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Human Rights of Children in the EU Context: Impact on National Family Law

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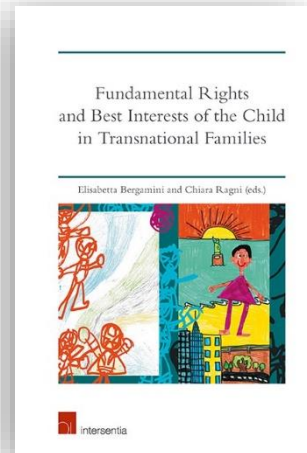
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Elisabetta Bergamini and Chiara Ragni (eds.)

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FUNDAMENTAL RIGHTS AND
BEST INTERESTS OF THE CHILD
IN TRANSNATIONAL FAMILIES

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HUMAN RIGHTS OF CHILDREN IN THE EU CONTEXT

Impact on National Family Law

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1. INTRODUCTION

We had to wait until 1989 for a specific general catalogue of children's rights to be approved at the supranational level (the Convention on the Rights of the Child (CRC)), which was drafted in New York in the framework of the United Nations).¹ However, some general principles applicable to children had already

¹ The Convention on the Rights of the Child was adopted with resolution No. 44/25 of the UN General Assembly on 20.11.1989 and entered into force on 02.09.1990. It is now applied in 193 States (The USA did not ratify it). For more details, see W. VANDENHOLE, 'The Convention on the Rights of the Child' in F. GÓMEZ ISA and K. DE FEYTER (eds.), *International Human Rights Law in a Global Context*, University of Deusto, Bilbao 2009, p. 452; I. BARRIÈRE-BROUSSE, 'L'Enfant et les Conventions Internationales' [1996] *Journal du Droit International* 4, 843.

been included in previously devised instruments concerning human rights. These include the Universal Declaration on Human Rights proclaimed by the UN General Assembly in 1948,² the International Covenant on Civil and Political Rights of 1966³ and the European Convention on Human Rights (ECHR) of 1950, all of which contain references at least to the need to protect family life.

The CRC differs from these previous instruments in that it considers the child as a subject and not only as an object of law.⁴ Through this ‘Copernican revolution’ children have become a focus of legal reasoning and are granted specific and autonomous rights that do not derive from their parents or, more generally, from being part of a ‘legitimate’ family. Such rights could also diverge from those of other family members. However, as will be illustrated in this chapter, the complex legal framework existing at the international level has yet to be fully implemented at the national level in most cases.

This chapter considers the idea that children’s rights need to be protected as human rights, and that such protections are not only reserved for toddlers but are also valid for adolescents and young adults.⁵ Accordingly, this work analyses the main supranational instruments concerning children’s fundamental rights, and assesses the global impact of the relevant principles on domestic family law in the EU Member States. Such an impact will be considered with particular regard to the role of the Court of Justice of the European Union (CJEU) in tandem with that of the European Court of Human Rights (ECtHR).

This chapter proceeds under the basic assumption that children’s rights can be divided into two categories. The first category encompasses the more basic rights that are usually not at risk of violation in EU Member States (e.g. the right to respect for physical integrity and its violation in case of female genital mutilation). Clearly, the risk of violation of such rights increases in cross-border situations, as migrating children could face infringement by their national communities in the host country or, as is more frequently the case, when sent back to their national countries (as we will see is the case for forced marriages, among other situations).⁶ The second category refers to rights whose protection

On the different approaches in place before and after the approval of the CRC, see N. CANTWELL, ‘Are Children’s Rights Still Human?’ in A. INVERNIZZI and J. WILLIAMS (eds.), *The Human Rights of Children: From Visions to Implementation*, Routledge, New York 2016, p. 38.

² The most relevant provisions of interest for this analysis are Article 16, which considers the family as the natural and fundamental group unit of society, and Article 25, which stresses that childhood is entitled to special care and assistance.

³ Articles 23 and 24 address, respectively, the need to protect the family as the natural and fundamental group unit of society, and the right of children to such measures of protection as are required by their status as minors.

⁴ Y. BEIGBEDER, ‘Children’ in G. T. WEISS and S. DAWS (eds.), *The Oxford Handbook on the United Nations*, Oxford University Press, Oxford-New York 2007, p. 513.

⁵ N. CANTWELL, above n. 1, p. 43.

⁶ See DE VIDO in this volume.

still needs to be specifically granted to children in their home countries, and where the risk of violation in cross-border situations is even higher. It includes the right of children to be heard in judgments regarding parental responsibility, which is still subject to many violations in domestic proceedings but is at much higher risk in all cross-border situations.

The main research question that this chapter will try to answer is whether cross-border situations (stemming from free movement of EU citizens and their families or from migration situations) affect the different national legal frameworks in a way that leads to higher-level protections of children rights as well as to a more satisfying and comprehensive application of the international instruments meant to protect human (or more specifically children's) rights.

2. ANALYSES OF HUMAN RIGHTS RULES RELEVANT IN THE FIELD OF INTEREST

This analysis of the existing legal framework mainly focuses on three documents among the various sources of international law: the CRC, due to the specificity of its provisions on the best interests of the child, which have been considered a model for the interpretative evolution of children's rights, then the ECHR and the Charter of Fundamental Rights of the EU (because of their relevance at the regional level and the effectiveness of their jurisdictional system). Other existing international instruments will not be considered either because they are too general (e.g. the International Covenant on Civil and Political Rights) or they are too specifically linked to particular situations (e.g. the Convention on Contact Concerning Children of 2003).⁷

2.1. THE NEW YORK CONVENTION

The need to take the child's best interests as the primary consideration is the main pillar of the New York Convention of 1989.⁸ No definition of such

⁷ Council of Europe, CETS No. 192, 15.05.2003. For a more general analysis of the international legal framework on this issue, see E. CANETTA, N. MEURENS, P. McDONOUGH and R. RUGGIERO, *Note on the EU Framework of Law for Children's Rights*, European Parliament, Brussels, [2012] <[http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT\(2012\)462445_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf)>.

⁸ On the limits of the Convention, see M. FREEMAN, 'The Value and Values of Children's Rights' in A. INVERNIZZI and J. WILLIAMS (eds.), *The Human Rights of Children: From Visions to Implementation*, Ashgate, Surrey 2011, p. 27. For a critical approach to the inadequacies of the CRC and some possible remedies, see U. KILKELLY, 'Using the Convention on the Rights of the Child in Law and Policy: Two Ways to Improve Compliance' in A. INVERNIZZI and J. WILLIAMS (eds.), above n. 1, pp. 179–97.

interests is given in that Convention. However, the relevance of this principle is clearly established by various Articles containing a reference to it. In particular, Article 3, as can be seen in General Comment No. 14, defines the best interests of the child as a threefold concept that is simultaneously a substantive right, a fundamental interpretative principle and a rule of procedure.⁹

If the UN Declaration on Children's Rights (1959) already stated that 'the best interests of the child shall be the paramount consideration',¹⁰ the text of the New York Convention seems to undermine this principle by slightly changing the definition and reducing the best interests of the child to 'a primary consideration', thereby giving space to the urge to balance the different needs that must be considered when taking decisions regarding children.¹¹

Notably, some national legal systems, such as the Spanish and the French, refer to the 'best interest of the child' in the singular, thereby implying that there could be only one such best interest. By contrast, the idea as expressed in the English system is that the 'best interests' of children exist and must be considered, thus clarifying that different interests exist for any given child and all should be balanced.

Some children's rights as listed by the CRC are not endangered for EU citizens living inside EU Member States (a clear example is the prohibition of inhuman and degrading treatment found in Article 37; it seems difficult to imagine a violation of this principle perpetrated against national citizens in Europe). However, they could still be at risk when we consider migrant children either lawfully or unlawfully residing in Europe (as was the case for some detention conditions to which migrant children were submitted by European States)¹²

⁹ United Nations (UN), Committee on the Rights of the Child (CRC) (2013), General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, CRC/C/GC/14, 29.5.2013, paras. 6–7. On Article 3 see U. KILKELLY, 'The Best Interests of the Child: A Gateway to Children's Rights?' in E. E. SUTHERLAND and L. A. BARNES MACFARLANE (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child – Best Interests, Welfare and Well-being*, Cambridge University Press, Cambridge 2018, p. 64.

¹⁰ On the evolution of children protection in international law see G. VAN BEUREN, *The International Law on the Right of the Child*, Dordrecht, Kluwer 1995, p. 8.

¹¹ For a comparison between the English and the French versions of the Convention see C. FOCARELLI, 'La convenzione di New York sui diritti del fanciullo e il concetto di "best interests of the child"' [2010] *Rivista di diritto internazionale* 4, 981. On the drafting of Article 3, see E. E. SUTHERLAND, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in E. E. SUTHERLAND and L. A. BARNES MACFARLANE (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child – Best Interests, Welfare and Well-being*, Cambridge University Press, Cambridge 2018, p. 22.

¹² *Popov v. France*, 19.01.2012. The ECtHR made a specific reference to the CRC encouraging 'States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents' (§91). See also *Muskhadzhiyeva and Others v. Belgium* No. 41442/07, 19.01.2010, and *Kanagaratnam v. Belgium* No. 15297/09, 13.12.2011, in which

and even more if they are at risk of *refoulement* towards their country of origin (as could be the case for victims of female genital mutilation or forced marriages).

Migrant children clearly need to be considered as particularly vulnerable and must be specifically protected. This was illustrated by the recent Joint General Comments by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, on the general principles regarding the human rights of children in the context of international migration as well as State obligations concerning the human rights of children in the context of international migration in countries of origin, transit, destination and return. The two sets of comments were approved on 16 November 2017; although each was issued independently of the other, they should be read and implemented together. These General Comments stress that the best interests of children should be protected

whether they have migrated with their parents or primary caregivers, are unaccompanied or separated, have returned to their country of origin, were born to migrant parents in countries of transit or destination, or remained in their country of origin while one or both parents migrated to another country, and regardless of their or their parents' migration or residence status (point 9 comment No. 3).¹³

The universal reach of the CRC is granted by its application to any child, irrespective of his or her citizenship. However, with Article 22, a specific protection is extended to refugees and asylum seekers, to whom the State should grant human rights as set forth not only in the CRC but also in all international human rights instruments to which the State is party.

The Committee on the Rights of the Child – a body of independent experts that monitors and reports on the implementation of the CRC – has also clarified the relevance of fundamental rights protections as they apply to the specific situation of migrant children,¹⁴ as the CRC is considered a 'complimentary source of protection' to be combined with the 1951 Refugee Convention, when possible.¹⁵

¹³ the ECtHR found a violation of Article 3 (degrading and inhuman treatment) due to the harsh detention conditions in which the migrant children were held by Belgian authorities. Respectively, Comments No. 3 and 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and Comment No. 22 and 23 (2017) of the Committee on the Rights of the Child. See Point 9 Comment No. 3.

¹⁴ On the main activities of the Committee and its role, see J. KANICS, 'The Best Interests of Unaccompanied and Separated Children: A Normative Framework Based on the Convention on the Rights of the Child' in M. SEDMAK, B. SAUER, B. GORNIK and D. SENOVILLA HERNÁNDEZ (eds.), *Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?* [Internet] Routledge, London 2016, p. 41. On its jurisprudence, see C. P. COHEN and S. KILBOURNE, 'Jurisprudence of the Committee of the Rights of the Child: A Guide for Research and Analyses', [1998] 19(3) *Michigan Journal of International Law*, 633.

¹⁵ J. M. POBJOY, *The Child in International Refugee Law*, Cambridge University Press, Cambridge 2017, p. 186.

2.2. THE ECHR

The best interests of the child are not expressly mentioned in the ECHR, which mentions the interests of the child (as opposed to other interests) only in Article 5.1.d, which recognises the possibility for the State to take necessary measures in the interests of children upon their lawful detention for educational supervision, and in Article 6, which declares that juveniles have a right to a fair hearing.

Although a specific provision is lacking, the promotion of children's rights has been granted in various cases because most rights listed in the ECHR are not reserved solely for adults, as well as through the application of the right to family life (Article 8 of the ECHR), which is widely used to recognise and preserve family ties. The case law of the Strasbourg court clarifies that the ECHR shall be applied consistently with the CRC and that the best interests of the child shall be thereby preserved (e.g. using Article 3, which prohibits inhuman and degrading treatment) and balanced with the interest of other family members.¹⁶

Another legal basis frequently used to protect children is Article 14, which prohibits 'discrimination on any ground such as ... birth or other status' and – as we will see – is usually applied concurrently with Article 8 to grant protection to children born out of wedlock.

None of these Articles are specifically targeted at protecting the rights of migrant children; however, they are intended to be respected and implemented in both domestic and cross-border situations. Yet, due to unaccompanied minors' general lack of access to the ECtHR, there is still no jurisprudence applying the Convention to asylum (i.e. *non-refoulement*) requests presented by children alone.¹⁷

2.3. THE EU AND THE CHARTER OF FUNDAMENTAL RIGHTS

The European Economic Community and later European Community Treaties had no specific provisions addressing children's rights, as children were merely indirect beneficiaries of social policy measures.¹⁸ However, human rights, including the right to family life, were already considered part of the general

¹⁶ J. M. SCOTT, 'Conflict between Human Rights and Best Interests of Children: Myth or Reality?' in E. E. SUTHERLAND and L. A. BARNES MACFARLANE (eds.), *Implementing Article 3*, above n. 9, p. 68.

¹⁷ For more remarks on this issue see C. SMYTH, 'The Jurisprudence of the European Court of Human Rights Relevant to Child Migrants' in J. BHABHA, J. KANICS and D. SENOVILLA HERNÁNDEZ (eds.), *Research Handbook on Child Migration*, Edward Elgar Publishing, Cheltenham 2018, p. 141.

¹⁸ See E. CARACCILO DI TORELLA and A. MASSELOT, *Reconciling Work and Family Life in EU Law and Policy*, Palgrave Macmillan, Basingstoke 2010.

principles of EU law thanks to the evolution of the case law of the CJEU. Eventually, the EU Charter included these rights in its provisions and, after the entry into force of the Treaty of Lisbon, they now have the same legal value as the Treaties.¹⁹

Although most of the provisions of the Charter can be applied equally to children as to any other individual, our primary focus will be Article 24. In accordance with the principles already enshrined in the CRC, Article 24 guarantees the rights of children: 1) to such protection and care as is necessary for their well-being;²⁰ 2) to be heard and for their opinion to be taken into consideration in accordance with age and maturity; 3) to have their best interests taken as a primary consideration in all actions; and 4) to maintain a personal relationship with both parents. This Article should also be applied concurrently with Article 21 of the Charter, which abjures any kind of discrimination based on birth circumstances (i.e. whether inside or outside wedlock) and on grounds of age. Furthermore, it should be applied with Article 7, which commands respect for private and family life. A specific reference to rights pertaining to children is also contained in Article 14 (the right to receive free compulsory education) and Article 32 (the prohibition of exploitative child labour). Moreover, Articles 3.3 and 3.5 of the Treaty on European Union now specifically address the topic by declaring that the EU shall promote the ‘protection of the rights of the child’, both in its internal dimensions and in its external relationships.

Recognition of the need to ensure child protection emerged clearly after 2006 with the EU Commission’s Communication titled *Towards an EU Strategy on the Rights of the Child*, which granted children their own rights extending beyond those deriving from their parents’ status (in particular from their parents’ choice to move within or to Europe).²¹

¹⁹ See H. STALFORD and M. SCHUURMAN, ‘Are We There Yet? The Impact of the Lisbon Treaty on the EU Children’s Rights Agenda’ [2011] *International Journal of Children’s Rights* 19, 381–403. For an overview, see S. IGLESIAS SÁNCHEZ, ‘The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights’ [2012] *Common Market Law Review* 49, 1565–1611; K. LENAERTS, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ [2012] *European Constitutional Law Review*, 375. More specifically, for the provisions of the EU Charter and family matters, see C. CAMPIGLIO, ‘L’applicazione della Carta dei diritti fondamentali dell’Unione europea in materia familiare’ [2015] *Diritti umani e diritto internazionale*, 279. On Article 24 of the EU Charter, see H. BOSSE-PLATIERE, ‘Le statut de l’enfant et l’eupéanisation des sources en droit de la famille’ in D. GADBIN and F. KERNALEGUEN (eds), *Le Statut Juridique de l’Enfant dans l’Espace Européen*, Bruylant Bruxelles 2004, pp. 82–88.

²⁰ In her opinion of 11.11.2004 in Case C-105/03, *Pupino*, ECLI:EU:C:2005:386 par. 57, Advocate General Kokott invoked Article 24 of the EU Charter for the first time. For a comment on the case, see J. R. SPENCER, ‘Child Witnesses and the European Union’, [2005] *The Cambridge Law Journal*, 569.

²¹ See also European Commission, DG Justice, EU Acquis and Policy Documents on the Rights of the Child, December 2015, pp.1–83.

As described by the European Agency on Fundamental Rights, we are currently facing a ‘gradual shift from the exclusively economic imperative family entitlement towards a rights-based approach.’²² However, Article 24 is legally binding only for EU Institutions and Member States when implementing and/or applying EU law. This means that while we clearly apply Article 24 in all situations in which we have a cross-border element (e.g. the free movement of EU citizens or migration law as long as the field is covered by EU law), there still could be situations inside the EU to which Article 24 could not be applied. Fortunately, with the influence of EU law on national legislation as well as the principle of non-discrimination delineated in most national Constitutions, any interpretative evolution that could emerge from the application of Article 24 will also influence internal rules even outside the competence of EU Law.

Article 24 does not provide specific rules for migrant children; however, it clearly sets general rules for any child. Its application to children in transnational situations derives from Directives 2004/38 and 2003/86, both of which contain an express reference to the Charter provisions in their recitals (a reference which is also paired in the 2003/86 Directive with a reference to Article 8 of the ECHR). As described below, the rights of children were extended due to the jurisprudence of the CJEU, specifically by its use of Article 24 and Article 8 of the Charter to grant children the possibility of living with their non-EU parents.

3. CHILDREN’S RIGHTS IN THE INTERPRETATIVE ACTIVITY OF THE CJEU

The CJEU has strongly influenced national legal frameworks by applying the relevant principles of human rights protection to children in cross-border situations, as analysed in the previous sections.

After decades of case law largely focusing on the general right to family reunification (stemming from Article 8 of the ECHR) as a parameter for evaluating compliance with human rights needs in the free movement of persons and migration law, the CJEU openly recognised the relevance of the CRC in 2006 in its judgment on the legality of the Family Reunification Directive (2003/86). Here, the CJEU affirmed the need to consider the CRC when evaluating whether EU measures comply with fundamental rights.²³

²² European Union Agency for Fundamental Rights, *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union*, Luxembourg, 2010.

²³ Case C-540/03, *Parliament v. Council*, ECLI:EU:C:2006:429. See H. STALFORD and E. DRWOOD, ‘Using the CRC to Inform EU law and Policy-making’ in A. INVERNIZZI, and J. WILLIAMS (eds.), above n. 1, p. 207.

The best interests of the child – now considered as ‘one of the principles permeating the EU legal order’²⁴ – was defined by the CJEU in the case *Dynamic Medien* as a ‘legitimate interest’ that ‘justifies a restriction on a fundamental freedom guaranteed by the EC Treaty’.²⁵ Thus, the CJEU recognised the ‘constitutional’ value of this principle in a case in which legitimacy of restrictions on the free movement of goods were at stake; in balancing different interests, the CJEU determined that the German prohibition on the selling of DVDs not labelled as child-appropriate under domestic law was justified and proportionate as a means to protect children’s rights.

The obligation to consider children’s best interests has been applied concurrently with the general right to private and family life in recent case law. In the case *Ruiz Zambrano*,²⁶ for example, the ability of the parents (who were third-country nationals) to benefit from EU Law was affirmed based on the citizenship status of their child, which thereby used the need to protect the child’s best interests to extend the EU rules on citizenship and freedom of movement and undermine national competence in the field of migration law. More recently, in case *CS* on the legitimacy of the expulsion of a single parent (third-country national) who was criminally convicted and therefore expelled even though she had a young dependent child,²⁷ the Court stressed the need to balance the public security requirements of the State with the need to protect the interests of the child. Rejecting any systematic and automatic link between criminal conviction and expulsion, the CJEU recalled the obligation for the national judge to particularly focus on the age of the child, his/her situation in the Member State concerned and the extent to which he/she is dependent on the parent, which was supported by making an express reference to the ECtHR case *Jeunesse* to suggest the parameters to be respected.²⁸ The ECtHR has frequently stressed the need to evaluate the best interests of the child in all migration cases and to give consideration of Article 8 of the ECHR as implemented in domestic law.²⁹

²⁴ See Advocate General Szpunar’s Opinion, delivered on 8.09.2016 in case C-133/15, *H. C. Chavez-Vilchez and Others*, ECLI:EU:C:2016:659, para. 42.

²⁵ Case C-244/06, *Dynamic Medien Vertriebs GmbH*, ECLI:EU:C:2008:85, paras. 41 and 42. The CJEU states that the ‘Member States’ right to take the measures necessary for reasons relating to the protection of young persons is recognised by a number of Community-law instruments, such as Directive 2000/31’. A specific reference was made by the CJEU to Article 17 of the CRC. For a comment, see H. STALFORD and E. DRYWOOD, ‘Using the CRC to Inform EU Law and Policy-making’ in A. INVERNIZZI and J. WILLIAMS (eds.), above n. 1, p. 213.

²⁶ See RODRIGUEZ and DEANA in this volume.

²⁷ Case C-304/14, *Secretary of State for the Home Department v. CS*, ECLI:EU:C:2016:674.

²⁸ ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 3.10.2014.

²⁹ J. M. POBJOY, *The Child in International Refugee Law*, Blackstone Chambers, London 2017, p. 209. Also see in national case law the UK Supreme Court case *ZH (Tanzania) v SSHD*, [2011] UKSC 4, in which Lord Kerr (para. 46) declared the need to accord a primacy but not a limitless importance to the best interests of a child.

A similar evolution and extensive interpretation of EU law can be found in case *MA and others* on asylum law.³⁰ The CJEU used Article 24 of the Charter to declare that the child's best interests must be a primary consideration in all decisions adopted by a Member State and therefore also when the State applies the second paragraph of Article 6 of Regulation No 343/2003. The State where the asylum application is lodged is consequently designated as responsible for the application even if the unaccompanied minor now present there had already presented a previous request in a different Member State. The particular situation of minors with no family members legally present in the territory of a Member State requires them to have prompt access to the procedures for determining refugee status and justifies the application of different rules from those applied to adults' asylum requests. However, the general principle of the Dublin Regulation requiring only one State to evaluate the application should always be respected.³¹

The need for a specific approach to children in cross-border situations could therefore lead Member States to adopt a more flexible approach in examining residence permits and asylum requests, thereby strengthening the level of protection of human rights in all cases involving children.

4. CHILDREN'S RIGHTS AND THE EVOLUTION OF DOMESTIC FAMILY LAW: SPECIFIC ISSUES

It is worth exploring in more depth a few particular situations in which children's rights have led to innovative changes in national family law to evaluate the influence of the international framework on the national legal orders.

4.1. CHILDREN BORN OUT OF WEDLOCK

The first example is related to the situation of children born out of wedlock and the need for them to not be discriminated against due to their parents not being married. The European States were largely not bound by the European Convention on the Legal Status of Children Born Out of Wedlock,³² and many

³⁰ Case C-648/11, *MA and Others*, ECLI:EU:C:2013:367, paras. 59–61.

³¹ Therefore, the possibility of presenting a new application in another State will be limited to cases in which the minor is present in that State and the first application has not been already rejected. Consequently, the second State shall inform the first one of the change in responsibility.

³² The European Convention on the Legal Status of Children born out of Wedlock, CETS No. 85, 15.10.1975, is in force for 23 States (however, many States did not sign and/or ratify it, including Belgium, France, Germany, Italy and Spain).

maintained for a long time discriminatory rules both on the acquisition of parental rights for the father and regarding inheritance rights.³³

The ECtHR deeply influenced the evolution of national legislation by declaring the incompatibility of such rules with human rights protection. At the same time, similar discriminatory situations also prohibited by Article 2 (1) of the CRC could hinder the free movement of persons in as much as the rights of a child towards parents and other family members might differ in different European countries due to their diverging national systems.

The *Marckx v. Belgium* decision confirmed that Article 8 applies both to 'illegitimate' and 'legitimate' family members; the protection of family life must be granted to relationships between parents and their children born both in and out of wedlock such that the child should be granted a relationship with other relatives (grandparents in particular) as well as full inheritance rights.³⁴ In *Keegan v. Ireland*, the Court had to consider the right of the natural father to be appointed as a guardian and informed and asked for consent in case his child born out of wedlock was placed for adoption.³⁵ Irish law infringed upon the father's right to family life, and therefore, Ireland was led to change its legal framework by introducing a simplified procedure for natural fathers to be appointed as guardians of their children.³⁶

The ECtHR pronounced again on the issue in three other cases related to the French and German legal systems. In *Mazurek v. France*, the Court determined that French legislation violated Articles 8 and 14 of the ECHR from the point of view of inheritance rights, as children born outside marriage were recognised as eligible for only half of the inheritance given to legitimate children.³⁷ In *Brauer v. Germany* in 2009, the still existing discrimination impacting children born out of wedlock before 1949 (a previous reform had already addressed the situation for children born after that date) was also deemed to violate Articles 8 and 14.³⁸

³³ For example, until 2002, a father in the UK could acquire parental rights only through marriage or a court order. It was only with the Children Act 2002 that fathers were allowed parental responsibility when registering the birth of the child, if formally agreed with the mother.

³⁴ *Marckx v. Belgium*, no. 6833/74 13.06.1979. For a comment on this and on the subsequent case law, see C. DRAGHICI, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Modern Studies in European Law Book 64), Hart Publishing, Oxford 2017.

³⁵ *Keegan v. Ireland*, no. 16969/90, 26.05.1994.

³⁶ The Children's Act 1997 allows unmarried parents to sign a statutory declaration granting guardianship also to the father. For a critical evaluation of the current framework see C. BEST, 'The Rights of Unmarried Fathers in Ireland' [2012] *Critical Social Thinking: Policy and Practice* 4, 35.

³⁷ The decision led to the amendment of French legislation with Law no. 1135, approved on 3.12.2001, which established equality between legitimate and natural children. However, a complete equating was introduced only later in 2009. See A. VALONGO, 'Children Born Out of Wedlock: The End of an Anachronistic Discrimination' [2015] *Italian Law Journal* 1, 83.

³⁸ ECtHR, *Brauer v. Germany*, No. 3545/04, 28.05.2009; *Anayo v. Germany*, No. 20578/07, 21.12.2010.

In the case of *Sahin*,³⁹ the Court took the view that the German approach to the position of fathers was a violation of Article 14, as the right to visit a child was dependent on a court ruling finding such contact to be in the child's interests and not only limited, such as for divorced fathers, if it was expressly against the child's interests.

Although the approach of the ECtHR was primarily focussed on general family life rather than the specific position of the child, the results were clearly favourable to his/her best interests. This influenced countries to introduce laws that fully equated marital with non-marital children, as Italy did with *Legge* (Act) no. 219/2012.⁴⁰

4.2. RIGHT OF THE CHILD TO MAINTAIN A RELATIONSHIP WITH OTHER FAMILY MEMBERS

Another relevant problem is the right of the child to maintain a constant relationship with both parents and, more generally, with other family members. Both the CJEU and the ECtHR have recently intervened on this issue, thus influencing national legal frameworks and their interpretation. The situation of parents is well known and generally protected; however, the new frontier seems to be the need to protect the interests of children in having a constant relationship with their grandparents.

The ECtHR applied Article 8 to the child-grandparent relationship for the first time in *Bronda v. Italy* and reaffirmed the principle in *Nistor v. Romania*, and *Manuello and Nevi v. Italy*.⁴¹ In the most recent case, Italy was condemned for a prolonged refusal to grant the right to visit grandparents; however, no reference was made to the best interests of the child in this case, as the evaluation was limited to the right to family life of the grandparents themselves. National judges have usually considered the former as a subordinate to the latter and have linked this right to the best interests of the (grand)children.⁴²

The CJEU addressed this issue in relationship with private international law when it interpreted Regulation 2201/2003 in a cross-border situation that was clearly influenced by the free movement of persons. The case of *Babanarakis* stemmed from the request of a Bulgarian grandmother who sought to be granted the right to visit a child who had been taken by the father to live in Greece.⁴³

³⁹ ECtHR, *Sahin v. Germany*, No. 30943/96, 08.07.2003.

⁴⁰ Completed with d. lgs. no 154/2013.

⁴¹ ECtHR, *Bronda v. Italy*, No. 22430/93, 09.06.1998; *Nistor v. Romania*, No. 14565/05, 02.11.2010; *Manuello and Nevi v. Italy*, 107/10, 20.01.2015.

⁴² For a comparison between EU and Italian case law, see E. BERGAMINI, 'La Corte di giustizia e il diritto di visita dei nonni: sentenza Valcheva c. Babanarakis' in *Eurojus.it*, July–September 2018.

⁴³ Case C-335/17, *Neli Valcheva v Georgios Babanarakis*, ECLI:EU:C:2018:359.

Although the focus of this case was not on the child's rights but rather on the grandmother's position (in terms of her relationship with the child), the declaration of the Advocate General was highly relevant to the former in its conclusions that the evolution of society is proceeding at a much faster pace than the process of legislative adaptation and that therefore, some 'grey areas' still exist for which the legislation does not provide an explicit response. In the absence of an existing legal framework, the level of protection to be recognised 'to a child's contact with other persons to whom the child has "family" ties based on law or on fact (such as the former spouse of one of the parents, the child's siblings, grandparents or the partner of a parent who is the holder of parental responsibility)' is one of the grey areas in which the judicial authorities at both the EU and at the national level should intervene to protect the child's best interests.⁴⁴

In fact, as stated by the Advocate General, the relationship between children and grandparents is an 'essential source of stability for children and an important factor in the intergenerational bond which undoubtedly contributes to building their personal identity'.⁴⁵

It will be up to the national legal systems to consider – whether in a general way or, as is more likely, with a case-by-case approach – if this multitude of external relationships contributing to the creation of the child's identity could be considered as essential for his or her best interests. Clearly, transnational situations will force national judges (and consequently national legislators) to face family situations that are distinct from those existing solely at the national level, which will ultimately lead to the integration of new models into the national context and the establishment of higher levels of protection for the interests of the children involved in such cases.

4.3. RIGHT OF THE CHILD TO BE HEARD

The third relevant issue is the right of the child to be consulted and to have access to justice.⁴⁶ Children should be permitted to express their opinions before a decision is made regarding their interests, and their views and wishes should

⁴⁴ Para. 31 of the conclusions.

⁴⁵ Para. 32.

⁴⁶ Article 12 of the New York Convention shall be read in conjunction with Article 14 of the International Covenant on Civil and Political Rights (ICCPR) on the general right for everybody to have access to the courts for the determination of his or her rights and obligations. On this idea, see G. LANSDOWN, 'Every Child's Right to be Heard. A Resource Guide on the Committee on the Rights of the Child General Comment no. 12', <https://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf>.

be considered even if they do not enjoy a right of self-determination. This means that they have a right for their opinions to be heard and to be acted upon.⁴⁷

The right of the child to be heard is enshrined in Article 12 of the CRC, Article 24.1 of the EU Charter and the European Convention on the Exercise of Children's Rights (the Strasbourg Convention of 1996). This principle has been given more specific protection than that found in its general framework in all cases involving a cross-border situation (migrating children as well as simple relocation cases in which one parent wants to take the child to live in a different country against the other parent's will) on the premise that children in such a situation are at greater risk of not having their opinions heard and duly considered.

The EU legal framework attempted to implement the principle in Directives 2003/9 and 2004/83 regarding asylum seekers and refugees, respectively, which establish the need to grant appropriate assistance and legal representation to children. However, the failure to consult the child has never been found to be in breach of the ECHR in the Strasbourg case law, and national legislations have yet to reach a full compliance with this principle, particularly in cross-border situations.⁴⁸ For instance, in the UK, a draft order intended to limit access to legal aid to persons (children included) who were lawfully resident in the UK (or had been for at least 12 continuous months) was deemed not to respect children's right to be heard.⁴⁹

Italy introduced legal changes only in 2006 to comply with this principle;⁵⁰ however, even earlier, the Italian Constitutional Court found that the international conventions on the need to hear the child had to be applied to make up for the shortcomings in the country's national legal framework.⁵¹ The Court sought to extend the principle by ruling that the child must be heard as part of relevant proceedings, and as such, the child may also be subjected

⁴⁷ On this view, see G. VAN BUREN, *The International Law on the Rights of the Child*, The Hague/Boston/London, Martinus Nijhoff Publishers 1998, p. 138. More generally on this principle see A. PARKES, *Children and International Human Rights Law/The Right of the Child to be Heard*, Taylor & Francis Ltd, London 2013.

⁴⁸ U. KILKELLY, *The Child and the European Convention on Human Rights*, Routledge, New York 2016, p. 118.

⁴⁹ For this opinion, see the Equality and Human Rights Commission, Updated submission to the UN Committee on the Rights of the Child in advance of the public examination of the UK's implementation of the Convention on the Rights of the Child, April 2016, <<https://www.equalityhumanrights.com/en/file/18726/download?token=mXNH6S2D>>. The Supreme Court allowed the appeal (not discussing the discrimination issue) in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39.

⁵⁰ Article 1 of Law No. 54 of 8.2.2006, which came into force on 16.03.2006.

⁵¹ See the decision of the Italian Constitutional Court 30.01.2002 no. 1. The same principle was expressed again in 2009 (Constitutional Court 12 June 2009 no. 179). For a comment, see also J. LONG, 'L'impatto della Convenzione delle Nazioni Unite sui diritti del minore sull'ordinamento giuridico italiano' [2008] *Famiglia* 4, 24–43.

to cross-examination. The more recent domestic case law therefore focuses on the need to combine the application of Italian law and international law such as Article 12 of the CRC, Article 6 of the Strasbourg Convention of 1996 and Article 24 of the EU Charter.⁵²

Clearly, most national legal systems still lack a coherent and full application of this principle, as can be seen in the Reports of the CRC Committee;⁵³ therefore, it will be relevant to check whether the future evolution of laws linked to cross-border situations could lead to a higher level of protection.

4.4. PROHIBITION OF INHUMAN TREATMENT AND MIGRATING CHILDREN

Another situation in which a new approach to children rights protection is emerging is linked to the *non-refoulement* principle.

In a recent case, the Committee on the Rights of the Child attempted to link the positive recognition of asylum demands and the national principles regulating it with the need to protect the best interests of the child in a more extensive manner.⁵⁴ The individual case was started by a Somali mother on behalf of her child born in Denmark. The mother and daughter had been subject to a deportation order; however, the mother claimed that such a deportation would have endangered her daughter, who would be subjected to female genital mutilation if returned to Somalia.⁵⁵ As established in the Committee's General

⁵² Supreme Court of Cassation, judgment rendered on 15.05.2013 (Case 11687/13).

⁵³ All States have to submit a first report to the Committee on how the CRC is being implemented after two years as well as periodic reports (every five years). The Committee responds to such reports with 'concluding observations' in which concerns and recommendations to the State party are addressed. In the Observations regarding France (2016), for instance, the Committee stressed 'the little progress made to systematically ensure and implement respect for the views of the child in all relevant contexts of life'. In the Observations regarding Spain (2018), the situation was considered critical, as the Committee 'reiterates its previous concluding observations (see CRC/C/ESP/CO/3-4, para. 30) and recommends that the State party increase its efforts to promote due respect for the children's view'.

⁵⁴ State parties to the Protocol on a communication procedure (which came into force in April 2014) allow individuals to submit complaints regarding specific violations of the CRC and its first two optional protocols.

⁵⁵ Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 3/2016*, 25.1.2018, CRC/C/77/D/3/2016. As clearly stated in General Comment No. 18, female genital mutilation can have various immediate and/or long-term health consequences, and therefore, immigration and asylum policies at the national level should consider such risk as a ground for granting asylum and also protect the accompanying relative. Therefore, States assessing refugee claims shall 'take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention' (for this wording, also see General Comment No. 6 para. 74).

Comments No. 13 and No. 18, States shall not only prohibit but also prevent and respond to all forms of physical violence against children. This means that national immigration and asylum policies must consider harmful practices, such as female genital mutilation, as grounds for granting asylum.

The mother asked for the *non-refoulement* principle to be applied, thus giving extraterritorial effect to the Convention to protect the best interests of the child. As a single mother, she claimed she would not be able to avoid genital mutilation for her daughter even though Somali law currently prohibits it,⁵⁶ as the law is not enforced in practice.

Similar cases are frequently subject to national and supranational judgments;⁵⁷ however, the outcome of this specific one was striking. The Committee decided to apply a precautionary principle and strongly protect the child by declaring that ‘the State party failed to consider the best interests of the child when assessing the *alleged* risk of the author’s daughter to be subjected to female genital mutilation ... and to take proper safeguards to ensure the child’s wellbeing upon return in violation of Articles 3 and 19 of the Convention.’⁵⁸

This interpretation of the CRC – considering the best interests of the child as decisive, since they are per se a reason for *non-refoulement*, rather than requiring the obstacle/exceptional circumstances test (as in *Jeunesse*) – could therefore be a relevant instrument for national authorities to enhance best interests assessments, as it reminds them to balance different needs without requiring full proof of the risk of violation (which is frequently impossible to obtain).⁵⁹

Although it is well known that the CRC has been strongly criticised for being more focused on the parent-children relationship and not sufficiently concerned with the problems of migrant children,⁶⁰ this new interpretative deal could lead

⁵⁶ Reference is made to the thematic paper used by Danish authorities to underpin the refusal for asylum: Southcentral Somalia: Female Genital Mutilation/Cutting, Country of Origin Information for Use in the Asylum Determination Process, January 2016, <[https://www.nyidanmark.dk/NR/rdonlyres/D011EB99-7FB6-4693-921A-8F912F4079CB/0/female genital mutilationnotat2016.pdf](https://www.nyidanmark.dk/NR/rdonlyres/D011EB99-7FB6-4693-921A-8F912F4079CB/0/female%20genital%20mutilationnotat2016.pdf)>.

⁵⁷ Although it is not in dispute that subjecting a child or adult to female genital mutilation amounts to treatment proscribed by Article 3 of the ECHR, in this context, see ECtHR, *Collins and Akaziebie v. Sweden*, no. 23944/05, 08.03.2007; *Izevbekhai and others v. Ireland*, no. 43408/08, 17.05.2011. The ECtHR usually bases its decisions on similar cases focussing on the necessity for the asylum request to be accepted in order to prove a real risk of being subjected to FGM upon the child return to the country of origin. See recently *R. B. A. B. and others v. The Netherlands*, no. 7211/06, 07.06. 2016.

⁵⁸ Emphasis added.

⁵⁹ See General Comment No. 14 (2013) para. 46; N. CANTWELL, ‘Are Children’s Rights Still Human?’, above n. 1, p. 50. U. KILKELLY, above n. 9, pp. 51–66.

⁶⁰ At the crossroads of power relations: B. GORNIK, ‘The Convention of the Rights of the Child and Unaccompanied Minor Migrants’ in M. SEDMAK, B. SAUER, B. GORNIK and D. SENOVILLA HERNÁNDEZ (eds.), *Unaccompanied Children*, above n. 14, p. 18.

to a new approach in the Convention's application at the national level. However, the ECtHR follows a different approach, as exemplified in *Josef v. Belgium*.⁶¹ In this case, three children were sent back to Nigeria with their HIV positive mother and the Court considered Article 8 of the ECHR to have been respected despite the risk of leaving the children alone in a State where they had no family links in case the mother died.⁶²

5. FINAL REMARKS

As we have seen, notwithstanding the international framework legally binding all European States, the protection extended to the rights of the child is not uniform at the national level. The free movement of persons and the protection of migrants have become key elements to assure better protection of human rights, particularly children's rights, by heightening the level of protection that would otherwise be granted by national legislators. These fields include the right of the child to maintain a relationship with his/her family members and the right not to be subject to inhuman or degrading treatment.

In fact any attempt to discriminate against children whose parental link is created in non-traditional circumstances (meaning not only outside wedlock but also through medically assisted reproduction methods, surrogacy agreements or adoption) and to prohibit their relationship with family members violates the fundamental rights of the child and hinders the free movement of persons outside the State in which the family link was created.⁶³ The new trend to protect similar situations in cross-border cases will consequently also influence the evolution of national legal systems in domestic situations.

The same protection extends to the prohibition of inhuman or degrading treatment. However, we need to distinguish between: 1) *non-refoulement* cases in which the fundamental rights of migrant children could be subject to a higher level of protection due to the new approach of a supranational authority such as the Committee on the Right of the Child, in the hope that that this new approach will influence national legislators even if the ECtHR still remains anchored to its

⁶¹ ECtHR, *Josef v. Belgium*, 70055/10, 27.02.2014.

⁶² C. SMYTH, 'The Jurisprudence of the European Court of Human Rights Relevant to Child Migrants' in J. BHABHA, J. KANICS and D. SENOVILLA HERNÁNDEZ (eds.), *Research Handbook on Child Migration*, Edward Elgar Publishing, Cheltenham 2018, p. 151.

⁶³ The free movement of persons and protection of migrants have become the key elements to assure a better protection of human rights, particularly children rights, by heightening the levels of protection that would otherwise be granted by national legislators.

previous restrictive interpretation; and 2) detention cases in which the ECtHR approach already grants extensive interpretative scope to protect migrating children's rights in host countries.⁶⁴

Although children's rights more closely linked to cross-border situations appear to be headed for a higher level of protection based on the international framework, more general rights that are not strictly linked to free movement, such as the right of the child to be heard, still need to be fully implemented. Even if the impact on children is perhaps less directly relevant in such cases, international instruments make it compulsory for European States to respect them. Therefore, it is highly desirable that national legal systems focus on respecting these rights in both domestic and international situations in the future.

⁶⁴ See *S. F. and Others v. Bulgaria*, no. 8138/16, 07.12.2017, in which the Court held that there had been a violation of Article 3 despite the fact that the period of detention was for just a couple of days due to the awful conditions in which the children were kept (i.e. delayed access to food and drink and even to the toddler's baby bottle and milk, limited access to toilet facilities).