

The Protection of Children's Rights under the ECHR

**Sixth Annual Regional Rule of Law Forum for South East Europe,
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I am very honoured to have been invited to give the keynote address at this forum. It is also a great pleasure for me to be here in Croatia, a country with which I have a slight connection through a former pupil of mine, from Croatia, who is now a Professor of Law at the University of Zagreb and has brought his students to visit our court in London. I am very pleased to see in the audience a number of judges whom I know from the European Court of Human Rights, and others whom I met a few years ago in Sarajevo at the 50th anniversary of the Constitutional Court of Bosnia-Herzegovina.

Delivering an opening address at a conference involving so many distinguished judges and experts is somewhat intimidating. The challenge is to think of a big idea, a uniting theme; to say something encouraging and thought-provoking.

I would like to begin with three observations which will be familiar to you all. First, for most human beings, nothing matters more than their children. They care deeply about their children's health and safety, and about their education and upbringing. When families split up, the parents often fight bitterly over the custody of their children and over other aspects of their children's lives. And these are not only matters of concern to the parents and other family members. The future of all our societies depends on the children who grow up there. So these are also matters of public importance.

Secondly, many adults who do not have children are very anxious to do so. This can also affect the interests of children, and partly, at least, for that reason, the state regulates such matters as the law of adoption, surrogacy arrangements and access to sperm banks.

Thirdly, any humane adult who witnesses the suffering of children feels compassion. The emotions aroused by children's suffering can set powerful forces in motion. We need only think of the impact of the famous photograph of the terrified little girl in Vietnam, running naked down a road after a napalm attack on her village, or of the political consequences of TV footage of children starving in refugee camps. But we are also capable of shrugging off the suffering of children. Events throughout Europe during the past century have demonstrated how political ideologies can lead people to forget their common humanity. And we cannot be complacent today. It is all too easy to turn a blind eye to child poverty, or to the plight of refugee families.

So children are at the heart of much of our public debate. How should they be brought up? When should the state intervene in their care and upbringing? How should they be educated? To what extent should that be controlled by the state? How should they be dealt with when they behave badly, perhaps committing serious crimes? How should adults behave in relation to them? How much weight should be attached to their best interests when we are deciding how to deal with their parents, for example if their parents are people whom the state has good reasons to exclude or expel from the country, or to send to prison? Should the interests of children be taken into account in other areas of public policy, for example when deciding on taxation or social security policies which may exacerbate child poverty?

These sorts of questions are constantly debated in the public life of our societies and considered by our legislators, and different societies answer them in different ways. They are reflected in our private law relating to children and families, our public law relating to children at risk and in care, the law relating to children who commit offences, the law relating to immigration and asylum, child trafficking and child labour, and in many other areas. Whether as judges we sit in civil courts, criminal courts, administrative courts or constitutional courts, we all have to deal with questions concerning the treatment of children.

In addressing questions of this kind, we all draw on values deeply embedded in our societies: values which are based on a shared European cultural tradition. I have in mind especially the idea that, as human beings, we should be treated by other human beings as possessing an inherent dignity; and the idea that we share a common humanity, from which rights and obligations flow,

including rights held by children, and obligations owed towards them. There is nothing new about this thought. I was reading recently a judgment of an English court delivered in 1803, at the height of the Napoleonic Wars, in which the court had to deal with what we might think of as a very modern question: whether the state had an obligation to provide financial support to an immigrant family – a woman and her four children, who had been abandoned by her German husband and were living in destitution. The English social security system of the time was confined to English residents of the local parish, and its administrators had declined to support the woman and her children. The Lord Chief Justice said this:

“As to there being no obligation for maintaining poor foreigners ... the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.”¹

The law of humanity now finds expression in what we call human rights. Our countries have given them expression, and guaranteed to respect them, in entering into the European Convention on Human Rights (the ECHR), and have established a court, the European Court of Human Rights, to give authoritative guidance on their interpretation and application. But, ultimately, it is only through the national courts that the Convention rights can be made real and effective. That is so not only for practical reasons, but also for a more fundamental reason. Although we share the fundamental values reflected in the Convention, the way in which they have developed in detail, and continue to develop, varies from one country to another, reflecting differences in history and social development. So all of us, whether we work in Strasbourg or in a national court, are charged with the responsibility of ensuring respect for human rights; but it is primarily the national judges who are best placed to make the necessary judgments. In order to fulfil that role we need to understand a large and developing body of jurisprudence, and then to apply it in the particular circumstances of our own society.

This is not the moment to consider that body of jurisprudence in detail. But I would like to make some general remarks about it. First, there is a great deal more of it now than there used to be, and that is one of a number of factors that have affected the relationship between national

¹ *R. v. Inhabitants of Eastbourne* (1803) 4 East 103.

judges and European judges. I can illustrate that from my own experience. The first time I went to Strasbourg for a case about children was when I was instructed on behalf of the British Government in a case 25 years ago, in 1994. The case was called *McMichael v United Kingdom*.² It concerned child care proceedings relating to a child whose parents lived together but were not married. The father had no parental rights under national law, because they were not given automatically to fathers who were not married to their child's mother, but had to be applied for in proceedings which the mother might oppose. And because he did not have parental rights, he had not been allowed to take part in the care proceedings. There was very little relevant Convention case law at that time, and so the case raised a number of novel questions.

The court decided that to deny a natural father automatic parental rights if he was not married to the child's mother was not unlawful discrimination contrary to article 14. The national legislation recognised that the relationship between unmarried fathers and their children varied greatly, and its aim was to protect the interests of the child and the mother by providing a mechanism for ensuring that only fathers who had a genuine relationship with their children were accorded parental rights. In the court's view, that was a legitimate aim, and the conditions imposed were proportionate, so that there was a reasonable justification for the difference of treatment.

Nevertheless, the court held that the refusal to let the father take part in the care proceedings had been a breach of his right under article 8 of the Convention to respect for his family life. That was because, whether or not he had parental rights under national law, he in fact enjoyed a family life with the mother and the child, since they lived together as a family. That was an important decision on the procedural aspect of article 8.

The next time I went to Strasbourg for a case about children was five years later, in 1999, and this time I was sitting on the Grand Chamber as an ad hoc judge. The case, *T and V v United Kingdom*,³ arose from the abduction and murder of a two-year old boy at the hands of two 10-year-old boys. Unsurprisingly, the case shocked the nation. In England, the criminal age of responsibility was (and still is) 10. So the two boys were tried for murder and convicted, and received an indeterminate sentence. Their complaint to the European court centred on the way

² (1995) 20 EHRR 205.

³ (1999) 30 EHRR 121.

the trial was conducted, in an adult court, and on the sentence imposed on them upon conviction. Again, these were novel issues for the court. In the end, the court rejected the complaint that the trial and sentences amounted to inhuman and degrading treatment contrary to article 3 of the Convention, but upheld the complaints of breaches of article 6, the right to a fair trial, and article 5(4), relating to the lawfulness of detention. This resulted in a reform of the procedures for dealing with child offenders in England and Wales.

One thing that both these cases illustrate is how society's attitudes are constantly evolving. It is not clear to me that the European court would decide them in the same way today. The new century has seen the proliferation of new family arrangements, and any distinction between married and unmarried fathers might I think be more difficult to justify. The age of criminal responsibility being set at 10 was already considered very low in the 1990s: whether it is acceptable today seems to me to be even more questionable. Understanding of the developmental psychology of children has also evolved further since then, and will be reflected in expectations as to how children are treated if detained in custody.

Although the court's application of the Convention evolves over time in the light of developments in society, nevertheless the fact that there is now far more case law than there used to be means that it is much easier for national judges to find guidance in the decided cases. The importance of their taking on that responsibility has also become clearer, as the principle of subsidiarity has gained greater prominence in the Convention system. The European court has repeatedly shown a willingness to defer to national courts' assessments of their state's compliance with the Convention, provided the national judge has identified the relevant Convention principles and has made a conscientious effort to apply them to the facts. As the European court has made clear in a number of its judgments,⁴ the higher the quality of the consideration of Convention issues at the national level, the more likely it is to defer to the views of the national authorities. Provided the national courts perform their task, the requirement under the Convention that applicants must exhaust domestic remedies before applying to Strasbourg should ensure that national courts remain the primary location for the interpretation and application of the Convention. The result is a system which fosters a culture of rights

⁴ For example, *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21; *Satakunnan v Finland* (2018) 66 EHRR 8, paras 192-196; and *Garib v Netherlands* (2018) 66 EHRR 29, para 138.

protection at the national level, subject to the safeguard provided by access to the supervisory jurisdiction of the European court.

In a recent article, Judge Robert Spano, one of the Section Presidents of the European court, expressed a similar view, stating that it is the national forum which is the primary arena for resolving Convention disputes, not Strasbourg.⁵ He argues persuasively that the court has developed over time, moving from the formulation of key principles and doctrines of Convention law, as for example in the cases I mentioned earlier, to a more recent shift which places the onus more emphatically on national authorities.

So what I would like to emphasise as a keynote for this forum is something which applies to the protection of children's rights but also more widely: the cooperative nature of the Convention, with the principle of subsidiarity at its heart, and responsibility lying on national courts to resolve Convention questions. The forum exemplifies that cooperative nature. It brings together national judges from all over south-east Europe and further afield, and also present and former judges of the European court, as well as experts. It presents us all with an opportunity to learn together, and to learn from each other. In my experience of the Strasbourg court, one can learn much during tea breaks as during the formal proceedings. I hope that we will all benefit from our discussions, formal and informal, over the next two days, and will be inspired to see ourselves as defenders of the human rights of children, wherever our court may be located.

⁵ "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law" [2018] HRLR 473.