CENTRE OF INTERNATIONAL AND EUROPEAN ECONOMIC LAW

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P. NASKOU-PERRAKI

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TABLE OF CONTENTS

FOREWORD

Focusing on the issue of child protection in the framework of the Council of Europe, one of the pioneer organizations in the field of human rights, was a conscientious choice: firstly, because of its importance, since after the 1989 United Nations Convention, the movement towards granting specific rights to children, mostly by means of new international legal instruments grew considerably strong in Europe; Secondly, because of the novelty of the subject since the European Convention on the Exercise of Children's Rights came recently into force, and thirdly, keeping in mind the needs of our readers: a focused concrete presentation of the regional system that interests European jurists was considered more appropriate than a vague and fragmented presentation of the entire international framework.

This volume presents the jurisprudence of the European Commission and Court of Human Rights on child protection, as well as the European Convention on the Exercise of children's rights, including an Annex of the Convention itself and the explanatory report.

A complete list of all international instruments protecting the child is also annexed.

Thessaloniki, January 2002

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE JURISPRUDENCE ON CHILD PROTECTION

PAROULA NASKOU – PERRAKI[*]

Contents

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INTRODUCTION

The protection of the child in the framework of the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter the Convention] has a very limited scope, compared to that of other international treaties on human rights[1].

The child is being protected initially by the general provision of art. 1 of the Convention, pursuant to which «the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention»; Thus the child is undoubtedly a beneficiary of all the human rights and freedoms established by the Convention[2].

Moreover, the provision of art. 14 establishing the principle of prohibition of discrimination, additionally covers the subject of age, when stating that prohibition of discrimination extends to discrimination «on any ground ... or other status», the enumeration of fields of discrimination being non-restrictive[3].

Probably the only article more directly related to child protection is art. 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms[4], which establishes the right to edu-

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1. *See* art. 24 of International Covenant on Civil and Political Rights of 1976, 999 U.N.T.S. 171, *and* art. 19 of American Convention on Human Rights of 1978, 1144 U.N.T.S. 123. *See generally* Ursula Kiklelly, THE CHILD AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1999).

2. For a discussion of the teleological and evolutive interpretation applied by the Court upon this article, *see* Juan Antonio Carrillo Salcedo, *Article 1*, *in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME 135-141 (Louis-Edmond Pettiti et. al. eds., 1995). *See also* Monserrat Enrich Mas, *La Protection des Enfants Mineurs en Europe*, 9 BULL. DES DROITS DE L' HOMME 1 (2000).

3. *See* Marc Bossuyt, *Article 14*, *in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME, *supra* note 2 at 475, 477.

4. Protocol to the Convention for the Protection of Human Rights and Funda-

cation, in the sense that it awards to parents the right to ensure the education and upbringing of their offspring in conformity with their own religious and philosophical convictions. This article has led the institutions of Strasbourg towards an ample jurisprudential interpretation, which will be examined herein.

Despite the lack of provisions related to the protection of the child, Strasbourg institutions have successfully resolved a wide range of cases regarding violations of children's rights. These cases are usually triggered by the issues of education, physical punishment, private and family life, hereditary rights of children, expulsion etc.

The present paper has the objective and ambition to present the most important landmark cases before the institutions of Strasbourg and to clarify their standing on protection of children.

1. THE CHILD AS LITIGANT PARTY

The first issue being posed and calling for immediate clarification is whether a child has standing before the Strasbourg institutions in its own capacity. The relevant rule is similar to the respective rules in the majority of member states. Thus, the application is filed by the parents or the legal representative of the child. However, this rule is not carved in stone, since neither the Convention nor the internal regulation of the European Commission of Human Rights [hereinafter the Commission] are bound by it, and as a result the child is capable of filing an application with the Commission without requiring the consent of its legal representative.

This can be deduced from the application filed against the government of the Netherlands by a 14-year-old alleging, among others, a violation of art. 8 of the Convention because she was forced by police-

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mental Freedoms, E.T.S. No. 009, entered into force May 18, 1954 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author) [hereinafter, the Additional Protocol]. For a detailed analysis of art. 2 *see* Pierre-Marie Dupuy, *Article 2, in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME, *supra* note 2 at 999-1010 (admitting, however that the article applies to all persons who would not want to be deprived of the right to education, regardless of their age, *id.* at 1003).

men to return to her home, from where she had secretly fled with her young boyfriend, of whom her parents did not approve.

The Commission did not accept the application on the merits for a multitude of reasons, but at least it decided for the application's admissibility[5].

By abiding to the rule of child representation by parents or legal representatives, the Commission examined various applications with issues pertinent to children. In all these applications great emphasis was given to the legal relationship between the child and its parent or legal representative pursuant to national law.

Thus, in a child custody case after the divorce of a Japanese national from his Swedish wife, the Commission rejected the application of the former, requesting that the children be permitted to visit him in Japan, on the grounds of ratione personae inadmissibility[6]. The Commission stressed that the desire of the child to be represented by the parent in proceedings before it must be established, and that such was not the situation in the case at hand, since custody had been vested upon the mother by the Swedish court. The Commission dealt with all details of the Swedish Appellate Court's ruling and with the reasons for which the right of communication with the children was limited on Swedish territory only[7], reaching the conclusion that «where parents are divorced and in other cases when the communal life of the parents is interrupted, it is legitimate and even necessary for the national law to provide rules covering the relationship between parents and children which differ from the rules which are applicable when the family unit is still maintained»[8].

An additional issue treated by the Commission in that stage was the standing of parents filing a request for the protection or non-protection of the fetus.

In the first case the application was filled by two German women against the Federal Republic of Germany and was pertinent to the law

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5. *See Application No. 6753/1974*, 2 Eur. Comm'n H.R Dec & Rep. 118.

6. *See Application No. 8045/1977*, 16 Eur. Comm'n H.R Dec & Rep. 105.

7. *Id.* at 107.

8. *See also Application No. 2699/1965*, 11 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n on H.R.) 376 (1968).

prohibiting abortion after the 12th week of pregnancy. The law included an exception to that prohibition for reasons related to the protection of the mother's health[9]. The second case regarded the request of a British father not desiring that his spouse interrupt her pregnancy, which was deemed necessary for health reasons[10].

The Commission did not consider necessary to rule neither on whether in art. 2 of the Convention the term «life» should also include the unborn child, nor on whether the child could be regarded as an entity justifying an intervention for the «protection of rights and freedoms of others» pursuant to art. 8 § 2 of the Convention[11]. The «life» of the fetus is completely connected to that of the pregnant woman and if the latter is endangered then abortion should be considered necessary[12]. Moreover, the Commission analyzing the notion «everyone's right to life» held that the term «everyone's» solely refers to persons already born and does not apply to the fetus[13].

It is self-evident that the child's presence as a litigant party before the European Court of Human Rights [hereinafter the Court], after the entering into force of the 11th Protocol[14] obtains an increasing importance and interest.

2. PROTECTION OF THE CHILD FROM DEGRADING TREATMENT

The issue of the degrading treatment of children by beating was repeatedly brought into the attention of both the Commission and the Court in a series of cases related to the U.K. system of education contrary to art. 3 of the Convention.

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9. *See Application No. 6959/1975*, 10 Eur. Comm'n H.R Dec & Rep. 100.
10. *See Application No. 8416/1979*, 19 Eur. Comm'n H.R Dec & Rep. 244 *et seq.*
11. *Application No. 6959/1975*, *supra* note 9 at 116.
12. *See Application No. 8416/1979*, *supra* note 10 at 252.
13. *See id.* at 250.
14. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, E.T.S. No. 155, entered into force Nov. 1, 1998 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author) [hereinafter the 11th Protocol].

In the most well known case, the case of *Tyrer v. U.K.*[15], the applicant was punished by beating by the Court for Minors of the Isle of Man[16], pursuant to the relevant law, because he had hit a fellow student.

Mr. Tyrer filed an application before the Commission alleging that facts of this case constituted a breach of art. 3 of the Convention, prohibiting infliction of torture and exposure to inhuman or degrading treatment or punishment[17].

The Commission as well as the Court held that beating does not constitute «torture» in the sense that this term has in the aforementioned article[18]. The facts in *Tyrer* are not relevant with the facts in the case of *Ireland v. U.K.*, where the Court entered into an extensive analysis of the notion of «torture» and of «inhuman or degrading treatment»[19], but did not venture at all into an analysis of the notions of «inhuman or degrading punishment», which were relevant with the present case.

Thus the Court proceeded into such an analysis under *Tyrer*, noting that «a person may be humiliated by the mere fact of being criminally convicted»[20], whereas in the scope of application of art. 3 fall only cases where it is shown that the person is degraded by the application of the punishment to which the person is convicted. In *Tyrer* the punishment was degrading because of its manner and method of execution; the

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15. *See* Tyrer v. U.K., 26 Eur. Ct. H.R. (ser. A) at 9 (1978). *See also* D.J. Harris, M. O' Boyle, C. Warbrick, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 84 *et seq.* (London, Butterworths 1995).

16. The Isle of Man is not a part of the United Kingdom but a dependency of the Crown with its own government, legislature and courts and its own administrative, fiscal and legal regimes. The Crown is ultimately responsible for the good government of the Island and when the U.K declared that the Convention should extend to various territories, pursuant to the Territorial Application Clause contained in former art. 63 (now 56) of the Convention, the Isle of Man was included in those, without any opposing reaction by the Isle's parliamentary assembly (Court of Tynwald). *See* Tyrer v. U.K., *supra* note 15 at 9.

17. For a detailed analysis *see* Frédéric Sudre, *Article 3*, *in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME, *supra* note 2 at 155-175.

18. *See* Tyrer v. U.K., *supra* note 15 at 14, Paul Sieghart, THE INTERNATIONAL LAW OF HUMAN RIGHTS, 170-1 (1983).

19. Ireland v. U.K., 25 Eur. Ct. H.R. (ser. A) at 66-8 (1978).

20. Tyrer v. U.K., *supra* note 15 at 15.

applicant was forced to lie in a table in order to be submitted – hands immobilized by two policemen – to beating before third persons.

The Court added that a punishment is considered degrading and in breach of art. 3, when it surpasses a commonly met limit, the conditions under which it is being administered as well as its methods being taken into consideration.

Degradation should be of a certain level of gravity and incorporate an unusual degrading element included in the punishment, the threshold of seriousness not being, however, a static one[21].

Corporal punishment contains the element of physical force exercised by one person against another and, despite the fact that such an exercise of force was provided for by the legislation of the Isle of Man, it was interpreted as being within the scope of the notion of degrading punishment of art. 3 of the Convention[22].

It is worth noting that the Court, in order to emphasize the importance of art. 3 of the Convention, referred to art. 15 containing the derogatory clause, pursuant to which the provision of article 3 belongs to the group of provisions from which there cannot be a derogation under any circumstances, thus stressing its meaning and importance[23].

Following the above thoughts, the Court held that corporal punishment provided for by law (institutionalized violence) constituted for Mr. Tyrer a degrading punishment pursuant to art. 3 of the Convention[24] since it was an assault on the applicant's dignity and physical integrity, which may have had adverse psychological effects. Moreover, the Court took into consideration the mental anguish experienced by the applicant

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21. *See* Francis Jacobs – Robin C. White, THE EUROPEAN CONVENTION OF HUMAN RIGHTS 49 (1996).

22. Tyrer v. U.K., *supra* note 15 at 17. *See also* B. Phillips, *The Case for Corporal Punishment in the United Kingdom. Beaten into Submission in Europe?* 43 INT'L & COMP. L. Q. 153 (1994).

23. Tyrer v. U.K., *supra* note 15 at 15,19. On the derogation clause *see also* P. Naskou – Perraki, ARTICLE 15 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, A JURISPRUDENTIAL AND THEORETICAL APPROACH (Athens – Komotini, Ant. N. Sakkoulas 1984), (in Greek).

24. Tyrer v. U.K., *supra* note 15 at 20.

while anticipating the punishment[25]. More specifically, pursuant to the Court's decision:

"The very nature of judicial corporal punishment is that it involves one human being inflicting violence on another human being. Furthermore, it is institutionalized violence, that is in the present case violence permitted by law, ordered by the judicial authorities of the state ... Thus, although the applicant did not suffer severe or long lasting physical effects, his punishment – whereby he was treated as an object of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects".[26]

In the case of *X v. U.K.*[27], the mother of a 14-year-old high school student filed an application before the Commission alleging violation of art. 3 of the Convention, because of her daughter being beaten with a stick by the school principal, causing her arm and leg injuries, followed by pain and malfunction for a considerable period of time. The case was resolved by means of a friendly settlement pursuant to former art. 28b of the Convention, followed by a monetary compensation[28]. The British government was obliged by the Commission to send a circular to all the School Inspecting Agencies, stating that «the use of corporal punishment in some cases constitutes treatment in violation of art. 3 of the Convention»[29].

In the *Costello – Roberts* case[30], related to corporal punishment as discipline measure in a private boarding school, seven- year-old Jeremy Costello – Roberts, was submitted to beating from the school principal, on the grounds of talking in the corridors and of being a little late for bed time in one occasion. His mother complained to the Police and to

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25. *Id.* at 16-17. *See also* F. Jacobs – R. C. White, *supra* note 21 at 58-9.

26. Tyrer v. U.K., *supra* note 15 at 16.

27. See Application No 7097/1977, Report of the Commission, 24 Y.B. EUR. CONV. ON H.R. 402 (1981).

28. *Id.* at 404.

29. *Id.*

30. Costello – Roberts v. U.K. 247-C Eur. Ct. H.R. (ser. A) at 50 (1993). *See also* D.J. Harris, M. O' Boyle, C. Warbrick, *supra* note 15 at 87.

the National Commission for the prevention of child abuse, but both Agencies stated that could not initiate any specific procedure, since the child did not bear any signs of beatings or bruises[31].

Concerning the violation of art. 3 of the Convention, the Court – citing *Tyrer v. U.K.* and distinguishing it from the case at hand – stressed that a punishment is being considered degrading, when the humiliation and the degradation therefrom reaches a certain degree of cruelty, to be judged according to the facts *in concreto* by the facts of each case. Besides from the consequences attached to every discipline measure, the applicant did not offer any evidence of other serious or long-term consequences of his teachers' actions. A punishment that does not have an analogous impact in the child's personality is held to be in violation of art. 3 only when exceeding the minimum limit of permitted cruelty. Although the Court entertained some reservations (due to the automatic nature of the punishment and the delay between the accumulation of the demerit points and the imposition of the penalty[32]), it was convinced that such a minimum level was not thereby surpassed and thus there was no violation of art. 3[33]. Thus, the Court's decision states in pertinent part:

"Beyond the consequences to be expected from measures taken on a purely disciplinary plane, the applicant has adduced no evidence of any severe or long- lasting effects as a result of the treatment complained of. A punishment which does not occasion such effects may fall within the ambit of Article 3 ... provided that in the particular circumstances of the case it may be said to have reached the minimum threshold of severity required".[34]

Also related to corporal punishment as a disciplinary measure for children is the *Cambell and Cosans* case[35], for which however the Commission - examining its admissibility – held that it fell into to the

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31. Costello – Roberts v. U.K., *supra* note 30 at 53.

32. *See* F. Jacobs – R. C. White, *supra* note 21 at 59.

33. Costello – Roberts v. U.K., *supra* note 30 at 58.

34. *Id.* at 60.

35. Campbell & Cosans v. U.K., 48 Eur. Ct. H.R. (ser. A 1982). *See also* P. Van Dijk, G. J. H. Van Hoot, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 645 *et seq.* (The Hague, Kluwer Law International 1998).

field of application of art. 2 of the Additional Protocol, guaranteeing the right to an education, and will be presented in the pertinent chapter.

In a similar case, against Sweden this time, a group of Swedish parents submitted an application to the Commission, because they believed that - in contrast with existing legislation prohibiting corporal punishment - such a punishment must be inflicted upon children as it is part of their religious convictions[36]. The Commission conceded that the family is primarily and presumptively responsible for the upbringing of children, but held that under no circumstances the use of force can be accepted. As a result, the application was found inadmissible[37].

Moreover, it has been held that corporal punishment during provisional detention of a minor is in violation of art. 3 of the Convention. Related to that is the recent *Assenov*[38] case, where the minor (14-year-old) son of the applicants was arrested as suspect for gambling, stealing and robbing and – according to his parents' allegations – was seriously abused during his detention in the police precinct. Both the Commission and the Court concluded that art. 3 had not been violated, since the competent national authorities did not conduct the necessary research for the allegations submitted regarding the minor's abuse, and since the conditions of detention did not raise the issue of art. 3 violation[39].

3. THE PROTECTION OF THE CHILD'S PRIVATE AND FAMILY LIFE

The cases related to violations of the art. 8 of the Convention[40],

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36. The parents belonged to the Protestant Church of Sweden and, as they mention in their application, corporal punishment of their children is justified by relative references in the Bible. *See Application No 8811/1979*, 29 Eur. Comm'n H.R Dec & Rep. 105.

37. *Id.* at 116.

38. See Assenov & others v. Bulgaria, 96 Eur. Ct. H.R. Rep. of Judgments & Dec. 3269 (1998-VII).

39. *Id.* at 3296.

40. *See* Carlo Russo, *Article 8 § 1, in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME, *supra* note 2 at 305-321. *See also* F. Jacobs – R. C. White, *supra* note 21 at 172-4 (discussing the differences and similarities between art. 8,

guaranteeing the respect of everyone's private and family life and prohibiting in principle any interference with an existing family unit can be classified in various distinct categories, depending on the subject the Court had to decide upon each time.

3.1. Children born out of wedlock

The first category concerns children born out of wedlock. Both the Commission and the Court interpret the provision of art. 8 as including in the notion of family life not only the relations existing in an *ex lege* family, i.e. one created by marriage, but also in those that issue from the birth of a child out of wedlock or those that are incorporated to the family by means of an adoption[41]. When interpreting art. 8 of the Convention, the Commission stressed that what should be considered of primordial importance is the interest of the child, and that alone should be examined[42].

The Court, in reaching the same conclusion, took under consideration all the recent developments in the morals and legislation of the majority of the member States of the Council of Europe, as well the provisions of certain other international acts protecting the child.

Thus in the *Paula Marckx* case[43], Paula Marckx gave birth out of wedlock to a child, Alexandra and, pursuant to Belgian law, she was supposed to recognize the child in order for a legal relation to be established between them.

However, the act of recognition would block the daughter from the property of the mother, whereas if the mother did not recognize the child, she could transact her property to her as to any non-relative, but she would not maintain any legal relationship with her. Thus, a clear distinction was established between «legitimate» and «illegitimate» fa-

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art. 12 of the Convention and art. 5 of the Seventh Protocol). *See also* M.E Mas, *supra* note 2 at 20-1

41. *Id.* at 175.

42. *See* Hendricks v. the Netherlands, *Report of the Commission*, 5 Eur. Comm'n H.R Dec & Rep. 18.

43. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A 1979).

milies in Belgium, the «illegitimate» ones being in a disadvantaged position[44].

The Court held that the Belgian law was in contrast with art. 8 of the Convention, noting that the interest of the child should be interpreted under the light of the present situations and the fact that in the majority of the European countries children born in and out of wedlock are held to be equal, as far as family life is concerned. The Court found that Belgium was violating - amongst others - art. 8 of the Convention and obliged the Belgian government to amend its legislation, striking out the child's voluntary recognition by his/her own mother[45]. More specifically, pursuant to the Court's decision:

"... in Belgium an unmarried mother is faced with an alternative: if she recognizes [sic] her child (assuming she wishes to do so), she will at the same time prejudice him since her capacity to give or bequeath her property to him will be restricted; if she desires to retain the possibility of making such dispositions as she chooses in the child's favor [sic], she will be obliged to renounce establishing a family tie with him in law ... the dilemma which exists at present is not consonant with «respect» for family life; it thwarts and impedes the normal development of such life" ...[46]

In the *Inze* case[47], Strasbourg institutions held that Austrian law was in violation of art. 14 in conjunction with art. 1 of the Additional Protocol, to the extent that it did not recognize to the applicant Mr. Inze the right to inherit from his mother, because he was born out of wedlock, as opposed to her «lawful» children, that enjoyed full hereditary rights.

The Court noted that the Convention is a live act which should be

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44. *See also* F. Jacobs – R. C. White, *supra* note 21 at 189, M.E. Mas, *supra* note 2 at 16.

45. Marckx v. Belgium, *supra* note 43 at 29 *et seq.* See also Maud Buquicchio - De Boer, The Direct Effect of the European Convention of Human Rights and the Rights of Children, in MONITORING CHILDREN'S RIGHTS 199-210 (Eng. Verhellen ed. 1996).

46. *Id.* at 17.

47. Inze v. Austria, 126 Eur. Ct. H.R. (ser. A 1987). *See also* J.G. Merrills, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 225-6 (1993), M.E. Mas, *supra* note 2 at 20.

interpreted under the light of the most recent situations, and that as a result the matter of equality of civil rights between children born in and out of wedlock, is of special importance to the member states of the Council of Europe.

For this reason the Organization proceeded to the adoption of the European Convention on the Legal Status of Children Born out of Wedlock, which was adopted by the member states in 1975 and was ratified by Austria in 28.5.1980[48] (on file with the author). Austria signed under a reservation, which did not apply, however, to the facts of the case. After the publication of the Decision by the Court, Austria immediately proceeded in the amendment of the aforementioned law, equalizing the hereditary rights of children born out of wedlock with the rights of their «legitimate» brethren.

3.2. Child custody

A second category of cases comprises of issues of awarding and exercising custody. Problems related to these issues come up whenever one or both natural parents of the child face psychological or other health problems and are not deemed capable of undertaking the upbringing of their children.

The Court had already stressed that the end of marriage by divorce does not *eo ipso* result to the end of family life. The child continues to maintain family bonds with both the parent having custody and the parent not exercising it. Furthermore, in the legal procedure for determining the parent to have custody, national courts should consider, pursuant to paragraph 2 of art. 8, the interest of the child, the child's emotional condition and health, and, should this be deemed necessary, courts should prohibit communication with one of the parents. Moreover, the Court held that art. 8 may, under specific circumstances, require an examination of the custody procedure's (be it judicial or administra-

48. European Convention on the Legal Status of Children Born out of Wedlock, E.T.S. No. 085, entered into force Aug. 11, 1978 http://conventions.coe.int/treaty/EN/cadreprincipal.htm

tive) fairness, an examination proceeding *pari passu* with that of art. 6 § 1[49].

Thus in the case of *X v. Sweden*, the Commission deemed non admissible the request of a father alleging article 8 violation, on the grounds that – as it was proven during the proceeding before the national courts – he was abusing his children, since this fact was causing them severe emotional distress during communication with the father[50].

In one of the relevant cases the Court examined[51], the issue was related to the legal regime of the applicant's daughter born out of wedlock, because the father was already married and, pursuant to the Irish Constitution, granting a divorce was forbidden to courts. Internal legislation granted custody to the mother immediately after the birth of the child. The father only had the right of visiting and communication.

The Commission, followed by the Court, held that the absence of a legal provision regulating the nature of family bonds – especially as far as the father is concerned – after the birth of a child out of wedlock, constitutes a failure not only regarding the respect of family life, but also regarding the respect of each of the parents, given the relationship that existed between them[52]. Thus, pursuant to the Court's decision – which, as far as the notion of family life is concerned, relies heavily on *Marckx*:

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49. McMichael v. U.K., 307-B Eur. Ct. H.R. (ser. A 1995) 57. *See also* F. Jacobs – R. C. White, *supra* note 21 at 186.

50. *Application No 7911/1977*, 12 Eur. Comm'n H.R Dec & Rep. 192 *et seq.*

51. Johnston & others v. Ireland, 112 Eur. Ct. H.R. (ser. A 1986). *See also* P. Mpitsaksis – M. Bravou *«Traditional Family» and «Free Union» under the Speculum of the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2 CRITIC REV. 225 (1999) (in Greek), H. Tagaras, MECHANISMS FOR INTERNATIONAL PROTECTION OF HUMAN RIGHTS, WITH AN INTERPRETATION OF ART. 6 AND 8 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 150 *et seq.* (Athens – Komotini, Ant. N. Sakkoulas, 1992) (in Greek) *and* J.S. Davidson, *The European Convention on Human Rights and the «Illegitimate» Child*, *in* CHILDREN AND THE LAW; ESSAYS IN HONOUR OF PROF. H.K. BEVAN, 75, 94-97 (David Freestone ed. 1995).

52. *See id.* at 155; *See also* P. Van Dijk, G. J. H. Van Hoot, *supra* note 35 at 509 *et seq.*

"As it is observed in its above-mentioned Marckx judgment, «respect» for family life, understood as including the ties between near relatives, implies an obligation for the State to act in a manner calculated to allow these ties to develop normally ... And in the present case the normal development of the natural family ties between the first and the second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child.

Examination of the third applicant's present legal situation, seen as a whole, reveals, however, that it differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences, Having regard to the particular circumstances of this case ... the absence of an appropriate legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life".[53]

After the Court's decision, the Irish Government introduced a bill of law in the Parliament (9.05.1986), proposing the following solution: the father that appears as such in the birth registry may ask the Court to grant him, jointly with the mother, the child's custody as well as all the rights and obligations every parent has[54].

3.3. Adoption

The Court with its jurisprudence has shown that the existence of family bonds with the child must be protected by the State and must develop gradually from the child's birth up to his/her incorporation in the family[55]. Public authorities should intervene only when such an

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53. Johnston & others v. Ireland, *supra* note 51 at 30-1.

54. The law related to the legal status of children born out of wedlock entered into force on June 4, 1988.

55. *See* Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) at 19 (1994), where the Court additionally invoked the provision of art. 7 of the U.N. Convention on the Rights of the Child, which states the right of the child the right «to ... be cared for by his or her parents.» *See* Convention on the Rights of the Child, opened for signature Nov. 20, 1989, entered into force Sept. 2, 1990, http://www.unhchr.ch/html/menu3/b/k2crc.htm (on file with the author). *See generally* Geraldine Van

intervention is provided for by law, constituting a necessary measure in a democratic society.

The adoption of a child born out of wedlock without the knowledge or consent of its natural father[56] and his lacking of capacity to question the lawfulness of the decision granting adoption are in violation of art. 8 of the Convention.

Mr. Keegan submitted an application to the Commission on May 9th 1991, alleging violation of his right to respect for his private and family life, because his daughter was given for adoption without his knowledge or consent, and because national legislation did not recognize that the paternal bonds are grounds, even under conditions, of a father's right to be guardian of his child.

As to the violation of art. 8 of the Convention, the Court clarified at first that the notion of the family pursuant the aforementioned provision is not limited to cohabitation in matrimony. Furthermore, the obligation of the state for protection of the family, be it a positive action or an abstention, is not expressly stated in the text of the above article. However, under any circumstances there should be a fair balancing between the interest of individuals and those of society as a whole.

Thus, Irish legislation considering lawful the adoption of a minor without the knowledge or consent of his natural father all but guarantees the desired balance between opposing interests and constitutes a violation of the right provided by art. 8 of the Convention.

This violation is of course provided for by law and has a plausible purpose, but it is in any case deemed as disproportionate, because it

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Bueren, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD (Martinus Nijhoff Publishers, 1995), Sharon Detrick, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (The Hague, 1999); Geraldine Van Bueren, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD – A GUIDE TO THE «TRAVAUX PRÊPARATOIRES» (The Hague – Boston – London 1992); Paroula Naskou – Perraki, THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD, *in* International Law Series No 17. (Athens – Komotini, Ant. N. Sakkoulas 1991, in Greek); F. Jacobs – R. C. White, *supra* note 21 at 190.

56. *Cf.* the recent case of Söderbäck v. Sweden, 94 Eur. Ct. H.R. Rep. of Judgments & Dec. 3086 (1998-VII).

seriously endangers the bond between the child and his/her father, creating an irremediable situation. Thus the violation of art. 8 of the Convention should be considered certain:

"The Court notes that the applicant was afforded an opportunity under Irish law to claim the guardianship and custody of his daughter and that his interests were fairly weighed in the balance by the High Court in its evaluation of her welfare. However, the essential problem in the present case is not with this assessment but rather with the fact that Irish law permitted applicant's child to have been placed for adoption shortly after her birth without his knowledge or consent. As has been observed in a similar context, where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care ... Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child".[57]

As to the violation of art. 6 § 1 of the Convention[58], the Court – viewing the adoption process separately from the guardianship and custody proceedings – noted that Irish legislation indeed did not grant to the applicant any legal capacity of intervening in the his daughter's adoption proceeding before the Adoption Committee, or even to question the Committee's decision before national courts. His rights were exhausted in the submission of a request for granting guardianship and custody of the child to him, and by the time these proceedings had terminated, there was a considerable danger that «the scales concerning the child's welfare had tilted inevitably in favor of the prospective adopters[59].»

Thus, the aforementioned provision was indeed violated[60].

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57. Keegan v. Ireland, *supra* note 55 at 20-1.
58. *Id.* at 21 *et seq.*
59. *Id.* at 22.
60. *Id.*

3.4. Parent – Children relationship

Also worth noting are the cases involving the sensitive issue of parent – children relationship, with an emphasis on the mutual right of communication, the latter being a fundamental element of family life in the context of art. 8 of the Convention.

The Commission held that whenever the parents are deprived of their child's custody, it is necessary for national courts to pose restrictions in their right of communication with the child, the ultimate goal being the protection of the interest of the child, pursuant to art. 8 § 2 of the Convention[61]. The Commission declared admissible an application[62] submitted before it, in which the applicant was expressing complaints as to the procedure followed by the competent state agency to issue the rulings prohibiting communication between natural parents and their offspring, after which the authority also ventured in the necessary actions in order to give the child up for adoption, without the natural parents' consent.

The Court recognized the fundamental character of the right described above and added that the natural relationship between parents and child is not terminated due to the sole fact that the child was put under state protection. This thought expressed by the Court, if combined with the facts of the case, clearly indicates that the decisions issued by the competent state agency are «an interference» in the context of art. 8 § 2 of the Convention, to the right of the applicant for respect of his/her family life; an intervention equivalent to violation of art. 8 § 2[63].

Moreover, under normal circumstances, parents live with their children and no problems exist as far as communication between them is concerned. The usual image of family life is being shattered by the separation of children from their parents because of marital disputes or because of the assumption of the child's upbringing by a public agency.

U.K. legislation recognizes the right of a parent's communication

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61. *See also Application No 8045/1977*, 16 Eur. Comm'n H.R Dec & Rep. 105 *et seq.*, Vincent Coussirat-Coustere, *Article* 8 § 2, *in* LA CONVENTION EUROPÉENNE DES DROITS DE L' HOMME, *supra* note 2 at 323.

62. *See* W v. U.K., 121 Eur. Ct. H.R. (ser. A 1987).

63. *Id.* at 37.

with his or her child, without stating that communication is automatically interrupted when a public agency is being given the child's custody. Simply put, the continuation of communication between parent and child lies within the discretion of the competent Agency. The Court construed this discretion to mean that such a right to communication does not cease upon placement of a child under the protection of the State. Moreover, the Court emphasized that such a termination of the right of communication is incompatible with the fundamental right of respect of family life, established by art. 8 of the Convention and being an inseparable part thereof.

Thus the Court held that even after the adoption of such a child, the applicant has a right to demand unhindered communication with his/her natural child[64].

Similar were the facts in the *Olsson* case[65], where custody was once again removed from the natural parents of three children and was awarded to third persons, while in the mean time the competent state authorities refused to grant the right of communication, despite the repeated applications of the parents to terminate the situation.

The Court admitted that the measures taken by the national authorities constituted an interference to the right of art. 8 of the Convention. Thus, the plausible or non-plausible character of the interference should be considered, taking also into consideration the conditions of the second paragraph of the aforementioned article. The existing Swedish legislation on the one hand, and the protection of health or morals and the rights and freedoms of children on the other hand, were considered as adequately fulfilling the conditions of art. 8 § 2 as to the three points of conflict[66].

The issue of whether these measures were necessary in the framework of the function of a democratic society was also subject of a warm debate, the Court describing the starting point of the relevant analysis in pertinent parts:

"According to the Court's established case-law, the notion of neces-

64. *Id.* at 27 *et seq.*

65. Olsson v. Sweden, 130 Eur. Ct. H.R. (ser. A 1988).

66. *Id.* at 31.

sity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is «necessary in a democratic society», the Court will take into account that a margin of appreciation is left to the Contracting States...

...

The approach which the Court has consistently – and from which it sees no reason to depart on the present occasion – differs somewhat from those described above. In the first place, its review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith ... In the second place, in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences [sic] at issue are «relevant and sufficient»".[67]

The Court held that the measures taken by Swedish authorities, despite the uncontested fact that they were always acting in good faith, were neither justified because of administrative or even practical difficulties, nor were they proportionate to the purpose sought. Consequently, such measures constituted a violation of art. 8 of the Convention[68].

In the light of all the above, the Court held that depriving the mother of custody and of the right to communicate with her child constitutes a violation of art. 8 of the Convention[69].

3.5. Abandonment of family home

Finally, in the case of abandonment of the family by a minor, the Commission dealt with the dilemma of which right's protection should prevail, the protection of the right to family life or that to private life.

Considering the interest of the child, the Court held that when a

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67. *Id.* at 31 *et seq. See also* Karen Reid, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS 165 (1998).

68. Olsson v. Sweden, *supra* note 65 at 37.

69. *See also* Johansen v. Norway, 13 Eur. Ct. H.R. Rep. of Judgments & Dec. 979 at 1012 (1996-III).

14-year-old is being forced to return in the family home, the right to family life, as established by art. 8 § 2 of the Convention, prevails, granting protection to the child's health and morals[70].

4. PROTECTION OF THE RIGHT TO EDUCATION

One of the very few rights - if not the only one – which guarantees a right of special relevance to children[71] is the right to education established in art. 2 of the Additional Protocol[72]. This provision contains a general guarantee, not specific to children, since the second sentence of art. 2 reserves to parents rather than to children the right to ensure «such education and teaching in conformity with their own religious and philosophical convictions». Thus, all children are entitled to an education and the aforementioned provision warrants them exactly free access to the existing educational foundations in a specific point in time.

4.1. Discrimination in the field of education

This provision is very often combined with that of art. 14 of the Convention, guaranteeing the abolishment of all discriminations. In one of its first cases, the Court dealt with the question whether certain provisions of the Belgian legislation regarding linguistic education are in accordance with or in violation of arts. 8 and 14 of the Convention and art. 2 of the Additional Protocol[73]. The applicants requested that their children, residing in Flemish areas of the state, be taught the french language in the flemish schools, otherwise they considered that there was a violation of the aforementioned provisions.

The Court in its interpretation of art. 2 of the Additional Protocol

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70. *See Application No 6753/74, supra* note 5 at 118 *et seq.*

71. *See* F. Jacobs – R. C. White, *supra* note 21 at 262-3 (discussing the wider view of the term education nowadays). *Cf.* Karen Reid, *supra* note 67 at 201, arguing for the contrary.

72. For a detailed analysis of art. 2 *see* D.J. Harris, M. O' Boyle, C. Warbrick, *supra* note 15 at 540 *et seq.*, P. Van Dijk, G. J. H. Van Hoot, *supra* note 35 at 643 *et seq.*

73. Eur. Ct. H.R. case «Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium» judgment of July 23, 1968.

stressed that, despite the negative phrasing of the first sentence «no person shall be denied the right to education», the article uses the term «right» and «right to education». Consequently, there is no doubt that article 2 provides individuals with a right[74]. It remains to be examined what the context of this right is and the scope of the obligations it imposes to the states.

The scope of the «right to an education» includes the obligation of the member states to guarantee such a right to all the individuals residing in their territory through measures to be dictated by the states themselves[75]. Thus, the right to education has the characteristics of a right of access to educational institutions existing at a given time, the member states not being obliged under any circumstances to establish such institutions at their own expense, or to subsidize a particular type of education at any level[76].

The Convention defines neither the means nor the way of realizing such an obligation of the member states, nor does art. 2 define the language in which such an education is to be administered. However, it is implied by the nature of such a right that the member states shall construct the framework of those rules, which may even vary time- or spacewise, depending on the needs of the community and those of individuals. It goes without saying that such rules should not be conflicting with the core of the right itself.

As far as the second phrase of art. 2 is concerned, as the preparatory work of the Convention indicates[77], the wording «to ensure such education and teaching in conformity with their own religious and philosophical convictions», under no circumstances may be construed to establish an obligation on the part of the member state to provide education in a language different of the official state language[78]. The

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74. *Id.* at 31.

75. *Id.* at 31-2. *See also* Karen Reid, *supra* note 67 at 204.

76. F. Jacobs – R. C. White, *supra* note 21 at 261. M.E. Mas, *supra* note 2 at 31.

77. Eur. Ct. H.R. case «Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium», *supra* note 73 at 32.

78. *Id. See also* G. Michailides – Nouaros, *The right to an education pursuant to the European Convention for the Protection of Human Rights (art. 2,2 of the Additional Protocol to the Convention), in* MÉLANGES EN L' HONNEUR PHÉ-

Court unanimously held that there was no violation of any provision of the Convention, noting however that the state's practice to provide education in flemish in french-speaking territories, but not in french in flemish speaking territories had some problems of incompatibility with art. 14 of the Convention[79].

4.2. Education – Sex Education

The issue of mandatory sex education in public schools caused a series of application to be submitted against Denmark. Parents were protesting for an alleged violation of the second phrase of art. 2 of the Additional Protocol, claiming that the education provided to their children was contrary to their own religious and other philosophical convictions.

According to the opinion of the Commission[80], the aforementioned article is an effort to achieve a balance between the right of the State to organize education depending on the needs of society and individuals on one hand and on the other hand the obligation to respect the rights of parents equally protected by the same article. The Commission found that the state respected both these conditions. The Court in its turn held that educational planning and scheduling fall within state competence and that the latter should provide children with the possibility of examining all subjects in a critical and pluralistic manner, and not to blindly abide by a religious or philosophic principle. Sex education of children is not an attempt of propagandistic teaching (i.e. there must be no attempt of indoctrination involved), but a genuine offering of knowledge and information regarding human sexual life:

"In order to examine the disputed legislation under Article of the Protocol ... one must, while avoiding any evaluation of the legislator's expediency, have regard to the material situation that it sought and still seeks to meet.

DON VEGLERIS vol. I, 8 (Ant. N. Sakkoulas, 1988) (in Greek).

79. Eur. Ct. H.R. case «Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium», *supra* note 73 at 87.

80. Kjedsen, Busk Madsen and Pedersen v. Denmark, 23 Eur. Ct. H.R. (ser. A 1976) at 21.

The Danish legislator, who did not neglect to obtain beforehand the advice of qualified experts, clearly took as his starting point the known fact that in Denmark children nowadays discover without difficulty and from several quarters the information that interests them on sexual life. The instruction on the subject given in State schools is aimed less at instilling knowledge they do not have or cannot acquire by other means than at giving them such knowledge more correctly, precisely, objectively and scientifically. The instruction, as provided for and organised [sic] by the contested legislation, is principally intended to give pupils better information;"[81]

The Court took into consideration the fact that in Denmark there are also state schools where the course of sex education is not taught, and – consequently – where dissenting parents could send their children to[82]. Thus the Court held that sex education of children was in compliance with art. 2 of the Additional Protocol[83].

4.3. Education and corporal punishment

The issue of education in combination with corporal punishment was examined by the Strasbourg institutions in the case of *Cambell and Cosans*[84]. British women Gracie Cambell and Jane Cosans, mothers of school age boys, submitted an application to the Commission, alleging that corporal punishment of pupils for discipline reasons as imposed in the schools of Scotland constituted a violation of the provisions of the Convention. The Commission was of the opinion that the critical facts of the case should be interpreted as violating the second phrase of art. 2 of the Additional Protocol, where it is stated that: «in the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical

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81. *Id.* at 27.

82. *See also* Giorgio Gregori, LA TUTELA EUROPEA DEI DIRITTI DELL' UOMO 58 (1979), J.G. Merrills, *supra* note 47 at 145-6.

83. Kjedsen, Busk Madsen and Pedersen v. Denmark, *supra* note 80 at 29.

84. Campbell and Cosans v. U.K., *supra* note 35. *See also* K. Reid, *supra* note 67 at 201.

convictions». The Court with its Decision agreed with the Commission's Opinion and concluded that the provision invoked was indeed violated[85], stating in pertinent part:

"The suspension of Jeffrey Cosans – which remained in force for nearly a whole school year – was motivated by his and his parents' refusal to accept that he receive or be liable to corporal chastisement ... His return to school could have been secured only if his parents had acted contrary to their convictions, convictions which the United Kingdom is obliged to respect under the second sentence of Article 2 ... A condition of access to an educational establishment that conflicts in this way with another right enshrined in Protocol No. 1 cannot be described as reasonable and in any event falls outside the State's power of regulation under Article 2."[86]

4.4. Education and freedom of religion

Finally, relevant to art. 2 of the Additional Protocol are the cases of two Greek pupils, Valsami and Efstratiou[87]. The two pupils, Jehovah's Witnesses as far as their creed is concerned, were obliged to participate with all the other school children in the parade of the 28th of October and when they refused – claiming that their freedom of religion was being violated, since pacifism is allegedly a fundamental tenet of their religion– they were expelled for one day in order to be disciplined. The pupils' parents alleged violation of art. 2, establishing it, among others, on the respect for the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions, as well as violations of arts. 3, 9 and 13 of the Convention. The Court held that the mandatory participation of the pupils in the parade for the 28th of October did not violate the parents'

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85. Campbell and Cosans v. U.K., *supra* note 35 at 20. *See also* M. Pirovetsis, *Comment on the case of Campbell and Cosans*, 4 HELLENIC REV. OF EUROPEAN L. 389 (1984) (in Greek) *and* G. Michailides – Nouaros, *supra* note 78 at 11.

86. Campbell and Cosans v. U.K., *supra* note 35 at 19.

87. *See* Valsamis v. Greece, 27 Eur. Ct. H.R. Rep. of Judgments & Dec. 2312 (1996-VI), *and* Efstratiou v. Greece, 27 Eur. Ct. H.R. Rep. of Judgments & Dec. 2347 (1996-VI). *See also* K. Reid, *supra* note 67 at 203.

right to educate their children according to their own convictions, that there is also no violation of the children's freedom of conscience and that therefore, such a state action does not constitute an interference to the freedom of religion, which is safeguarded by art. 9 of the Convention:

"The Court reiterates that Article 2 of Protocol No. 1 enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme [sic] ... That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the «functions» assumed by the State. The verb «respect» means more than «acknowledge», or «take into account». In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State...

The Court has also held that «although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail ...»

...

While it is not for the Court to rule on the Greek State's decisions as regards the setting and planning of the school curriculum, it is surprised that pupils can be required on pain of suspension from school ... to parade outside of the school precincts on a holiday.

Nevertheless, it can discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicant's pacifist convictions to an extent prohibited by the second sentence of Article 2 of Protocol No. 1."[88]

The Court also noted that establishing and planning of the educational schedule falls primarily within the sphere of competence of the member states, with the restriction of conforming to religious and philosophical convictions of the parents. In the aforementioned case, this restriction was respected, given that the pupils' schedule did not include the special course on Greek Orthodox religion, which is offered to all other pupils following the Greek Orthodox creed:

"The Court notes at the outset that Miss Valsamis was exempted

88. Valsamis v. Greece, *supra* note 87 at 2324 *et seq.*

from religious education and the Orthodox mass, as she had requested on the grounds of her own religious beliefs ... The impugned measure [of participating in school parades] ... did not amount to an interference with her right to freedom of religion either ..."[89]

Moreover, their limited participation – only once or twice a year – in a military parade, to celebrate a historical event does not constitute an interference with the right provided by art. 2 of the Additional Protocol[90].

Consequently, the Court did not accept that there was, among others, an art. 2 violation[91].

5. FREEDOM OF EXPRESSION

«The Little Red Schoolbook» of two Danish writers, published by Mr. Handyside in London, gave the Court an opportunity to venture into an interpretation of meaning of the freedom of expression established by art. 10 of the Convention[92]. The circulation of the book was prohibited by the British authorities to prevent the corruption of youth[93] and, interestingly, both the Commission and the Court agreed to that action, judging that it protected the morals of young individuals, keeping them away from actions harmful for them[94]:

"Sharing the view of the Government and the unanimous opinion of the Commission, the Court first finds that the 1959/1964 Acts have an aim that is legitimate under Article 10 § 2, namely, the protection of

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89. *Id.* at 2326.

90. *Id.* at 2325.

91. *Id.* at 2329. *Cf.* Paroula Naskou – Perraki, *The Jurisprudence of European Court of Human Rights Related to the Protection of Religious Freedom in Greece*, 19 HELLENIC REV. OF EUROPEAN L. 785 (1999) (in Greek) *and* T. Sigalas, *Children's Parades and Freedom of Religion*, 23 THE CONSTITUTION 995 (1997) (in Greek).

92. Handyside v. U.K., 24 Eur. Ct. H.R. (ser. A 1976). *See* E. Croustallakis, *Freedom of Expression, the Protection of Property and Indecent Publications*, 28 CRIMINAL REVIEW 369 (1978) (in Greek).

93. For an idea of the contents of «The Little Red Schoolbook» *see* Handyside v. U.K., *supra* note 92 at 10, 15, 16.

94. Handyside v. U.K., *supra* note 92 at 25.

morals in a democratic society. Only this latter purpose is relevant in this case since the object of the said Acts – to wage war on the «obscene» publications, defined by their tendency to «deprave and corrupt» – is linked far more closely to the protection of morals than to any of the further purposes permitted by Article 10 § 2."[95]

6. PROTECTION FROM EXPULSION

The problem arising out of rejection of an application for permit to establish oneself or to temporarily stay in a European country is common though usually related to adults. Children are in the majority of cases indirectly harmed, when an entire family is obliged to seek refuge in an another country, or even wander further away after that[96]. Strasbourg institutions however also dealt with cases where policy of a certain state directly concerned children.

Thus, Swedish authorities decided to deport a 12-year-old Syrian boy with his mother and brothers, when their permit to stay in Sweden expired. The family sought and took refuge in a monastery to protect themselves from expulsion, but finally they were discovered and deported all save the 12-year-old. The boy submitted an application to the Commission, which held that the overall stance of the Swedish government is contrary to art. 3 of the Convention, because of inhuman treatment on the part of Swedish authorities, and also to art. 8 of the Convention for violation of family life and to art. 13 for lack of judicial remedies. The Commission held that the application was admissible[97]. The case was removed from the Court's list by means of a friendly settlement, since Sweden granted to the child and its family permit to stay and work, paid lawyers' fees and was ordered to amend its internal legislation concerning expulsion.

The second case concerned a seven-year-old boy of Turkish descent, to whom Dutch authorities did not grant permit to stay, although his

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95. *Id.* at 21.

96. *See also* F. Jacobs – R. C. White, *supra* note 21 at 180-5.

97. *See Application No 9330/1981*, 35 Eur. Comm'n H.R Dec & Rep. 57 *and Report of the Commission*, 39 Eur. Comm'n H.R Dec & Rep. 75.

father had lived and worked in the Netherlands for ten years. The child was born in Turkey and after his parents' divorce remained under the custody of his paternal grandmother. The father immigrated to Holland, sending financial assistance to his mother and his child, until the death of the child's grandmother, when the father took the child with him to raise it in the new family he had in the meantime created.

Dutch authorities, though accepting the principle that, for the sake of the family unity, the child should live with his father, denied granting a permit to stay under the pretext that, pursuant to the court's decision the child should remain under the custody of the grandmother. Once the Commission held that the application was admissible on the basis of art. 3 and on the grounds that lack of protection would constitute inhuman treatment, the Dutch authorities retreated and granted the child permit. The case was removed by the Court's list after a friendly settlement[98].

Even more inhuman are the cases of interruption of family life due to an expulsion order. That the Convention does not warrant the right of entrance or of stay in a third country is not debatable. However, the Commission concluded that blocking out an individual from a country where the rest of his/her family members live constitutes a violation of art. 8 of the Convention[99]. Despite that, the Commission did not accept a specific application of an American father who was to be deported because he had already been convicted for heroine trafficking and thus the exceptions of art. 8 § 2 of the Convention duly and justly applied. The Commission mainly examines the linkage between immigration policy and its necessity for ensuring public safety, as stated in art. 8 § 2 of the Convention[100].

Thus in the case of a Moroccan citizen who, after his marriage to a

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98. Taspinar v. The Netherlands, *Report of the Commission*, 44 Eur. Comm'n H.R Dec & Rep. 262 *et seq.*

99. *Application No 7816/1977*, 9 Eur. Comm'n H.R Dec & Rep. 262.

100. *See Application No 9080/1980*, 28 Eur. Comm'n H.R Dec & Rep. 160, where it was held that the application of a Pakistani spouse was non admissible, although his family was permanently residing in the U.K., since the applicant entered the country without a permit to stay.

Dutch citizen and the birth of a child took a divorce and was deported from the Netherlands, the Commission held that the Moroccan father was being deprived of the right to communicate with his 14-year-old daughter, whose custody was entrusted to his ex-spouse, in violation of the art. 8 of the Convention safeguarding the right to family life[101].

Also characteristic are the cases of a 9-year-old girl from Zaire[102], whose expulsion was ordered immediately upon her arrival in a Dutch airport, accompanied by her aunt, who had a permit to enter the Netherlands, as well as the case of a young Algerian deaf-mute, who faced the peril of expulsion from France where he lived with his family[103]. In their applications both children claimed that their expulsion would violate, among others, their right to respect of their family life. The Court noted that the member states have the right to control, in accordance with the principles of international law, the entrance, establishment and expulsion of aliens from their territory. However, measures imposed must on one hand be based on a demanding social necessity, and on the other hand must not be disproportionate to the plausible goal they serve.

The Court held that in the first case expulsion would not violate art. 8 of the Convention for the protection of family life[104], whereas in the second case that the deaf mute's expulsion would cause him serious psychological problems and that only his family could provide him with sentimental peace; thus, his expulsion would constitute violation of art. 8 of the Convention[105].

CONCLUSIONS

The lack of specific provisions granting protection to children's rights in the framework of the Convention did not prevent Strasbourg

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101. *Application No 10730/84, Report of the Commission*, 29 Y.B. EUR. CONV. ON H.R. 138 (1986).

102. Nsona v. the Netherlands, 23 Eur. Ct. H.R. Rep. of Judgments & Dec. 1979 (1996-V).

103. Nasri v. France, 320 – B Eur. Ct. H.R. (ser. A 1995) at 14 *et seq. See also* K. Reid, *supra* note 67 at 270.

104. Nsona v. the Netherlands, *supra* note 102 at 2007.

105. Nasri v. France, *supra* note 103 at 26.

institutions to treat the subject and to create ample relevant jurisprudence[106]; Moreover, it has led the Council of Europe to undertake a series of initiatives towards that direction. One could mention the European Convention on the Legal Status of Children Born out of Wedlock[107], which has already been cited in the Court's jurisprudence[108]; the European Convention for Recognition and Enforcement of Decisions Related to the Custody of Children[109]; the European Convention Related to the Adoption of Children[110]; the European Convention for the Exercise of Children's Rights[111], which recognizes to children mainly procedural rights before national judicial authorities in cases related to family law, but also in any other judicial proceeding that concern them; the European Charter for Regional or Minority Languages[112], safeguarding the minorities' right to a language; the Framework Convention for the Protection of National Minorities[113], pursuant to

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106. *See* Ursula Kilkelly, *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, 23 HUM. RTS. Q. 309 (2001) for an analysis of how the Court utilized the UN Convention on the Rights of the Child to achieve such a result.

107. European Convention on the Legal Status of Children Born out of Wedlock, *supra* note 48.

108. Inze v. Austria, *supra* note 47.

109. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, E.T.S. No. 105, entered into force Sept. 1, 1983 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author).

110. European Convention on the Adoption of Children, E.T.S No. 058, entered into force Apr. 26, 1968 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author).

111. European Convention on the Exercise of Children's Rights, E.T.S. No. 160, entered into force July 1, 2000 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author).

112. European Charter for Regional or Minority Languages, E.T.S. No. 148, entered into force Mar. 1, 1998 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author).

113. Framework Convention for the Protection of National Minorities, E.T.S. No. 157, entered into force Feb. 1, 1998 http://conventions.coe.int/treaty/EN/cadreprincipal.htm (on file with the author).

which the member States should take measures in the field of education to assure that less spoken languages are taught, etc.

On its behalf, the Parliamentary Assembly of the Organization has adopted Recommendation No 1286 (1996)[114] for the establishment of a common european strategy for children with an emphasis to the children's rights, interests and needs, while at this moment it is discussing the establishment of a European Ombudsman for children[115], an institution that already exists in twenty countries all over the globe, many of which are European[116]. The Ombudsman's objective will be to satisfy the needs, protect the rights and interests of children and represent them in any civil or criminal case they are involved in, directly or indirectly. Mainly though the Ombudsman will supervise the application of international conventions and agreements related to children, urging the Member States of the Council of Europe to fully apply the U.N. Convention for Children's Rights[117]. Moreover the Parliamentary Assembly, deeply sensitive not only concerning children's rights in Europe but widely in a global level, discusses the creation of an ad hoc Committee dealing with crimes related to pedophilia[118], while it has already proposed the undertaking of a campaign against the use of children as soldiers[119]. Another proposal of the Parliamentary Assembly concerns the taking of measures to enable mothers imprisoned for socially non-dangerous crimes not to be deprived of their children[120].

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114. *See also Reply of the Comm. of Ministers*, Eur. Parliamentary Ass., 652nd Meeting of the Ministers' Deputies, Doc. No 8287 (1998). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

115. *See Motion for a Recommendation*, Eur. Parliamentary Ass., Doc. No. 8123 (1998). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

116. *E.g.* Austria, Belgium, Denmark, Finland, Germany, Iceland, Luxembourg, Norway, Portugal, Russia, Spain, Sweden, Ukraine.

117. *See also* the relevant *Report of the Soc., Health and Fam. Aff. Comm.*, Eur. Parliamentary Ass., Doc. No. 8552 (1999).

118. *See Motion for an Order*, Eur. Parliamentary Ass., Doc. No. 8865 (2000). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

119. *See Motion for a Recommendation*, Eur. Parliamentary Ass., Doc. No. 8345 (2000). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

120. *See Motion for a Recommendation*, Eur. Parliamentary Ass., Doc. No. 8479

Finally, the Parliamentary Assembly proposes measures for the increased protection of abandoned and abused children[121], as well as of children-victims of financial exploitation[122].

However, it is our view that the Council of Europe, despite its renowned tradition on the effective protection of human rights and the control mechanism it possesses[123], presents a weakness in the sector of substantial protection of children's rights. Such a weakness may be eliminated in only one way, that is by adopting a new Protocol to the Convention, containing a complete enumeration of children's rights and fundamental freedoms. Let us hope that the Organization shall soon take action to that direction.

(1999). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

121. *See Report of the Soc., Health and Fam. Aff. Comm. on Abuse and Neglect of Children*, Eur. Parliamentary Ass., Doc. No. 8041 (1998). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

122. *See Report of the Soc., Health and Fam. Aff. Comm.*, Eur. Parliamentary Ass., Doc. No. 7840 (1997). Also available on http://stars.coe.fr/index_e.htm (on file with the author).

123. As recently amended by the 11th Protocol, *supra* note 14.

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1. P. Naskou-Perraki (Ed.) Black Sea Econonic Cooperation - Basic texts, Ant. N. Sakkoulas Publishers 2001

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