedom of thought, conscience and religion.

Article 10

Everyone has the right to freedom of expression.

Article 11

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.

Article 12

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

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

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.

There is no strict definition of the best interest of the child but all State and Judicial bodies are obliged to make every decision regarding a child in their best interests. The only definition from the UK we are aware of is the following:-

In re O and N (minors) (FC) In re B (minors) (2002) (FC) House of Lords on Thursday 3<sup>rd</sup> April 2003 it was stated in para 24;. This has long been axiomatic in this area of the law. The matters the court

may take into account are bounded only by the need for them to be relevant, that is, they must be such that, to a greater or lesser extent, they will assist the court in deciding which course is in the child's best interests. I can see no reason of legal policy why, in principle, any other limitation should be placed on the matters the judge may take into account when making this decision. If authority is needed for this conclusion I need refer only to the wide, all embracing language of Lord MacDermott in *J v C* [1970] AC 668, 710-711. Section 1 of the Guardianship of Infants Act 1925 required the court, in proceedings where the upbringing of an infant was in question, **to regard the welfare of the infant 'as the first and paramount consideration'**. Regarding these words, Lord MacDermott said: "I think they connote a process whereby, when **all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare** as that term has now to be understood." In principle the same approach is equally applicable under section 1 of the Children Act 1989. 25. The Children Act directs the court, when making a decision regarding a child's welfare, to have particular regard to the factors set out in the welfare checklist in section 1(3).

International Conventions, treaties and declarations and national laws governing protection of adults and children's rights are very specific in terms of protection of all people; men, women and child against abuses by the State.

## **CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)**

### Article 1

Human dignity

**Human dignity is inviolable. It must be respected and protected.**

### Article 3

Right to the integrity of the person

**1. Everyone has the right to respect for his or her physical and mental integrity.**

### Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

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

### Article 5

Prohibition of slavery and forced labour

**1. No one shall be held in slavery or servitude.**

### Article 7

Respect for private and family life

**Everyone has the right to respect for his or her private and family life, home and communications.**

### Article 8

Protection of personal data

**1. Everyone has the right to the protection of personal data concerning him or her.**

**2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the**

**right of access to data which has been collected concerning him or her, and the right to have it rectified.**

Article 11  
Freedom of expression and information

**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.**

Article 13  
Freedom of the arts and sciences

**The arts and scientific research shall be free of constraint. Academic freedom shall be respected.**

Article 20  
Equality before the law

**Everyone is equal before the law.**

Article 21  
Non-discrimination

**1. Any discrimination based on any ground such as sex.... shall be prohibited.**

Article 23  
Equality between men and women

**Equality between men and women must be ensured in all areas, including employment, work and pay.**

Article 24  
The rights of the child

**Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.**

**2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**

EN 18.12.2000 Official Journal of the European Communities C 364/13

**3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.**

Article 33  
Family and professional life

**1. The family shall enjoy legal, economic and social protection.**

Article 35  
Health care

**Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.**

EN C 364/16 Official Journal of the European Communities 18.12.2000

Article 41

Right to good administration

**1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.**

**2. This right includes:**

**the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;**

**the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;**  
**the obligation of the administration to give reasons for its decisions.**

**Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.**

Article 47

**Right to an effective remedy and to a fair trial**

**Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.**

**Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.**

Article 48

Presumption of innocence and right of defence

**1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.**

**2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.**

Article 49

Principles of legality and proportionality of criminal offences and penalties

**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 law or international law at the time when it was committed.**

Article 53

Level of protection

**Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.**

Article 54 Prohibition of abuse of rights:-

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

**The Bill of Rights, Magna Carta, Praemunire and Coronation and Judicial Oaths** combined assert the following constitutional rights;

1. The rule of law is entrenched 'Be ye never so high the law is above you.'
2. Only the customary and lawfully recognized Courts are to exist.
3. No taxation without representation.
4. Right to petition the Monarch.
5. Subjects right to armed defence.
6. To freely choose representatives for Parliament.
7. Parliamentary privilege/ freedom of speech in Parliament.
8. Parliament to respect the limitations of the Constitution.
9. To be governed by a Constitutional and free Parliament.
10. Punishment to fit the crime.
11. Trial by jury.
12. The presumption of innocence.
13. No arbitrary conviction.
14. Elect and hold parliament.
15. Parliaments composition – Monarch, Lords and Commons.
16. Confirmation of Magna Carta.
17. The Rights to be adjudged absolute and eternal.
18. Constitutional protection from the abuse of power and prerogative.
19. The Protestant Religion.
20. A guarantee of Justice.
21. The right to private property. An Englishman's home is his castle.

### **From the Coronation Oath.**

1. That it is the Duty, principle and function of the Government to maintain the people of the Realm in our;- Statutes, laws, customs, Spiritual and Civil Rights and properties.
2. The protection from the abuse of power.
3. The common law.
4. The guarantee of Justice and Mercy.
5. The establishment and maintenance of the Protestant Religion.
6. The Right to private property (property and possessions – goods and chattels).

The Rights of the declaration were considered to be the ancient rights and liberties i.e. customs. No one could reasonably doubt that the Coronation oath was intended to uphold this.

### **From the Declaration of rights;**

1. The Right is for the Subjects to be ruled by Statute and Common law and not to be ruled by any arbitrary power. No man is above the law.
2. The Right of the Subject is that only the customary and lawfully recognized Courts of the Kingdom should exist.
3. The Rights is for no taxation without representation.
4. Right of the Subject to petition the Monarch without fear of commitment (imprisonment) or prosecution.
5. The personal right to armed defence.
6. The Right for the people to choose their representatives in Parliament without let or hindrance.
7. The right is to have a free Parliament with freedom of speech and debate. Parliamentary privilege.
8. The right to be governed according to our Constitution.
9. The right is to be governed by a free Parliament. It has no right to destroy its own legislative omnipotence as limited by the Constitution.
10. The right for punishment to fit the crime and there be no torture.
11. The right to trial by jury.
12. The presumption of innocence. There can be no fine or forfeiture without trial and conviction.
13. The Right to have an elected parliament at all times.
14. The Rights to be upheld indefinitely and they are always to be adjudged absolute.

### **Further there is also the law within the Children and Young Persons Act 1933;**

#### **(1) Cruelty to persons under sixteen**

(1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health

(including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, and shall be liable;

(a) on conviction on indictment, to a fine . . . or alternatively, . . . , or in addition thereto, to imprisonment for any term not exceeding [ten] years;

(b) on summary conviction, to a fine not exceeding [£400] pounds, or alternatively, . . . , or in addition thereto, to imprisonment for any term not exceeding six months.

(2) For the purposes of this section

(a) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;

(b) where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health.

(3) A person may be convicted of an offence under this section

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.

(17) Interpretation of Part I

(1) For the purposes of this Part of this Act, the following shall be presumed to have responsibility for a child or young person

(a) any person who

(i) has parental responsibility for him (within the meaning of the Children Act 1989); or

(ii) is otherwise legally liable to maintain him; and

(b) any person who has care of him.

(2) A person who is presumed to be responsible for a child or young person by virtue of subsection (1)(a) shall not be taken to have ceased to be responsible for him by reason only that he does not have care of him.

### **Offences against person Act 1861**

42. Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and

the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, . . . for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of [£200]; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, . . . for any term not exceeding two months, unless such fine and costs be sooner paid.

43. Persons convicted of aggravated assaults on females and boys under fourteen years of age may be imprisoned or fined; When any person shall be charged before two justices of the peace with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions herein before contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, . . . for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of [£500] and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid . . .

51. Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, . . . for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of [ £200]; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, . . . for any term not exceeding two months, unless such fine and costs be sooner paid.

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47. Assault occasioning bodily harm. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to imprisonment for a term not exceeding 7

years] . . . and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years] . . . Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude

56. Child-stealing. Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . . Provided, that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.

The Perjury Act 1911 applies not just to words under oath in Court proceedings but also to the contents of the reports as they are reports whether under section 7, 37, 47 etc of the Children's Act 1989 and as is stated in the perjury Act 1911 where reports are provided under an Act of parliament; if any of the contents are known or believed to be untrue then this is perjury.

All private information held by the State bodies regarding the family and their children should be accurate, true and lawfully processed (Data protection Act 1998).

Social protection and protection of the rights of the children and their parents are also protected by the Magna Carta 1215 and 1225, the Bill of Rights 1688, Human Rights Act 1998 and the European Convention of Human Rights and children have particular rights under UN treaties i.e. UN rights of the child.

### **Note on legal definitions**

**Battery** (noun). the actual intentional striking of someone, with intent to harm, or in a "rude and insolent manner" even if the injury is slight. Negligent or careless unintentional contact is not battery no matter how great the harm. Battery is a crime and also the basis for a lawsuit as a civil wrong if there is damage. It is often coupled with "assault" (which does not require actual touching) in "assault and battery."

**Assault** 1) (verb) the threat or attempt to strike another, whether successful or not, provided the target is aware of the danger. The assaulter must be reasonably capable of carrying through the attack. In some states if the assault is with a deadly weapon (such as sniping with a rifle), the intended victim does not need to know of the peril. Other state laws distinguish between different degrees (first or second) of assault depending on whether there is actual hitting, injury or just a threat. "Aggravated assault" is an attack connected with the commission of another crime, such as beating a clerk during a robbery. 2) (noun). the act of committing an assault, as in "there was an assault down on Third Avenue." Assault is both a criminal wrong, for which one may be charged and tried, and civil wrong for which the target may sue for damages due to the assault, including for mental distress.

### Unlawful Sexual Intercourse

This is the main age of consent offence for heterosexuals. It is unlawful for a man (including a boy) to have intercourse with a girl under the age of 16, and where the girl is under the age of 13, the offence attracts a higher penalty.

The so-called “young man’s defence” provides that a man of between 16 and 24, who has not previously been charged with a like offence, can claim (on reasonable grounds) that he did not think the girl he had sexual intercourse with was under 16.

The girl, even if consenting, cannot be prosecuted for the offence as “principal”, nor for aiding and abetting. This follows the ruling in *R v Tyrell* which found that, where the purpose of the offence is to protect certain persons, no such persons can be convicted for it.

Offence	Max penalty
Unlawful sexual intercourse with a girl under 16	2 yrs
Unlawful sexual intercourse with a girl under 13	life

### Anal intercourse

Anal intercourse is defined as buggery in England and Wales, and as sodomy in Scotland. **In Scotland, heterosexual sodomy has never been an offence and an age of consent of 16 applies.**

The offence of buggery in England and Wales applies to both heterosexual and homosexual consensual anal intercourse. It was originally an ecclesiastical offence directed against sexual activity that could not lead to procreation.

Curiously, although the 1967 Sexual Offences Act partially decriminalised homosexual buggery, it still remained a heterosexual offence. After 1967, homosexuals were not in breach of the law relating to anal intercourse where both parties were over 21 and the act took place in private.

In 1994, two important changes were made to the law through amendments to the Criminal Justice and Public Order Act. Firstly, heterosexual buggery was decriminalised. Secondly, a common age of consent for heterosexual and homosexual anal intercourse was set at 18 for England and Wales. The 1994 Act also amended the law to include the offence of male rape. **Non-consensual anal intercourse is, therefore, properly charged as rape.**

Where two persons engage in consensual anal intercourse, each commits the offence as principal and, therefore, both parties can be charged. There is no *Tyrell* defence for the younger party.

Offence	Max penalty
Buggery with a person under 16 or an animal	life
Buggery by a person over 21 with a person under 18	5 yrs
Buggery by a person under 21 with a person aged 16 or 17	2 yrs
Buggery by a person over 18 with a person over 18 where the act was not in private	2 yrs

Male rape – anal intercourse without consent	life
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### Gross indecency

The offence of gross indecency was introduced in 1885. The nature of gross indecency is not statutorily defined although it is generally held to cover any genital contact between men. The Sexual Offences Act 1967 did not abolish the offence of gross indecency but exempted acts between men carried out in private where both parties were over 21.

In 1994, the Criminal Justice and Public Order Act reduced the age of consent for gross indecency to 18.

Offence	Max penalty
Gross indecency by a man over 21 with a man under 18	5 yrs
Gross indecency by a man under 21 with a man under 18	2 yrs
Gross indecency where both parties are over 18 but the act is not in private	2 yrs
Where a man over 21 procures an act of gross indecency by a man under 18 with another man	5 yrs
Where a man under 21 procures an act of gross indecency by a man under 18 with another man	2 yrs
Where a man over 18 procures an act of gross indecency by a man over 18 with another man	2 yrs

Other laws in effect include Public Interest Disclosure Act 1998 (c. 23) permitting employees of the State to whistle-blow and seek redress for victimization of the wrongdoing of Public bodies. Public Bodies Corrupt Practices Act 1889 which speaks for itself, habeus corpus which gives parents right to have the family court case overturned if unlawful decision, Work and Families Act 2006 (c. 18) which increases length of time for maternity pay and also increases for adoption pay.