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## Fundamental Rights of Children in Europe

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### Abstract

This article deals with the fundamental economic, social and cultural rights of children as provided in three key European *treaties of human and fundamental rights*:

- the European Convention of Human Rights (1950)
- the European Social Charter (1961 and revised in 1996)
- the Charter of Fundamental Rights of the European Union (2007)

During recent decades, *concrete norms and standards* have been defined by the three monitoring bodies: the European Court of Human Rights (ECtHR), the European Committee of Social Rights (ECSR) and the Court of Justice of the European Union (CJEU). Their case law shows that states still have a long way to go in safeguarding the rights of children and young people. There are countries in Europe that do not comply almost with any fundamental right.

After 1. introductory remarks, the following areas of rights will be discussed:

2. living conditions and support to families
3. education
4. child labour and protection of young workers
5. negligence, abuse and maltreatment
6. child welfare and public care
7. legal protection.

The final part (section 7.3) summarizes, in the light of the decisions and conclusions of the ECSR how 43 states have fulfilled their obligations.

## 1. Introduction

### 1.1 Treaties

At its inception (1950), the *European Convention of Human Rights* (ECHR) established important principles, not only for fundamental freedoms but also for supporting disadvantaged citizens. It set as a basic requirement the respect for *human dignity*, which includes, as a minimum standard, that each

person is guaranteed the support they need for subsistence, necessary care and a life of human value. The ECHR also protects the *fundamental freedoms*, such as the *integrity* of individuals and families and requires *fairness* by authorities and the possibility of recourse to an independent judicial body, ultimately before a court.

Alongside this, the ECHR prohibits all types of discrimination and establishes the basic requirement of equal treatment (Art. 14 and the Additional Protocol 12). In short, *non-discrimination* in combination with respect for human dignity means that those in the same position should be treated similarly and those in a clearly disadvantaged position must be supported. The latter opens the door for positive measures, at least to the extent that a dignified life is guaranteed for all.

The *European Social Charter* (ESC) is fundamentally based on the same principles as the ECHR but with new elements. The ESC was adopted in 1961 by Western European nations in the spirit of their emerging welfare systems and was revised in 1996 before the breakthrough of conceptions related to neoliberalism and globalisation. As key principles of the time, the ESC expresses the need for *solidarity* and *equal opportunities* and requires that efforts be made to bring the disadvantaged into the mainstream through *positive actions*. The ESC also sets new standards for the *inclusion* and *participation* of all.

In the 2007 *Charter of Fundamental Rights of the European Union* (CFREU), the special provision to protect the *rights of children* is Article 24, which is based on the principles and rights of the two treaties above as well as on the UN Convention on the Rights of the Child, particularly Articles 3, 9, 12 and 13. The other key provision of this EU Charter is Article 14 on the *right to education*. As a new element, the CFREU extends protection to a third generation of human and fundamental rights by promoting a healthy living environment, setting standards for necessary amenities and protecting the rights of consumers, children included.

In summary, the ECHR provides principles and standards for the respect of dignity, fundamental freedoms and justice. In a material sense, the ESC is the broadest of these treaties in terms of the rights of children. However, as previously stated, the CFREU is based on both the abovementioned human rights treaties and introduces a new time-based approach by considering the importance of a healthy living environment and changes in the roles and habits of individuals.

## 1.2 Best interest of the child

The UN Convention on the Rights of the Child (1989) calls for the *best interests of the child*. In Article 3§1 of the Convention, the best interests of the child are established as a *primary consideration in all actions* concerning children. Paragraph 1 refers to the *collective interests* of children, whereas paragraph 2 highlights *the interests of an individual child*.

### *Article 3 of the CRC*

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Also, Article 17 of the ESC expresses extensively the principle of best interest of the child. In a substantive sense, it is in the best interests of every child to grow up in safe and just conditions, to be supported according to his or her needs, and to receive good care and an adequate upbringing offering understanding and affection. Moreover, it is in the best interests of every child to grow up free of poverty, to avoid corporal punishment and exploitation and to enjoy access to education appropriate to his or her abilities and aptitudes. The introductory phrase of Article 17 of the ESC expresses the best interests of the child in a material sense, as it aims to promote the “full development of the child's personality and physical and mental capacities”. In decision-making, the best interests of an individual child can be understood according to what constitutes the best possible or least harmful option for that child, here and now and in the future.

In the public services system, the best interests of the child are ensured by procedure. *Procedural requirements* to guarantee such interests are 1) ascertained consultation with the child by means of professional social work in the environment typical to the child (no minimum age), 2) the recorded opinion of the child, taking into account the age and degree of maturity (indicative age limit 10, 12, 15 years), 3) necessary legal aid and the right to remedies and appeal to an independent legal body and 4) protection of the child from publicity in matters of the child's privacy, integrity and family life.

Legislative bodies, institutions, administration and the courts should consider the “best interests of the child” in both a substantive and procedural sense. The child should be treated as an independent legal subject with the right to be heard and, according to age and degree of maturity, an equal say to that of the custodian(s). Even small children can express what is good for them and what is not, especially if the questioner is a trained social worker or family counsellor. There is no minimum age for such consultation. On the other hand, it is also important that the wishes and opinions of a child who has reached a sufficient degree of maturity are respected as provided in Article 12 of the CRC and recorded in the minutes.

#### *Article 12 of the CRC*

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In practice, the realisation of the best interests of the child requires respect for three operational principles. The integration of a child into the community should primarily occur through *mainstream* activities and, where equal opportunities are not achieved, through *positive actions* for the children concerned.

## 1.3 Material scope

### 1.3.1 The ECHR

The key provisions of the ECHR that protect the rights of children are Article 2, protecting the right to life, Article 3, prohibiting inhuman and degrading treatment, Articles 5 and 8, protecting fundamental freedoms and Articles 6 and 13 concerning the rights to a fair trial and effective remedy, respectively.

Respect for *human dignity* necessitates that everyone be guaranteed the right to life, a healthy living environment, support for subsistence, necessary care and housing appropriate to human dignity (Art. 2, 3 and 8). The ECHR also protects *fundamental freedoms*, such as privacy, communication and integrity of individuals and families (Art. 5 and 8) and requires *fairness* from authorities and the possibility of recourse to an independent judicial body, ultimately before a court (Articles 6 and 13). Article 2 of the First Additional Protocol provides for the right to free basic education.

The ECHR also contains a non-discrimination provision (Article 14) aimed at protecting children from unequal treatment and discrimination in regard to the rights provided by the Convention. An important extension to the material scope of non-discrimination is contained in the 12th Additional Protocol to the ECHR. It prohibits all discrimination. In principle, it applies, inter alia, to all children's economic, social and cultural rights, although provided outside the material scope of the ECHR. This provides the ECtHR with authority also to control the rights in the ESC.

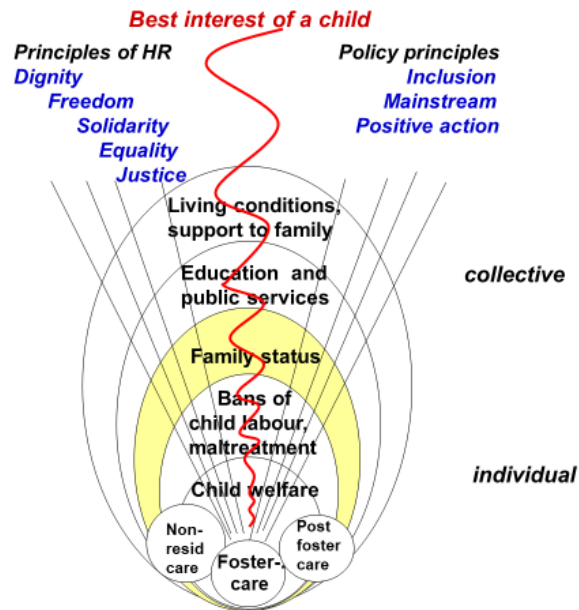
### 1.3.2 The ESC

The ESC widely covers children's rights on a healthy living conditions and support to families, education and public services, protection in the family and protection from negligence, all kinds of abuse and maltreatment, protection against child labour as well as welfare and the public care of children and young persons. In fact, the ESC deals with the entire sphere of the life of children:

- living conditions and support to the family (Art. 11, 16, 17, 27, 31)
- day care, education and public services (Art. 10, 11, 15, 16, 17, 27c)
- negligence, maltreatment and abuse (Art. 7, 17§1b)
- child labour and protection of young workers (Art. 7)
- child welfare and public custody (Art. 17§1c)
- legal protection of children and young persons (ref. to ECHR 6, 13).

Article E of the ESC prohibit all forms of discrimination, which, inter alia, requires children to enjoy equal rights to their parents, regardless of their marital status, and to be treated equally as users of public services and as participants in educational programmes.

Other legal provisions that affect the lives of children, either directly or indirectly, are Article 8 of the ESC (protection of maternity) and 27 (reconciliation of work and family life). The first contains provisions on maternity leave, wages or social security during the period of leave and the right to breastfeed. The latter, in turn, includes standards for parental leave based on the child's need for short-term or long-term care, provisions to facilitate the return to work of parents, and increased standards for the organisation of day care.



The *best interests of the child* is a principle that permeates understandings and interpretations of child law. At all levels, it should be pursued by a) principles of human rights and b) by three operational principles for which there is no linguistic equivalent in many languages: mainstream activities, positive actions and inclusion.

One of the main purposes of *mainstreaming* is to place and keep every child in school and among the activities of other children. *Positive action*, on the other hand, requires placing those with disabilities or disadvantaged circumstances on an equal footing with others through additional support. The amount of support must be sufficient to enable the child to use his or her own abilities and be treated similarly to others. Positive action is not a discriminatory privilege if it acts as a means for achieving material equality. *Inclusion* includes the idea of providing all children with the necessary support to participate in life in the same way as others.

### 1.3.3 The CFREU

In the 2007 Charter of Fundamental Rights of the European Union (CFREU), the special provision to protect the rights of children is Article 24, which is based on the principles and rights of the two treaties above as well as on the UN Convention on the Rights of the Child, in particular Articles 3, 9, 12 and 13. Children's right to education is provided in Article 14 of the CFREU, which is based on Article 2 of Protocol 1 of the ECHR and Article 10 of the ESC.

Articles 36 to 38 of the CFREU extend protection to children's third generation fundamental rights through provisions on protection of the environment, services of general economic interest, including basic housing amenities, and the rights of consumers. The latter may, for example, allow the restriction of the use of children in advertisements aimed to increase sales to children or to prohibit, in the spirit of Article 35 (high-level health protection), the distribution of dangerous and unhealthy appliances and toys (Explanations relating to the CFREU, 2007/C 303/02).

Handbook on European law relating to the rights of the child (European Union Agency for Fundamental Rights and Council of Europe, 2015) summarises the key points of the protection of children as *consumers* as follows (p. 183 – 189):

- According to the CJEU, child consumers' best interests and the protection of their rights override requirements of public interest justifying limits to the free movement of goods, persons, services and capital.
- Children as consumers should be provided with relevant information so as to be able to consider all relevant facts and make an informed choice.
- Unfair commercial practices are those that do not comply with the principle of professional diligence and may influence adult and child consumers' transactional decisions.
- Children can be included in clinical trials only if the administered medicinal product is expected to be of direct benefit to them, thereby outweighing the risks.
- EU and CoE law limit the amount of marketing children may be exposed to, without banning it as such.
- Children are entitled to specific protection, which implies protection against any advertising as well as tele shopping programmes which could cause moral or physical harm to them.
- The placement of products advertisements in children's programmes is forbidden

Furthermore, the key points for *personal data protection* of children are (p. 189 – 193):

- Under EU and CoE law, personal data protection has been acknowledged as a fundamental right.
- The right to respect for private and family life, home and correspondence (Article 8 of the ECHR) includes the right to protection of personal data.
- Children have, among other rights relating to their personal data, the right to object to the processing of their data, except on compelling legitimate grounds.

#### 1.4 Personal scope

The rights of the ECHR are universal and protect children's rights whatever their country of origin. Rights protecting the human dignity and basic freedoms belong to everyone!

By contrast, the additional rights provided in the ESC are limited in coverage, in particular those requiring significant financial inputs from the state. There, the point of departure is a kind of macro-reciprocity. These rights are afforded *only to nationals of the Contracting States* who are legally resident or regularly employed in the country in question.

The wording of the Introduction to the Appendix to the ESC seems to leave citizens of third countries, as well as illegal residents, outside the scope of the country's welfare benefits and services. For example, at the beginning of the millennium, persons residing illegally in France, including minors, were unentitled to emergency health care. However, the ECSR has assessed the situation of children differently. Based on Article 17 of the ESC, the ECSR Committee has decided that emergency health services should be provided for all children (*FIDH v. France, CC 14/2003, §32*).

Moreover, the ECSR has recently interpreted existence level of social aid (Art. 13§4) and temporary housing (Art.31§2) as covering also irregular adult migrants (*CEC v. The Netherlands, CC 90/2013, p. 73-75; FEANTSA v. The Netherlands, CC 86/2012, §141*). In addition, the ECSR has decided that all children, including those without the required permit, should enjoy the same right to primary education as other children (*C 2011, Statement of interpretation on Article 17§2; Médecins du Monde - International v. France, CC 67/2011, §128*).

Furthermore, in the case of the prohibition of ill-treatment and abuse, such as corporal punishment or economic, sexual or other exploitation, or other fundamental protection of *human dignity*, the ESC has

*universal coverage*. Here, the application of the ESC is an ancillary provision of the ECHR and must not reduce the rights established by the latter.

## 2. LIVING CONDITIONS

### 2.1 Healthy environment

When applying Article 2 of the ECHR, in order to reduce risks from hazardous activities, the European Court of Human Rights (ECtHR) has required a) prior authorisation or the use of other mandatory control systems for such activities, as well the communication of said risks to residents (*Öneryildiz v. Turkey* (2004), and b) an appropriate *system of health* services available to everyone in the event of a life-threatening situation. Specific threats to health and loss of life have concerned poorly tested and poorly controlled vaccination programs and the resulting disproportionate risks, use of transfusions, and patient injury (*Calvelli and Ciglio v. Italy*, 2002).

Under Article 8, the ECtHR has decided that the right to an unpolluted environment is also part of the protection of the home and family (*Bacila v. Romania*, 2010). In addition, Article 8 has been applied to protect residents from prevalent nuisances and hazards (noise, vibration, dust and air pollution, etc.) and against threats to cultural activities (*Fadeyeva v. Russia*, 2005; *Taskin and others v. Turkey*, 2004; *Moreno v. Spain*, 2004; *Noack and others v. Germany*, 2000).

Article 11§1 of the ESC sets concrete environmental standards and “hardest core” indicators for the protection of minors. Infant and maternal mortality are indicators of how well a particular country’s overall health system is operating.

The provision covers risk-free nutrition, drinking water, air and standards of construction as well as protection against noise, radiation and hazardous substances. Moreover, it encompasses product safety both in a physical and psychological sense, including bans on dangerous toys. The provision also requires countries to have a comprehensive health care system accessible to all children, including a child and maternity counselling system (C 2005, Moldova, pp. 450–452) and that health services are available promptly to all children. This also applies to children living in child welfare institutions. Psychological protection includes legislation that restricts or prohibits obscene or harassing communication and advertising to children.

Article 11§2 provides for health promotion. The provision focuses on children’s nutrition, sleep, hygiene and health education, the control of intoxicants (tobacco, alcohol and drugs), and the control of contagious diseases (C XV-2, 2001, Belgium, p. 96–99). Health promotion can occur in the form of general public education or based on group-oriented or individual guidance and counselling. According to the case law of the ECSR, health education, including sexual health education, is sufficient if it is part of the school curriculum and continues throughout primary school (Digest of the ECSR, 2018, p. 132).

Article 11§3 of the ESC contains preventive measures to protect health. These measures include the reduction, prevention and early diagnosis of endemic or chronic illnesses and accidents through:

1. systematic school health care (C XV-2, 2001, France, p. 208–211)
2. comprehensive mass screenings (C 2005, Moldova, p. 450–452; C XV-2, 2001, Belgium, p. 96–99)
3. vaccination programmes for the prevention of infectious diseases and other demographic, regional or group activities

4. special programmes and awareness-raising measures for the elimination of accidents at home, at school, in traffic and during leisure time as well as injuries to children by animals (C 2005, Romania, p. 603–606).

Belgium and Turkey were considered to be in breach of this provision when their populations were found to be insufficiently resistant to certain dangerous diseases due to inadequate vaccination programmes (CXV-2, 2001, Belgium; CXV-2, 2001, Turkey). Moreover, the state must prevent the sale of tobacco to minors and implement specific measures to combat alcohol and drug use among young people (C XVII-2, 2005, Portugal, p. 685–689).

Article 35 of the CFREU on health care is linked to Article 11 of the ESC. (Explanations relating to the CFREU on Art. 35, 2007/C 303/02)

## 2.2 Support for families

The cornerstone of children's well-being is the well-being of families and communities. They, in turn, are doing well if and when society provides families and local communities with positive incentives. When parents live in cramped, inadequate conditions, children's wellbeing suffers.

### 2.2.1 Decent housing standards

Children require their own space, and thus it is often necessary for families to seek larger dwellings. The right to housing of families with children is enshrined in Article 8 of the ECHR and Articles 16 and 31 of the ESC. According to Article 31 of the ESC, a homeless family must be provided a) immediately at least a temporary shelter (§2), and b) a standard dwelling without undue delay (§1). In turn, Paragraph 3 of Article 31 leaves it open for states either to lower housing prices for families by subsidising construction costs or supporting families with housing allowances.

Article 16 of the ESC calls for special programmes for young families to ensure access to housing as first-time buyers or recipients of social rental housing, and to protect them from substandard housing and slums (ERRC v. Bulgaria, CC 31/2005).

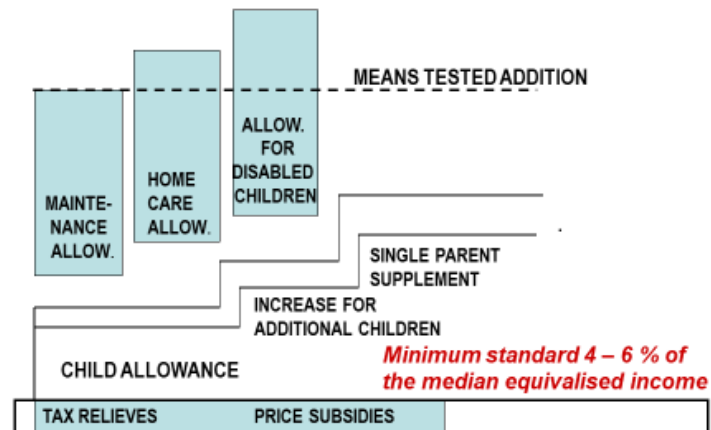
### 2.2.2 Compensation for family expenses

The basis of children's livelihood is their parents' income, supported by compensation for family expenses. Article 4§1 of the ESC obliges states to set the level of the minimum wage so as to ensure a fair standard of living for workers and their family members. However, as this seldom takes into account the number of people consuming this wage, the 'hard core' provisions, Articles 12 and 16, require states to compensate for the expenses of children with family or child allowances and other adequate support.

Based on the case law of the ECSR under Article 16 of the ESC, the minimum level of child benefits is determined in relation to a country's average net salary. Child benefits should be "a significant addition to family income" and should be between 4% and 6% of median net income, depending on other support, such as tax reductions, price subsidies and services with reduced prices or no fee. In Estonia, a level of 5% was considered sufficient due to the country's many free services (C 2004, Estonia, p. 215). However, child benefits were deemed to be below these requirements in Romania (C 2004, Romania) and Turkey (C XVII-1, 2005, Turkey).



## Compensation of family costs



Every European country except Turkey has a comprehensive system for compensating family expenses in the form of direct income transfers. The main form of support is paid as a universal family benefit or child allowance regardless of the parent's income. However, in Greece, that benefit is paid only to employees, and in Bulgaria it is earnings-related. Slovakia was the first country to abolish the payment of child benefits to the Roma population, a model that was followed by some other Central and Eastern European countries in the 1990s. However, this practice was clearly against the discrimination clauses in all the key treaties of human and fundamental rights. Turkey, for its part, violated the requirements by limiting compensation to the children of public sector employees (C XVI-1, 2003, Turkey).

### 2.2.3 Reconciliation of work and family life

The traditional approach to the protection of reproduction deals with the protection of maternity by restricting dangerous work for pregnant women or breastfeeding mothers by providing for maternity leave and security of income during that period. This is the approach in Article 8 of the 1961 ESC.

Article 8§1 provides for a minimum *maternity leave* of 14 weeks. Of these, at least 6 weeks must be mandated by law such that the employee cannot relinquish them. For the period of the leave, a salary or social insurance benefit must be paid of at least 70% of the previous salary and never less than 50% of the country's average net income calculated according to Eurostat (C XVII-2, 2005, Latvia). However, for high salaries, reasonable reductions from that 70% level are accepted (C 2015, Statement of Interpretation on Article 8§1). The payment of a social insurance benefit may be conditional on a persons' presence in the labour market for a certain reasonable minimum period (C 2015, Statement of Interpretation on Article 8§1).

Under Article 8§2 of the ESC, after notification pregnancy, it is unlawful for an employer to *dismiss* a worker after until the end of maternity leave. This rule must also be observed for those in fixed-term employment and those working under a civil law contract. However, the provision does not preclude termination of employment at the end of maternity leave (C XIII-4, 1996, Statement of Interpretation on Article 8§2).

Article 27 of the 1996 ESC emphasises the mother's return to work and introduces new standards for the daily care of children. It also prolongs maternity leave, extends the protection against unlawful dismissal and introduces the option for fathers to use the leave in the form of *parental leave*. The immediate intention of all this is to protect the parents of small children and as a result also ensure those children a safe start.

#### 2.2.4 Public services

In addition to support for livelihood, housing and protection of health, psycho-social and educational services are important for families with children. Maternity and child counselling (C 2005, Moldova, p. 450–452), day care or early childhood education classes and primary education are the key public services for children and their families. They are important for all, but they are most relevant for children living in vulnerable circumstances. It is of the utmost significance for their future that they are able to enjoy the same care and education as children from more affluent families. The right to low-fee or free public services, and to free education in particular, is an effective means of realising equal opportunities for all.

### 2.3 Rights in the family

#### 2.3.1 Custody of the child

Children are minors, persons under the age of 18, and their parents are, in principle, their custodians and guardians. The custodians are responsible for the upbringing, maintenance and representation of the child. The child's custodian or guardian (Western Europe) or equivalent holder of *parental rights* and responsibilities (Eastern Europe) is entitled to exercise the child's right to voice an opinion on matters pertaining to his or her well-being. However, young persons enjoy a certain maturity- and age-bound parallel right to express an opinion on such matters. Both the custodian/guardian and the young person exercising his or her own right must have access to adequate legal aid to ensure legal protection.

A young person may enter into an *employment contract* at the age of 15 and is entitled to light work even earlier with the consent of the custodian or guardian (Article 7§1 of the ESC). In matters central to the child, he or she must be heard. Article 8 of the ECHR on privacy and integrity is applicable to children by analogy.

The age of *criminal responsibility* must not be excessively low. In many countries it is set at 15 years. Thus far, the ECSR has monitored the situation in Contracting States and expressed concern over the age limits in Turkey (11 years), the United Kingdom (10 years) and Ireland (9 years) (C XV-2, 2001, Ireland ; C 2011, Ireland; C XV-2, 2001, Turkey ; C XV-2, 2001, United Kingdom).

#### 2.3.2 A child's own wishes and opinion

When arranging custody of a child, that child's own wishes and opinion should be taken into account, and the child should be provided an independent or parallel say in matters concerning his or her custody according to *age and maturity*. The right to be heard and consulted should be provided by law.

In cases where both parents are denied custody or guardianship or if the interests of the child and the guardian are in conflict, a third person must be appointed to guard the child's interests. The appointment of an external custodian or guardian or the placement of a child outside the home shall not deprive the child of the right to be heard. Neither shall it result in the child's opinion and wishes being disregarded.

When a child is placed outside the home temporarily or permanently, his or her dignity, fundamental freedoms and rights must be respected as before. The director of the child welfare institution or other person responsible for the care and upbringing of the child neither holds the power to restrict these rights nor enjoys supremacy in matters of custody or guardianship. All restrictions must be *provided for in law*, based on justified reasons and assessed according to the principles of a democratic society as stipulated in Article 8§2 of the ECHR and Article G of the ESC (C XV-2, Statement of Interpretation on Article 17§1).

### 2.3.3 Rights in a single parent family

Children's family status and relations with their parents must be organised with respect for the equality of various forms of family (C 2004, France; C 2011, Ukraine). Children in single-parent families should enjoy the same rights to their parents as children living with both parents (C XVII-2, 2005, Malta).

Articles 16 and 17 of the ESC require that *children born out of wedlock* receive the same rights as children born in marriage. National law must guarantee them equal rights to the father's *surname* as well as *alimony* and *inheritance* from the father. The state must have functioning systems in place to establish paternity and ensure maintenance obligations and the recovery of alimony (C XVII-2, 2005, Malta, p. 567).

The break-up of a family or serious neglect of the care of a child can lead to the limitation of custody. This does not, however, break the biological connection between the child and the parent, nor does it remove the parent's obligation to pay alimony. When the rights of a custodian / guardian are restricted, the child retains the right to visit his or her parent and vice versa, the exception being when this would endanger the child, the other parent or a third party. (C XV-2, 2001, General Observation, p. 29; C XV-2, 2001, Austria).

### 2.3.4 Freedom for family formation

The three main Christian denominations of Europe, Catholicism, Protestantism and Orthodoxy, have played a significant role in developing national family laws and practices. In recent decades, however, responsibility for the management of family formation and the definition and registration of families has increasingly shifted to civil administrations. Simultaneously, liberalisation of family formation and strengthening of children's status in family relations has occurred, as indicated by the case law of the ECSR under Article 17 of the ESC.

Young people must enjoy the opportunity to choose their spouses at their own discretion and be protected from unions agreed by their parents. The minimum age for marriage should, in principle, be the same for both men and women (C 2003, France; C 2011, Ukraine).

## 3. Right to education

### 3.1 Day care and preschool

The right to day care and early childhood education is provided in three articles: Article 16 of the minimum supply of day care, Article 17§1a of the quality of all education and Article 27§1c of the increased standards for supply of day care or early beginning of school.

Day care systems include the provision of care in a creche (Kindergarten), in family day care, supported home care or day care in a rotation system of several families. Day care can be organised as early childhood education at school or preschool. Care can be private or public, and support for families can be provided as a service or as a benefit (care allowance, voucher). The fee that may be charged for the service must not prevent low-income families from accessing it in a similar way to other families. Group sizes and the content of day care should promote the growth of children's personalities and the development of their physical and mental characteristics (C XVI-1, 2003, Turkey).

According to Article 16 of the ESC, a state should have a functioning day care system, at least for those children whose care would otherwise be endangered due to lack of income or single parenthood or

other social reasons, or who have a special need for care. The provision of day care in Turkey has been considered manifestly inadequate (C XVI-1, 2003 Turkey, p.490). If a state has ratified Article 27§1 on the reconciliation of work and family life, it is required to ensure that the organisation of day care takes better account of the need for care arising from the employment of parents than required by Article 16.

## 3.2 Basic school

### 3.2.1 Access to education

Every child has the right to education in accordance with Article 17 §1 of the ESC (MDAC v. Bulgaria, CC 41/2007, §34). Primary and lower secondary school should be accessible to all, including children with disabilities and long-term illnesses. In order to promote the integration of vulnerable children, Article 15 of the ESC requires positive action for their education. (*Autism-Europe v. France*, CC 13/2002, §49; *MDAC v. Bulgaria*, CC 41/2007, §33-34) Such action should be also provided for children of migrant families to help them adopt the language of the host country and develop their mother tongue (Article 19§11 and §12).

Article 17§2 provides for basic *education free of charge* and for special measures to minimise and protect *school dropouts*. Vocational training is provided for in Article 10 and the right of children and young people with disabilities to special education in Article 15.

Educating the entire population as far as possible according to each individual's abilities increases the skills and capacity of future employees and entrepreneurs, the productivity of work and future employability and prosperity. This was one of the basic ideas of the Beveridge Report (1942), which guided Britain's post-war cultural and labour policies under reconstruction and on the way to a welfare society.

Basic education must extend at least until the young person is entitled to enter an employment contract (C 2003, France, p. 174; C 2003 Italy, p. 795) and tuition must be free of charge. Nevertheless, Article 17§1 of the ESC allows for some form of user charges to *compensate for food and study materials and school uniforms*. However, these must not become barriers to schooling. In order to support low-income families, the necessary support systems or regulations for free services must be provided. The same rules must also concern children with foreign origin (*Ponomaryovi v. Bulgaria*, Judgment of the ECtHR 21 June 2011).

In terms of equal treatment, the Bulgarian school system has been found wanting in its fulfilment of the educational needs of children with disabilities and children of Roma families (C 2003, Bulgaria, p. 66). Moreover, Slovenia, previously segregated Roma children into special schools, which was considered discriminatory for these children (C 2003, Slovenia, p. 513).

### 3.2.2 Adequacy of education

According to the principal decision and case law of the ECSR, basic education should meet the following standards (C XV-2, 2001, "General observation regarding Article 17"; C XV-2, 2001, Austria):

- Education should promote integration with other children and society. This integration requirement also applies to children living in institutions or in hospitals. Differentiation should only occur when it is in the best interests of the group of children concerned and of each child.
- The training and salaries of educators should be sufficient to allow access to qualified teachers.
- Teaching and class sizes should encourage students to fully develop their personality as well as their physical and mental capacities.

- The necessary social and health services should be provided to keep every child in full-time education with: school health care, assistant services, curative services, a support person or special education, and, if necessary, the assistance of a school curator or even a social worker to keep the pupil in school.

Article 17§2 of the ESC imposes an obligation on states to encourage children and young people to *attend school regularly*, which requires special support measures for children who would otherwise be at risk of exclusion from regular education (C 2003, Bulgaria, p. 66; C 2003 Italy, p. 304; C 2005, Bulgaria, p. 42–43). The ECSR considered it a violation of children’s right to education that 6 % of all compulsory-school-age Romanian children were early school leavers (C 2003, Romania on Article 17§1). The Committee concluded that:

“the situation in Romania is not in conformity with Article 17§1 of the Revised Charter as the corporal punishment of children within the family is not prohibited and as the *level of non-attendance* of compulsory schooling is too high.”

The ECSR can be understood to require even more positive action to ensure the participation in mainstream education of at-risk groups, such as migrant children, Roma children, other children belonging to ethnic minorities, children with disabilities and children living in institutions. If the best interests of the child so require, education must ultimately be provided as private education in the child’s own living environment, which must not mean that the child is left without proper education.

### 3.2.3 Access to quality education of children with disability

Article 15§1 of the ESC makes it an obligation for States Parties to provide quality education for children with disabilities. Priority should be given to inclusive education in the mainstream school system. States parties must demonstrate that tangible progress is being made in setting up inclusive and adapted education systems (Council of Europe, Press Briefing Elements Conclusions 2020).

In order to assess the effective equal access of children with disabilities to education in the coming years, the ECSR asks States Parties to provide information, covering the reference period, on:

- the number of children with disabilities, including as compared to the total number of children of school age;
- the number and proportion of children with disabilities educated respectively in:
  - mainstream classes
  - special units within mainstream schools (or with complementary activities in mainstream settings)
  - in special schools
- the number and proportion of children with disabilities out of education
- the number of children with disabilities who do not complete compulsory school, as compared to the total number of children who do not complete compulsory school
- the number and proportion of children with disabilities in other types of educational settings, including:
  - home-schooled children
  - attending school on a part time basis
  - in residential care institutions whether on a temporary or long-term basis
  - the drop-out rates of children with disabilities compared to the entire school population.

In the supervisory cycle 2020, the ECSR gave the following principal statement (Council of Europe, Press Briefing Elements Conclusions 2020): “The Committee recalls that Article 15§1 of the Charter makes it an obligation for States Parties to provide quality education for persons with disabilities,

together with vocational guidance and training, and that priority should be given to inclusive education in mainstream school. States parties must demonstrate that tangible progress is being made in setting up inclusive and adapted education systems.”

Furthermore, the Committee found several violations against Article 15§1, such as: Luxembourg and the Russian Federation were found not to be in conformity on the grounds that it could not be established that there are adequate remedies in the event of discrimination on grounds of disability in education. Montenegro, Poland, Romania, Serbia, Ukraine and Turkey were found not to be in conformity on the ground that it has not been established that the right of children with disabilities to mainstream education and training is effectively guaranteed or the information on it is missing.

### 3.3 Vocational training

The principles applying to basic education also apply to vocational training. All discrimination in access to training is prohibited. Personal ability must be the only prerequisite for pursuing vocational and occupational training, all the way from secondary school to higher education (Article 10§1).

States that have ratified Article 10§5 (or the corresponding Article 10 § 4 of the 1961 ESC) have committed themselves to *gradually reducing and eliminating all fees* for vocational training. Such training is not required to be free of charge, but the fees must not be an obstacle to anyone. In order to guarantee equal treatment, states must have a functioning support system for students that, at least, removes obstacles due to deprivation (Article 10§5).

Students who are citizens of other contracting countries should also be entitled to grants or student benefits unless the state has set a certain minimum period of residence. According to the relevant EU directive, such a waiting period may not exceed five years. In the Nordic countries, the period required for living in the country is two years.

According to the case law of the ECSR, a student from a Contracting State who has moved to a country for purposes other than study must be given the same benefits as the nationals of that country with no waiting period (C 2012, Finland).

## 4. Prohibition of child labour

### 4.1 Absolute ban

Child labour is prohibited in all the key treaties of human rights, and the ILO has declared this prohibition one of the four fundamental rights of workers (1998).

Article 7§1 of the ESC prohibits the use of the labour of children under the age of 15 (C I, 1969, Statement of Interpretation on Article 7§1). The ECSR considers the ban part of the fundamental protection of human dignity. The Committee has required clear legislation, effective supervision and practices aimed to eradicate the use of child labour. The use of children as a tool in *third sector activities* has also been equated with a ban on the use of child labour (C 2019, Albania, p.4).

The use of child labour can take the form of ongoing care for siblings or other relatives, *domestic work* as well as work in a *family business* or on a farm that could be considered payable work by a non-family member (CI, Statement of Interpretation on Article 7; *International Commission of Jurists v. Portugal*, CC 1/1998). Repetitive tasks performed on behalf of an association, even for one’s own association, can also be considered work.

By contrast, everyday domestic chores or normal maintenance or care for one another are not considered work, and neither are occasional assignments for the benefit of one's own association, even if they are intended to raise money for that association. Moreover, prohibited work does not include voluntary work or cultural heritage work performed by the majority of participants without pay.

In addition, Article 7§1 allows for an exception concerning light work, i.e. work which entails no risk to the health, moral welfare, development or education of children. States are required to define the types of light work, or at least draw up a list of work outside this category. Furthermore, work that is deemed light ceases to be so if it is performed for an excessive duration (*International Commission of Jurists v. Portugal*, CC 1/1998, §§29-31). The conditions and duration of the work, a maximum of six hours per day and 30 hours per week, must be regulated by law or other binding regulations (C 2015, Statement of Interpretation on Articles 7§1 and 7§3).

Under national law, the absolute minimum age for employment (in light work) is usually between 11 and 13 years. In the Nordic countries, young persons are entitled to engage in *temporary light work* in the year they turn 14, whereas in Italy they must reach the age of 16. However, instead of work, the ECSR has considered education a clear priority in the lives of young persons.

#### 4.2 Prohibitions on heavy, dangerous work and night work

The special protection of young workers requires also that minors do not undertake dangerous or unhealthy work (Art. 7§2) except when it is part of their vocational education and performed under close supervision (ECSR Digest 2018, p. 108).

A minor, i.e. a person under the age of 18, must not be employed in *heavy or hazardous work*. It is the responsibility of the employment services of each country to draw up and issue a list of heavy or hazardous work or of physical, chemical, biological or radiological risks (C 2006, France. p. 310–313).

However, minors may engage in hazardous work (Art. 7§2) for educational purposes when it is educationally important for the person's future work, has received permission from the authorities and is performed under controlled conditions (C 2006, Norway, p. 631; C 2006, C 2006, Sweden, p. 868) or when a minor has been trained for such a task (C 2019, Albania, p. 5).

In addition, the law must ensure that persons under the age of 18 are not employed in nightwork (Art. 7§8) except in certain occupations provided for by national laws or regulations.

The provision in Article 7§9 of the ESC on regular *medical examinations* for minors applies, in particular, to work which is considered heavy and dangerous. The provision has been considered to require that a medical examination be performed for the first time before the start of the work, or at the latest three months subsequent to that, and *regularly* thereafter at intervals not exceeding one year. Biennial inspections are considered too infrequent (C 2011, Estonia)

#### 4.3 Protection against physical and moral danger

Furthermore, Article 7§10 guarantees the right of children to be protected against physical and moral dangers within and outside the working environment (C XV-2, Statement of Interpretation on Article 7§10, pp. 26–27). This protection applies to all children and young people in the country, including third country citizens (*Defence for Children International (DCI) v. Belgium*, CC 69/2011 §§ 85-86).

Article 7§10 covers the protection of children and young persons against all forms of exploitation, including grave forms of exploitation such as sexual abuse and trafficking (C 2004, Bulgaria, p. 55 and Norway, p. 412).

## 4.4 Protection of young workers

### 4.4.1 Regular working hours

Under Article 7§4, national law must limit the working hours of persons under 18 years of age who are no longer subject to compulsory education. The regular working time of young people under the age of 16 who have completed primary school must be less than eight hours a day and 40 hours a week (C XI-1, 1989, Netherlands). This provision rarely applies in countries, where the compulsory education continues for more than 16 years.

The limitation may be the result of legislation, regulations, contracts or practice but effectively exercised (C 2006, Albania, p. 55).

“Working time for children from 16 to 18 years old is limited up to 6 hours a day and 30 hours a week and up to 2 hours in a school day and 12 hours a week for work performed over a period beyond hours specified for school attendance . This limit may be increased to 8 hours in the case of children who have reached the age of 16. They are entitled to at least 4 weeks of annual holidays.”

### 4.4.2 Fair wage

In application of Article 7§5, domestic law must provide for the right of young workers to a fair wage and of apprentices appropriate allowances. This right may result from statutory law, collective agreements or other means. The young worker’s wage may be less than the adult starting wage, but any difference must be reasonable, and the gap must close quickly (C II (1971), Statement of Interpretation on Article 7§5). For fifteen/sixteen year-olds, a wage of 30% lower than the adult starting wage is acceptable. For sixteen/eighteen year-olds, the difference may not exceed 20% (C 2006, Albania).

The adult reference wage must in all cases be sufficient to comply with Article 4§1 of the Charter. If the reference wage is too low, even a young worker’s wage which respects these percentage differentials is not considered fair (C XV-2, 2001, Malta).

The “fair” or “appropriate” character of the wage is assessed by comparing young workers’ remuneration with the starting wage or minimum wage paid to adults (aged eighteen or above) (CXI-1, 1991, United-Kingdom). In accordance with the methodology adopted under Article 4§1, wages taken into consideration are net wages, those after deduction of taxes and social security contributions.

Apprentices may be paid lower wages, since the value of the on-the-job training they receive must be taken into account. However, the apprenticeship system must not be deflected from its purpose and be used to underpay young workers. Accordingly, the terms of apprenticeships should not last too long and, as skills are acquired, the allowance should be gradually increased throughout the contract period (C II, 1971, Statement of Interpretation on Article 7§5), starting from at least one-third of the adult starting wage or minimum wage at the commencement of the apprenticeship, and arriving at least at two-thirds at the end (C 2006, Portugal).



#### 4.4.3 Training and holidays

Based on the conditions of Article 7§6, the time spent in vocational training forms part of the working hours (C XV-2, 2001, Netherlands). Such training must, in principle, be related to the young person's work and be done with the employer's consent although it is not necessarily financed by the latter (C V, 1977, Statement of Interpretation on Article 7§6).. Training time must be remunerated as normal working time, and there must be no obligation to make up for the time spent in training, which would effectively increase the total number of hours worked (C V, 1977) Statement of Interpretation on Article 7§6).

Persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay (Art. 7§7 ESC). The duration of interrupted period of rest must not be less than 2 weeks during the summer holidays. The assessment of compliance over the school year takes account of the length and distribution of holidays, the timing of uninterrupted period of rest, the nature and the length of the light work and of the control efficiency of the labour inspectorate (C 2011, Statement of Interpretation on Article 7§3 ). The four weeks holiday provided by Article 7§5 cannot be replaced with additional pay.

#### 4.4.4 Medical check-ups

According Article 7§9 of the ESC, national law must provide for compulsory and regular medical check-ups for under eighteen-year-olds employed in occupations specified by national laws or regulations.

In application of Article 7§9, domestic law must provide for compulsory regular medical check-ups (C IV (1975), Statement of Interpretation on Article 7§9) for under-eighteen year olds employed in occupations specified by domestic laws or regulations. These check-ups must be adapted to the specific situation of young workers and the particular risks to which they are exposed (C 2006, Albania). They may, however, be carried out by the occupational health services, if these services have the specific training to do so (C VIII, 1984, Statement of Interpretation on Article 7§9).

The obligation entails a full medical examination on recruitment and regular check-ups thereafter (Conclusions XIII-1, 1993, Sweden). The intervals between check-ups must not be too long. In this regard, an interval of two years has been considered to be too long (C 2011, Estonia). The medical check-ups foreseen by Article 7§9 should take into account the skills and risks of the work envisaged (C XIII-2, 1994), Italy).

### 4.5 Work of school children

Over the decades, the ECSR has created, on the basis of Articles 7§3 and 7§4 of the ESC, an extremely detailed set of rules to protect children's attendance at school from excessive temporary employment. Work must not undermine this priority, which requires states to include in their legislation detailed provisions on permitted *light work* and *working hours*.

Only *light work* is permissible for school children. The notion of "light work" is the same as under article 7§1 (C I (1969), Statement of Interpretation on Article 7§1 and C 2015, Interpretative Statement on Articles 7§1 and 7§3). Adequate safeguards must be in place to allow the authorities (labour inspectorate, social and education services) to protect children from work which could deprive them of the full benefit of their education (C V (1977), Statement of Interpretation on Article 7§1; C 2006, Portugal). During school term, the time during which children may work must be limited so as not to interfere with their attendance, receptiveness and homework (C 2015, Statement of Interpretation on Articles 7§1 and 7§3; C 2006, Albania on 7§1; C 2006, Albania on 7§3). According to the established

case law of the ECtHR the maximum length of working hours *during the school day* is two hours and 12 hours per week.

Children under 15 years of age may be permitted light work subject to the following conditions:

- work is prescribed as permissible light work in national legislation,
- work is not performed regularly,
- work is not performed before an early-starting school day, Distribution of newspapers from six to eight in the morning, five days a week before the start of school was considered contrary to Article 7§3 of the ESP (C XVII-2, 2005, Netherlands; C 2015, Statement of Interpretation on Articles 7§1 and 7§3)
- work is not performed after 22.00 or before 06.00 (not even on holidays or on days off from school),
- working hours on a school day do not exceed 2 hours, and together with the school day do amount less than 8 hours,
- weekly working hours do not exceed 12 hours and weekly consecutive rest time amounts to at least 36 hours,
- work must be prohibited for a period of at least 4 weeks during the summer holidays and for at least half of each holiday period granted in the course of the school year (C XVII-2, Netherlands, 2005 p. 581).

## 5. Prohibition of maltreatment and abuse

### 5.1 Legal provisions

#### 5.1.1 The CRC

The 1989 UN Convention on the Rights of the Child (CRC) sets universal standards in the fight against violations of the dignity of children. Article 19§1 establishes an absolute prohibition on inhuman or degrading treatment of a child, including all forms of violence. No state can waive this obligation, even in a national emergency. Whatever the circumstances, states must take necessary action to ensure that children in their jurisdiction are not subject to the threat of inhuman or degrading treatment, whether by public authorities or private citizens.

#### 5.1.2 The ECHR

As provided for in the ECHR, the life of the child shall not be endangered (Art. 2), nor shall children be treated or punished in an inhuman or degrading manner, or abandoned or subjected to corporal punishment (Art. 3). Article 5 prohibits the deprivation of the liberty of a child, supplemented by Article 8 on the protection of family life and integrity.

Article 3 of the ECHR imposes an absolute ban on inhuman and degrading treatment, including assault. The state cannot deviate from this even in the face of a threat to the nation (*Ireland v. United Kingdom*, 1978, §163, *Ireland v. United Kingdom*, Revised Judgment, 2018). States should, in all circumstances, take the necessary steps to ensure that persons under their jurisdiction are not subjected to inhuman or degrading treatment, including mutual ill-treatment. The state may be held liable for a human rights violation if the law does not provide adequate protection for citizens in this regard. Vulnerable individuals, children in particular, have the right to effective state protection of their integrity (*X and Y v. Netherlands*, Decision 26 March 1985, §§21- 27). A state may be charged with human rights violations if its legislation fails to provide appropriate protection for its citizens in this regard (*A v.*

*United Kingdom*, Decision 29 April 1997, §40). Protection must also cover the threat of inhuman treatment (Dudertre, G. 2003, p. 56).

Article 3 of the ECHR is based on the premise that the threat of violence or the infringement referred to in that article, or an infringement which has already occurred, is sufficiently weighty. An inhumane act is one that affects the victim's body, upsets his or her mental balance or causes suffering. In turn, an act is considered derogatory if it causes fear, anxiety or terror that may humiliate the victim or lead to a sense of inferiority and potentially to the collapse of mental and moral resistance (*Soering v. United Kingdom*, 1989, §100). The treatment can be degrading and humiliating even if this is not the intention. Thus, absence of intent does not nullify this infringement (*Raninen v. Finland*, 1997, §55).

### 5.1.3 The ESC

A prohibition on the violation of children's dignity is provided by Articles 17§1b and 7§10 of the ESC. The former intends to protect children against neglect, violence and exploitation. The latter focuses on the protection of children against moral hazards in working life, violent communication and the dangers of tobacco, alcohol and drugs (C XIII-2, 1993, General Observation on Article 17).

According to Articles 7§10 and 17§1b of the ESC, children are protected against:

1. degrading treatment
2. corporal punishment
3. sexual abuse and exploitation: incest, paedophilia, child prostitution, trafficking
4. other exploitation: use of child labour, use as a tool for begging or criminal activity, use as a donor of organs or human tissues, immoral and violent communication and child pornography.

In a principal conclusion the ECSR considered that moral protection (Art. 7§10) also covered a prohibition on the sexual exploitation of children, child prostitution, child pornography and the trafficking of children. In that regard, Articles 7§10 and 17§1 are parallel. The protection is required although a state has ratified only one of them (C XV-2, 2001, General Observation regarding Article 17, p. 26-32); (C XV-2, 2001, Austria).

## 5.2 Removal of insecurity

### 5.2.1 The most exposed – street children

The ECSR has repeatedly referred to the general position of the UN Committee on the Rights of the Child, which calls on states to develop long-term guidelines for tackling the problem of street children:

Recalling that children in street situations are particularly exposed to trafficking and worst forms of child labour, the Committee refers to the General Comment No. 21 of the UN Committee on the Rights of the Child which provides authoritative guidance to States on developing comprehensive, long-term national strategies on children in street situations using a holistic, child rights approach and addressing both prevention and response in line with the Convention on the Rights of the Child, which has been ratified by Albania. (C 2019, Albania on Article 7§10)

When the Revised ESC was enacted in the 1990s, the problem of street children was still commonplace in South-Eastern Europe. It was, inter alia, precisely in order to eliminate this issue that a separate point was introduced in Article 17§1b of the ESC, according to which the state is required to "protect children and young people from neglect, violence or exploitation" by all necessary means. The starting point was the view that a large number of abandoned children or street children itself represents a collective violation of human rights against vulnerable children. This was considered evidence that the state had failed to provide sufficient protection to its children and young people.

The transfer of street children to institutions was not accepted as a general solution within the meaning of the educational objectives of Article 17 of the ESC. The ECSR's supervisory practice has thus far addressed this issue by taking a stand on the segregated education of Roma children and by insisting that the number of placements in institutions does not exceed that of placements in foster families (C XV-2, 2001, General Observation regarding Article 17).

### 5.2.2 Negligence, violence, abandonment

*Abandoned* children are prone to vulnerability and exploitation. National law must not allow the neglect of children or one-sided withdrawal from the duties inherent to parenthood. In terms of policy measures and legislation, priority must be given to strengthening families and rehabilitating children and families in difficult life situations. On the other hand, the relocation and placement of a child necessitates special effort to ensure the full development of that child's personality and physical and mental capacities, as required by the introductory sentence of Article 17.

The ESC prohibits all forms of *violence* against and *ill-treatment* of children, as well as other forms of violence in society (C XV-2, 2001, General Observation regarding Article 17, pp. 26–32; C XV-2, 2001, Austria). Violence against children comprises physical abuse, coercion, subjugation and any other degrading treatment that is physically or psychologically harmful. *Corporal punishment* is also considered violence (C 2011, Statement of Interpretation on Articles 16 and 17).

The starting point is that violence against children must be punishable. National legislation must prohibit all forms of violence against children at school, day care, and other institutions, and in the domestic environment. Appropriate agents and services are required to protect children and prevent them from being subjected to violence.

Mere criminalisation of assault or increased penalty scales are insufficient when the child is the target of violence. Article 17§1b of the ESC is considered to require that corporal punishment be explicitly prohibited and sanctioned either in criminal law or in civil law (*OMCT v. Greece*, CC 17/2003; *OMCT v. Ireland*, CC 18/2003; *OMCT v. Italy*, 19/2003; *OMCT v. Portugal*, 20/2003; *OMCT v. Belgium*, 21/2003).

The degrading treatment and physical abuse of children may sometimes be structural, or endemic to a particular group or particular area. When the state does not strive effectively enough to maintain the child-parent relationship, strengthen family ties, rehabilitate families, or adequately protect children in difficult life situations, violations are structural and communal.

### 5.2.3 Sexual abuse and exploitation

Article 17§1b of the ESC explicitly prohibits the exploitation of children, including all kind of sexual abuse. The prohibition on sexual abuse and exploitation covers all its manifestations.

The sexual abuse and sexual exploitation of children refers to any act where a person exploits a child's dependent position, or their own superior position due to age, to direct sexual acts at the child, either at home or elsewhere. The different forms of sexual abuse cover incest, paedophilia and exploitation for economic gain, such as child prostitution, trafficking and child pornography.

*Incest* concerns a sexual relationship within a family. Traditionally, incest has been a punishable act in Europe. A marked awakening to the issue occurred in the 1980s, concurrent to the preparation of the UN Child Convention, when several studies concluded that increases in reconstituted families and foster family care were resulting in increases in the occurrence of incest. By contrast, *paedophilia* concerns the sexual exploitation of a child by a person outside the family. In the internet age, paedophilia may even occur through international paedophile chains. The Internet offers paedophiles

a new, nearly uncontrollable medium to seek and approach victims. The level of such internet usage has virtually halted discussion of incest.

Both incest and paedophilia concern the *subjugation* of a child and the exercise of sexual desire without attention to the child's needs; indeed, in such cases, the perpetrator seldom even experiences guilt or considers the act destructive to the child. Without exception, sexual abuse is damaging to the child concerned, whether the perpetrator is a family member, relative or stranger.

The forms of sexual *exploitation* of children for economic gain comprise:

- *Child prostitution* – offering sexual services where children act as instruments for economic gain.
- *Child trafficking* – acts of recruiting, expediting, transporting, receiving, hosting, selling and caring for children with the intent of sexual exploitation.
- *Child pornography* – audio-visual performances and print, as well as the use of digital media. Child pornography covers the whole production chain: actual production, distribution, dissemination and possession. A pornographic product refers to audio-visual, digital or graphic products that show a child as the object of sexual activity, or create a realistic illusion of a child in such a situation (C XVII-2, Portugal, p. 677).

Internet Service Providers (ISP) have the primary responsibility for controlling the child pornography they host. Nevertheless, states are required to include in their legislation the necessary measures to protect children from information technology abuse, in particular unprotected access to morally harmful websites or audio-visual brochures (C 2004, Romania, p. 473).

In the case law of the ECSR, Article 7§10 has also been applied equally widely to protect the sexual integrity of children. Article 7§10 requires that all forms of sexual abuse of children be punishable (CXVII-2, 2004, Czech Republic, p. 122; CXVII-2, 2004, Poland, p. 638). Punishable acts must include all sexual offences against minors (under 18), regardless of the age of consent defined by the penal code. The act must be subject to official prosecution, and the victim of abuse must not be prosecuted under any circumstances (C XVII-2, 2004, Poland, p. 639; C XVII-2, 2004, United Kingdom, p. 817).

The moral protection of Article 7§10 requires states to exercise active policy and to use special measures to counter all forms of child sexual abuse or prevent commercial sexual exploitation. Moreover, states must formulate and implement a *national action plan* (C XVII-2, 2004, Statement of Interpretation on Art 7§10; C XV-2, 2002, Poland; C XVI-2, 2004, Poland p. 623) and have appropriate *legislation*, an effective *supervisory system* and appropriate *penal sanctions* at their disposal (C 2002, Italy, p. 88; C 2004, Bulgaria, p. 56).

It is important to ensure that suspected abuse is investigated, and that the judiciary is effective. The ECtHR has repeatedly insisted that the state has a duty to protect children from all forms of sexual abuse and an active duty to investigate violations whether it is the question on child pornography (*Söderman v. Sweden*, 2013), trafficking (*Rantsev v. Cyprus and Russia*, 2010) or sexual exploitation (*MC v. Bulgaria*, 2003).

Effective judiciary presupposes among others that incest within the family or other exploitation without financial gain are also acts subject to formal prosecution. Furthermore, ensuring the just outcome of legal proceedings requires that persons who have discovered exploitation, regardless of their family or official status, be able to appear as witnesses in the proceedings.

When children are at risk of abuse or exploitation, they must be provided with adequate psychosocial, financial and other support as well as housing arrangements appropriate to their life situation. These rights are applicable not only to children of the native population but also to paperless children

(*International Federation of Human Rights Leagues, FIDH v. France*, CC 14/2003, §36; *Defence for Children International, DCI v. Netherlands*, CC 47/2008, §§70-71; *European Federation of National Organisations working with the Homeless, FEANSA v. Netherlands*, CC 86/2012, §50).

#### 5.2.4 Other forms of exploitation

The ECSR has long demanded that states prohibit the exploitation of children as cheap or free domestic labour in family enterprises or agriculture or as instruments of begging and crime.

Moreover, the ECSR has considered that determining the age of paperless children entering the country by *skeletal testing* alone is an uncertain and inappropriate method and as such is to be deemed a human rights violation (*European Committee for Home Based Priority Action for the Child and the Family, EUROCEF v. France*, CC 114/2014).

Special measures must be taken to protect vulnerable children, especially street children, from abuse by criminal gangs and other profit-seekers (C 2004, Bulgaria, p. 57; C 2006; Albania, p. 62). States should also address the issue of *organ removal* from children.

Organ transplants without medical justification and the necessary permits should be treated as criminal offenses. It is forbidden to trade in the renewable tissues of children and to donate them free of charge without proper authorisation. Thus far, the ECSR has not decided whether, in addition to the provisions of the Penal Code, states should legislate specifically on organ transplantation and introduce detailed provisions for those situations where the donation of tissues could exceptionally be authorised and the conditions under which this could occur.

## 6. Child welfare and public care

### 6.1 General

#### 6.1.1 Concept

Child protection or the *welfare and public care* of children can be understood in either a narrow or broader sense. In a narrow sense, it mainly protects children from insecurity or their own undesirable behaviour. In a broader sense, child protection also approaches shortcomings in the living environment, housing, livelihood, education or public services, which can all be the root causes of problems and at the same play an important preventive role in terms of individual and family-centred protection measures.

The concept of *child welfare and public care* also varies across Europe. The concept largely reflects the different purposes set for the care controlled by the public authorities in each country. The conditions of public care are provided under Article 17§1c of the ESC and Article 8 of the ECHR.

Generally, the term 'child' denotes all minors, including young persons, for whom measures of after-care can continue even after reaching the age of 18.

#### 6.1.2 Objective

If parents neglect their duties or the young person's behaviour risks endangering that person's physical or mental development, society is obliged to intervene with measures of child welfare and public care based on Articles 3 and 8 of the ECHR and Article 17§1c of the ESC.

According to the introductory sentence of Article 17 of the ESC, all support and care for children and young persons must aim for the *balanced development of the child's personality and physical and mental capacities*. This general goal of education and the growth and development of children provides the framework for what must be considered in the *best interests of the child*, for both the entire child population and an individual child. Consequently, the best interests of the child must be pursued not only in terms of procedure but, in particular, in terms of substance.

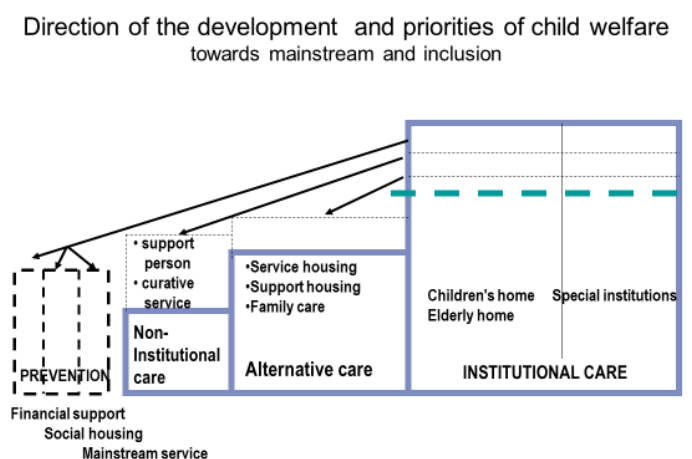
The goal of child welfare and care is to improve the circumstances of both the child and the family, whenever possible, and, at the very least, provide safe living conditions with positive human relations for the child.

The legal standards for child protection are largely based on the decisions taken by the ECtHR over the years and the conclusions made by the ECSR in its statement of interpretation in 2001 (C XV -2, 2001, General observation on Article 17). Both bodies give priority to preventive, non-institutional services over placement of the child or young person in an institution. This is a paradigm shift from the child welfare and care of earlier times.

### 6.1.3 Organisation and resources

Institution-based child welfare was developed in the 19th century during the early stages of industrialisation as centralised units for neglected and abandoned children, orphans, disabled children and school leavers. WW1 and WW2 created an urgent need for the adoption and foster family care of hundreds of thousands of orphans as an alternative form of substitute care. From the 1960s onwards, however, the tendency has been to replace both types of substitute care with non-institutional support systems.

Structurally, child welfare and care comprise preventive measures, supportive non-institutional social services, foster family care, different forms of rehabilitative care, support housing, institutional care and post-foster care. Alternative weightings and the convergence of these factors are essential in determining the adequacy of the child welfare service structure. The more alternatives there are available, the easier it is to meet the special needs of children.



In this spirit, the ECSR developed concrete standards for Article 17§1c of the ESC by assigning priority to:

1. financial support, social housing, home help and other services for families

2. physical and mental health and social services for children and young persons
3. criteria-based selection of foster families
4. guidance, support and supervision for foster families
5. home-like quality of institutional care units with rehabilitative activities
6. respect for the dignity and fundamental freedoms of the child in substitute care
7. the right of the child to know his / her origin
8. the preservation of contacts between children and parents
9. rehabilitation of the biological family
10. post-foster care to help the young person cope with future challenges

The Statement of Interpretation of Article 17§1 (2001) requires a unit in a child welfare institution to *resemble the home environment*, which led the ECSR to limit unit size and stress the unit's functional resources. A care unit must be clearly distinguishable from other units in the institution. It should be identifiable as a close community or a family unit which children can attach to and which treats others as guests. The requirement of a home-like environment also limits the number of children to no more than 10 (per unit), which is the norm followed by the ECSR for the maximum size of units in child welfare institutions (C 2005, Moldova, p. 474).

As a general policy for child welfare and care, all this requires a change of approach from:

- centralised to decentralised,
- distant to close by,
- remedial to preventive and supportive,
- large to small,
- specific to mainstream, and
- segregated to integrated

In addition, such a shift generally entails more humane, less stigmatising and less costly protection and public responsibility for the care of children.

## 6.2 Support and non-institutional care

Ultimately, the best interests of the child must be assessed from every child's individual viewpoint. Thus, the most beneficial or least harmful support must be determined for a particular child, here and now and in the longer term. The substantive interests of the child require the sufficient availability of options to enable the best possible action plan for every individual child.

Support should be provided primarily in the child's natural environment as part of other mainstream activities, with the aim of integrating the child into life with others. It is essential that preventive measures (family and child welfare clinics, special attention in child day care, the curative services of schools and counselling services for families in crisis) are effective and act to promote common pedagogical aims while preventing the development of more serious family problems. In addition, rehabilitation of the whole family functions as a preventive measure against the arising of serious problems among children.

When children are at risk of abuse or exploitation, they must be provided with adequate financial and other support and the housing required by their life situation, and this obligation includes not only children from the native population but also paperless children (*International Federation of Human Rights Leagues (FIDH) v. France*, CC 14/2003, §36; *Defence for Children International (DCI) v. Netherlands*, CC 47/2008, §§70-71; *European Federation of National Organisations working with the Homeless (FEANSA) v. Netherlands*, CC 86/2012, §50).



The larger the range of non-institutional open-care services the more options will be available for each child from which the best set of measures can be chosen. The breadth and quality of services largely determine the extent to which child welfare is able to help families and children in their natural environment or resorts to placing children outside their homes.

Specialised child welfare work should be performed in a goal-oriented, *systematic* way. Therefore, when long-term support is needed, an individual plan is required for the care, treatment or rehabilitation of the child and his or her family. This *family welfare* plan specifies the goals of different actions, the key activities, as well as the commitments of the parties involved. Children should also be allowed to participate in creating the plan according to their developmental stage, and their right to be informed of plans concerning them should be respected. Thus far, however, the ECSR has not considered these extensive requirements to be prerequisites of conformity with Article 17§1c of the ESC.

Whenever possible, public custody and care must strive towards the rehabilitation of children and their biological families. To allow for rehabilitation to proceed, children and their families must be provided with the necessary support required to overcome their problems, which may include counselling and assistance, financial aid, as well as material or educational support for home maintenance and everyday living.

The public authorities' obligation to provide child welfare must continue for as long as the needs of a child or young person so require and serve the best interests of the child, up to the age of 18 if necessary. In the process of forging an independent life, a young person must receive access to appropriate *post-foster services*, which include support for housing and sufficient financial and other aid to begin an independent existence.

The afore mentioned support and standards should be applied also to the provision of children's psychiatric services. The ECSR has also adopted a Statement of Interpretation on support for disabled persons and disabled children (CXVI-2, Introduction to Article 15), which largely follows the principles of the statement on Article 17§1 examined above. The core idea is to strive towards equal opportunities for all children by means of positive measures. Support must be organised primarily in a setting familiar to the child and as a part of other social policy measures that follow the 'mainstreaming' principle and aim to allow disabled children to participate in life with others.

The change from institution-centric to non-institutional care is manifest throughout Europe, but many factors hamper this progress and the optimal fulfilment of children's human rights, especially those of children in institutional care.

## 6.3 Interference

### 6.3.1 Provision in the three treaties

Public custody and care outside the parental home is the ultimate measure to protect the child, and it represents a serious intervention in family life. It could be described as a three-way drama between the child, the parents and the local authority, where the latter has a positive duty to intervene in cases where serious negative symptoms are evident. The children, in turn, have the right to be adequately protected against harmful development but should also be shielded against excessive and unjustified interventions in their privacy and family life.

The UN Convention on the Rights of the Child (Art. 9) and the European Convention of Human Rights (Art. 8) contain similar provisions on the protection of family life and interference in parents' custodial rights. In the ESC, the corresponding provision occurs under the rights of children (Art. 17§1c), which

focuses primarily on consideration of the best interests of the child. Also, Article 3 of the CRC emphasises that “the best interests of the child shall be a primary consideration”, which has both a substantive and a procedural dimension, as stated above in Section 1.2.2. All three treaties, however, stress that possible public custody should be an exceptional and temporary measure.

### 6.3.2 Article 8 of the ECHR

The objective of Article 8 of the ECHR is two-fold: to define the sphere of fundamental freedoms concerning privacy and family life and also to lay down conditions for justified intervention. Consequently, it does not merely compel the public authorities to abstain from interference (§1) but provides additional positive obligations to protect the child (§2).

In the case law of the ECtHR, the concepts of family and family life are understood to correspond to a factual situation based on close personal ties (*Marcks v. Belgium*, Judgment of 13 June 1979, Series A No. 31, §31), i.e. ties with parents, siblings and others with whom children live or enjoy a close relationship in their daily life.

In addition, the notion of the best interests of the child is of crucial importance for justification of any interference described above. This is recalled, inter alia, in the judgment *T.P. and K.M. v. United Kingdom* (Judgment of 10 May 2001, 28945/95, §70).

In several cases, while the Court has emphasised the need for respect of family life, it has nevertheless also stressed the importance of striking a reasonable and fair balance between different interests. Thus, the ECtHR decisions permit public custody where compelling grounds exist, and it is in the best interest of the child. However, a strong emphasis on the temporary nature of public custody prevails, as does the aim of reuniting the parent and child (*K. and T. v. Finland*, Judgment 12.7.2001, 25702/94; *K.A. v. Finland*, Judgment 14.1.2003). Under the ESC, optimal arrangements to secure the best possible opportunities for the physical and mental development of the child (both in the short and long term) are stressed.

### 6.3.3 Conditions for interference in the ECHR

Since the *Silver* case (1983), the ECtHR has relied on the principle of proportionality and the condition of necessity in cases concerning the placement of children outside the parental home. The *Silver* case also provided a summary of the Court’s previous case law (*Silver and Others*, judgment of 25 March 1983, Series A No. 61, §33 and §97).

The adjective “necessary” is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. For interference to be “necessary in a democratic society” and thus compatible with the Convention, it must, inter alia, correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued”. Finally, those paragraphs of the Articles of the Convention which provide for a restriction of a guaranteed right, are to be interpreted narrowly (*Klass and Others* judgment, Series A No.28, p. 21, §42). When the problems of the family are financial (*Saviny v. Ukraine*, 2008) or due to a poor housing situation (*Wallová and Walla v. the Czech Republic*, 2006), the priority is to support the family financially or by adequate housing over public care.

The contracting states enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to provide the final ruling on whether they are compatible with the Convention.

In 1984, the Court clarified the legally defined (clear) criteria for the dissolution of parental rights in *Malone v. United Kingdom* and required also that children be given the right to contact and communicate with persons important in their life even after replacement. The ECtHR has adopted a strict stance concerning any additional restrictions of rights in the exercise of public custody, epitomised by the decision in *Olsson v. Sweden* (1988).

In *Olsson v. Sweden*, three children whose treatment and care by their mentally disabled parents was considered seriously negligent by the local social service authorities were taken into public custody. The oldest child was placed 100 kilometres away from home, the second 500 km away and the third equally far and over 100 km away from the second child. In addition, social services decided not to inform the parents of the whereabouts of the foster homes or their addresses.

The Court accepted the decisions to exercise public custody but found no grounds for either the separate placement of the siblings or for placing them far away from home and from each other, which was considered to prevent visitation and communication between family members. Moreover, the long duration of the restrictions on visitation and communication was considered to constitute unreasonable interference in family life.

In addition, in child welfare issues, the Court has traditionally emphasised the principle of the rule of law in any interference in privacy or family life, and, beginning with the *Golder* case (1973), it has required states to provide appropriate legal remedies, i.e. the right of appeal to the courts, an effective complaint system and legal aid for the family and child (*Golder v. United Kingdom*, judgment of 21 February 1975, A18).

#### 6.3.4 Article 17§1c of the ESC

In 2001, the ECSR adopted a Statement of Interpretation concerning the principles of child welfare and public care under Article 17§1c of the ESC (C XV-2, 2001, Statement of Interpretation on Article 17§1, p. 29–31), which provided grounds for case law to strengthen the rights of children subject to child welfare measures in the following ways:

1. More intrusive forms of intervention should not be undertaken if adequate support can be provided through non-institutional outpatient activities (C XIX-4, 2011, Statement of Interpretation on Articles 16 and 17).
2. The children should be consulted using established social work methods to identify their own wishes and opinions (C,XIX-4, 2011, Statement of Interpretation on Articles 16 and 17).
3. The criteria for taking a child into public custody must be laid down in law in sufficient detail. The criteria should be appropriate and reasonable, and public care should not be exercised against the best interests of the child (C XV-2, 2001, General observation regarding Article 17§1, p. 29).
4. Children should be placed close enough to their own home and parents to allow continued visitation and communication. Siblings should be placed together unless grounds exist for separation to different foster families or institutions (*ibid.*).
5. The long-term care of children outside their home should occur primarily in foster families that are suitable for the children concerned. The majority of public care placements should be non-institutional (C XV-2, 2001, General observation regarding Article 17§1, p. 30).
6. Selection criteria are required for foster parents, who should also receive training for their task. They should be compensated in full for meeting the child's special needs and the costs of childcare.
7. Any restrictions or limitations of parents' custodial rights should be based on criteria laid down in legislation and should not exceed what is necessary for the protection and best interests of the child and the rehabilitation of the family (C 2003, France, p. 175).

8. Child welfare and care workers should be sufficiently qualified for their tasks, particularly in the case of institutional staff. Foster families and institutions must be adequately supervised. To ensure the desired results, institutional care must resemble a family setting as closely as possible; the number of children in institutional units must not exceed 10 (C 2005, Moldova, p. 474). Here, 'unit' refers to children and their personal caretakers and other close care staff who enjoy sufficient autonomy and privacy to act separately from other units.
9. Finally, the child clients of social welfare services also have the right to integrity, to move freely and express themselves, to meet and communicate with persons close to them, to act and decide on matters concerning them and to enjoy protection of their privacy wherever they are, even when in institutional care. Children in public care also have the right to know their origins (C XV-2, 2001, General observation regarding Article 17 §1, p. 31).
10. Consultation with the child begins at birth. Even small children are able to indicate preferences regarding the situations and company in which they feel safe and nurtured. Procedural consultation and the parallel right together with the parents to be heard must be respected.

### 6.3.5 Conditions for restrictions in the ESC

Whether children are placed in foster care or institutions, any restriction of their basic freedoms must be 1) prescribed by law, 2) necessary in a democratic society and 3) based on a justified reason, such as the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals. These conditions are provided in Article G of the ESC and closely resemble those under Article 8§2 of the ECHR. On this issue, the two key human rights' treaties are, indeed, indivisible and interdependent in many ways.

Any of the following restrictions must be prescribed by a parliamentary law (Art. 8§2 of the ECHR and Art. G of the Revised ESC):

- restrictions of personal integrity and privacy
- aberration from confidentiality
- restriction of movement and disciplinary restriction of fundamental freedoms
- criteria for isolation, which must be appropriate and reasonable
- restriction of parents' or custodians' rights
- restriction of contact with persons close to the child

The social support provided by Article 17 cannot remove the abovementioned freedoms but should be respected in all circumstances. Children's right to communicate and have contact with persons important to them, i.e. parents, siblings, other close relatives and close friends, must not be restricted only in the interest of the institution or based on administrative instructions. Freedom of communication can only be restricted for the safety of the children themselves or of other persons, or in order to eliminate a threat.

Isolation, exclusion or stigmatisation plays no part in an upbringing intended to promote the balanced development of the child. In the case of severe psychosis requiring separation from other children, isolation should occur for a short period only, be based on the instructions of a physician well informed of the child's health, be supervised by the child's personal caretaker and terminated when no longer necessary.

### 6.3.6 Substitute families

When families are distressed and when their living conditions are inadequate, children's wellbeing suffers. Insecurity in the life of a child may lead to placement with another family on the basis of:

1. adoption
2. upbringing in the extended family
3. foster family care

Adoptive parenting should lead to a good and gratuitous child-parent relationship. The criteria for accepting parental responsibility must be laid down by law. Moreover, adoption must be so-called 'full adoption', which can only be dissolved in exceptional cases.

Foster parents must be suitable for their task, and the criteria for acceptance must also be provided for by law. The foster parent must be instructed and, if necessary, advised on his or her role and must be reimbursed for the child's expenses (C XV-2, 2001, General observation regarding Article 17, p. 26–32; C XV-2, 2001, Austria).

A child in foster care should also enjoy the right to maintain contact with his or her biological parents and other important persons (Article 8 of the ECHR). In all situations, children have a fundamental right to know their origin (C 2003, France, p. 173).

#### 6.4 Young offenders

In addition to the prohibited act itself, a criminal offense is also based on the perpetrator's unacceptable state of mind and the reprehensible nature of the behaviour in question. Crime has both objective and subjective aspects on the basis of which the perpetrator is punished. In the case of young offenders, the options for punishment are various types of disciplinary measures intended primarily to foster their social integration. Another underlying default assumption is that the mind of a child is not fully developed and thus cannot be considered criminal. Consequently, criminal law requires a minimum age.

The general point of departure is that the age of criminal responsibility must not be excessively low. Thus far, the ECSR has monitored the situation in the Contracting States and expressed concern over the age limits in Turkey (11 years), the United Kingdom (10 years) and Ireland (9 years) (C XV-2, 2001, Ireland; C 2011, Ireland; C XV-2, 2001, Turkey; C XV-2, 2001, United Kingdom).

Integration necessitates alternative punishments to fines and prison sentences that are better adapted to the needs of children. Prison sentences for minors are permissible only in exceptional circumstances, such as in the case of serious crimes (C XVII-2, 2005, Turkey, p. 795; C 2005, Lithuania, p. 371; C 2005, Slovenia, p. 650).

A further requirement is that young offenders be subject to more lenient punishments than adults. In this context, Turkey's legislation was found to diverge from the requirements of the ESC, as it permitted prison sentences of over 10 years for 11–15-year-old offenders and even 15–20-year sentences for 15–18-year-olds (C XVII-2, 2005, Turkey, p. 795).

Likewise, the duration of periods of arrest and pre-trial detention must respect the requirements of the ECHR, which have been followed also in the case law of the ESC. In the case of arrest, the maximum duration of detention is hours or days, while with remand it is weeks or months (C 2011, Denmark; C 2011, Norway). The ECSR has considered pre-trial detention periods of up to two years a violation of the human rights of young people (C XV-2, 2003, Statement of Interpretation on Article 17§1, pp. 660–661).

The ECSR requires that crimes committed by young offenders be tried in youth courts, or in separate youth sections of regular courts, which should draw on the expertise of youth social care services.

Furthermore, young offenders must be allowed to serve their prison sentences separate from adult prisoners and to maintain contact with parents, other family members and persons close to them (C XV-2, 2003, General Observation regarding Article 17§1; C XV-2, 2001, Belgium).

A prison sentence as such necessarily includes the physical separation of a prisoner from other people, which in itself is a restriction of free movement. Certain other precautionary measures to prevent escape or the smuggling of unwanted objects or substances into prison premises constitute restrictions of basic freedoms that are permissible when appropriate and prescribed by law.

## 7. Legal protection

### 7.1 Procedural guarantees

In a legal sense, the child is the subject of his or her own rights from birth. In the case of small children, parents or other possible custodians and factual caretakers assume the child's authority, as the subject of his / her rights, for representation. However, children should enjoy the possibility of representation alongside their parents and other custodians, and even independently, according to their level of maturity. Nevertheless, no common age limits concerning representation exist in Europe.

To ensure the fulfilment of the best interests of the child, a key procedural requirement is nonetheless that the child be heard, regardless of age or developmental stage, to ascertain the child's own wishes and preferences, which may be achieved by means of social work and psychological approaches.

#### Hearings and authority for representation

##### 1. Hearings as part of child welfare:

- no minimum age
- intended to ascertain the best interests of the child: 1) what is best for the child at present and in the long term, 2) what is least harmful for solving the child's problems and for the future of the child, and 3) who the most important person is for the child emotionally and socially
- conducted in the child's own natural environment

##### 2. Procedural hearing:

- accommodation of the child's opinions and preferences, depending on the maturity of that child
- creation of a system of recording the child's opinions and preferences

##### 3. Representation alongside the custodians:

- maturity and age limits
- decision, after consulting the child, according to the child's own wishes or independently
- effective legal remedy with the right to appeal to the court ensured in the case of independent decisions.

Representation, either alongside parents or independently, requires that the child's opinions and preferences must not be overlooked and decisions be taken in accordance with the child's opinion. Legitimate grounds for exceptions to these principles are stipulated by Article 8§2 of the ECHR and Article G of the ESC. The ECSR has neither developed case law on children's right to represent themselves nor taken any stand on age limits.

### 6.2 Legal remedies

Children must be provided with sufficient legal remedies to protect them from violations of their rights. If a child's fundamental rights are violated, the child must have the possibility of appeal to an independent body, as provided by Articles 6 and 13 of the ECHR. Where dynamic welfare rights are concerned, there must be at least a possibility to complain to a higher or supervisory authority or

'ombudsperson'. In any case, the child must be granted sufficient legal aid for the exercise of his or her legal rights.

Legal remedies available to the child

1. Right to appeal in matters concerning human dignity, basic freedoms and subjective rights
2. Right to lodge complaints in other matters
3. Sufficient legal aid to fully exercise rights
4. Right to reinstatement and/or full compensation of damage

### 7.3 Violations of children's rights in 2020

Violations of the social human rights of children and young people had occurred in all 36 countries that submitted an annual report in 2019 on their compliance with Articles 7 and 17 of the ESC. (Council of Europe, Press Briefing Elements Conclusions 2020).

The situation in these states was grouped into four categories: 1) prohibitions on the exploitation of children (7§1–2; 7§10), 2) protection from maltreatment and the right to education (17§1–2), 3) reconciliation of the working time of school (7§3–4), and 4) safeguarding of the fair working conditions and special protection of young workers (7§4–9). In the report, the countries were divided into two groups according to the version of the European Social Charter they had ratified, the 1996 revised Charter or the original 1961 Charter.

It should also be noted that the reformed reporting system allowed seven (5 + 2) countries not to report their situation under the cycle 2019. The following table is a compilation of unsatisfactory situations and violations against the rights of children and young persons in the 36 countries in 2019. For non-reporting countries (marked in red) the tables describe the situation in 2015. The symbols in the tables are:

- (V) violation
- (N) the state is not committed
- (O) the decision is deferred or state is doesn't comply adequately.
- The symbols indicate failure to comply with an ESC provision of the rights of children in Europe in 2019.

#### 1996 ESC

As the table demonstrates, in general, most of the rights of children had either not been respected in a sufficient way (N and O) or had been violated (V). The situation was nevertheless better in Western European countries than in the East.

The extremes were Finland and Albania. The former had failed to ratify (N) two of the rights in the 1996 ESC but was in compliance with all 10 of the remaining rights. Likewise, the latter had not ratified (N) two 1996 ESC rights; however, it was in breach (V) of all 10 of those rights it had ratified. Thus, none of the rights of children had been respected in Albania.

#### 1961 ESC

\* Countries that have ratified the 1961 ESC have not committed themselves to fully guaranteeing children's right to education in accordance with Article 17§2 of the Revised (1996) ESC. The countries marked in red were not required to report in cycle 2019.

As the table indicates, while Denmark and Ireland had ratified Article 17 of the ESC, they had ratified none of the paragraphs of Article 7. By contrast, three other countries, Germany, Luxembourg and Spain, reported just one area of non-compliance.

Overall, in 2019, the situation was most positive in six countries that had ratified the 1996 Charter – Andorra, Austria, Belgium, Finland, France and Latvia – and in three countries that had ratified the 1961 Charter: Germany, Luxembourg and Spain. Most violations occurred in East-European countries, indicating that, in terms of the rights of children, the transition period in these countries is not complete even three decades after the collapse of Communism. Moreover, as far as children of Bulgaria and Romania are concerned, accession to the European Union has failed to improve their situation.