Routledge International Handbook of Children’s Rights Studies

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Children’s rights from a legal perspective

Publication details
Wouter Vandenhole
Published online on: 27 Mar 2015

How to cite :- Wouter Vandenhole. 27 Mar 2015, Children’s rights from a legal perspective from: Routledge International Handbook of Children’s Rights Studies Routledge
Accessed on: 24 Aug 2023

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Part I

Disciplinary perspectives
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Children’s rights from a legal perspective

Children’s rights law

Wouter Vandenhole

It may be fair to say that the legal discipline has appropriated a substantial part of children’s rights scholarship. Legal literature is mostly thematic, i.e. addressing a certain issue or right, although some general works exist (see in particular Van Bueren, 1998; Detrick, 1992; Hodgkin and Newell, 2007). Legal scholarship ranges from (sub-)national (Williams, 2013) to regional (Van Bueren, 2007; Kilkelly, 1999) and global publications (Apodaca, 2010; Druml, 2012).

Some terminological clarification is needed from the start, as there is substantial confusion about children’s rights in the language used on the subject, in particular by non-lawyers. Children’s rights law differs from child law and children’s rights. Child law is arguably the broadest legal category, encompassing all law concerning children and childhood: this may be domestic law on e.g. adoption, education or affiliation, or international law on e.g. parental abduction. Children’s rights law is a narrower legal category that refers to the fundamental rights of children, i.e. the human rights of children (Morrow and Pells, 2012, p. 909). Children’s rights law is about the fundamental rights of children that have been legally recognized in national constitutions and/or in international law (and in particular in treaty law). A legal instrument belonging to the latter category is e.g. the UN Convention on the Rights of the Child (CRC). Children’s rights refers also to the fundamental or human rights of children, but is not (necessarily) a legal category. It may be argued, for example, that there is a children’s right to work, based on notions of self-determination or human dignity, but such a right has not been legally recognized so far. To add to the confusion, “children’s rights” tends to be used as a shorthand for children’s rights law too. This chapter deals with children’s rights law, i.e. the legal codification of human rights of children, and will draw on international law at the global and regional level in particular, to the exclusion of national (constitutional) law.

A considerable part of the legal literature deals with the so-called implementation gap (see introduction). Lawyers (and others) tend to see outstanding children’s rights issues mainly as a problem of lack of implementation of the existing legal standards. They thereby seem to assume that relevant standards exist for each children’s rights issue, that the meaning of these standards is clear, and that these standards are able to satisfactorily address the issue at stake. The standards themselves are therefore seldom called into question. Whereas in litigation it may be important at times not to re-open the discussion on the (beneficial) meaning of legal guarantees in a specific case, but to have them “simply” applied and implemented, legal scholarship should
engage not only with questions of implementation, but also with legally defining and re-defining the meaning of children’s rights. There is an emerging school of interdisciplinary thinking that takes up the challenge of critical reflection on children’s rights in their legal codification (Hanson and Nieuwenhuys, 2013; Liebel et al., 2012), but that approach is far from being mainstreamed.

The objective of this chapter is threefold. First of all, it seeks to familiarize readers with the international legal frameworks on children’s rights. Second, legal reasoning on children’s rights will be introduced, in particular by clarifying the general obligations incumbent on States, the general principles guiding the interpretation of children’s rights law, as well as by introducing some of the case-law. Third, the chapter wants to offer some building blocks for a critical assessment of the legal approach to children’s rights, highlighting some of its strengths and weaknesses.

In what follows, key legal instruments, monitoring bodies and procedures at the global and regional level will first be introduced. Second, general obligations and general principles as key parameters for children’s rights law will be fleshed out, followed by the exploration of case-law on three topics: juvenile justice, family matters and education. Before concluding, some moot points of social change through children’s rights law will be discussed. At the very end, some questions for reflection and discussion are flagged.

1. Legal frameworks at global and regional level

International law has three sources of binding law: treaties, custom, and general principles. In the field of human rights law (including children’s rights law), the most important source is treaty law. Treaty law is only binding on the parties, usually States, that have ratified or acceded to the treaty.

At the global level, there are meanwhile nine core UN human rights treaties, which are all of relevance to children – for children are human beings that are equally entitled to all human rights as adults are. Among these UN human rights treaties, the Convention on the Rights of the Child (CRC, 1989) is without doubt the landmark legal instrument on the human rights of children. The CRC currently counts 195 States parties, and is the most widely ratified human rights treaty. In 2000, two substantive optional protocols were adopted, one on the Involvement of Children in Armed Conflict (hereafter OPAC) and one on the Sale of Children, Child Prostitution and Child Pornography (hereafter OPSC). More recently, in 2011, a third optional protocol was adopted on a communications procedure (hereafter OPIC). The latter entered into force on 14 April 2014.

The CRC consists of three parts. Part I offers a definition of the child, contains general principles and obligations and a detailed list of specific rights and obligations. The CRC is very comprehensive in scope, and covers civil, political, economic, social and cultural rights. A popular categorization among children’s rights proponents and CRC commentators is the three Ps: rights to protection, provision and participation (for a critical assessment, see Quennerstedt, 2010). Part II deals with the CRC’s monitoring body, the Committee on the Rights of the Child. Part III holds some final provisions on ratification, amendments, reservations, denunciation, etc.

The Committee on the Rights of the Child, composed of 18 experts elected by the States Parties, meets three times a year. It monitors State compliance with the CRC and its protocols.

1 Available at www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (last accessed 8 July 2013).
through the reporting procedure. Initial reports are to be submitted two years after the coming into effect of the CRC for the State. Periodic reports are to be submitted every five years (Art. 44 CRC). States that are equally parties to the CRC and the (substantive) optional protocols are to submit a separate initial report under the substantive optional protocols, but can thereafter include information on the implementation of the protocols in their periodic reports on the implementation of the CRC (Art. 8 OPAC and Art. 12 OPSC). With the entry into force of OPIC, the Committee is also able to receive individual complaints and inter-state complaints, and to engage in an inquiry procedure for grave or systematic violations (provided that the State concerned has opted in for the inter-state complaints, and not opted out of the inquiry procedure).

Since the Committee started its practice of issuing general comments in 2001, it has adopted 17 general comments, on issues as diverse as (in order of adoption) the aims of education; the role of independent national human rights institutions; HIV/AIDS; adolescent health and development; general measures of implementation; the treatment of unaccompanied and separated children outside their country of origin; early childhood; corporal punishment and other cruel or degrading forms of punishment; disability; juvenile justice; indigenous children; the right to be heard; violence; the best interests of the child; the right to health; the business sector; and the right to leisure and play. General comments are meant to promote further implementation of the Convention and its Protocols, and to assist States parties in fulfilling their reporting obligations (Rule 73 Rules of Procedure) by offering a deeper understanding of the content and implications of the Convention. Strictly speaking, they have not the same legal force as the CRC or its Optional Protocols. They are authoritative interpretations of the treaties’ monitoring body.

It is important to recall that other UN core human rights treaties too contain child-relevant and child-specific provisions. Child-relevant, for a child is a human being, and a human right recognized to belong to “every person” therefore also belongs to every child. For example, provisions on the right to education will be of particular relevance for children too (see Art. 12 International Covenant on Economic, Social and Cultural Rights (ICESCR); Art. 24 Convention on the Rights of Persons with Disabilities (CRPD); Art. 30 and 45 Convention on the Protection of the Human Rights of All Migrant Workers and Members of their Families (CMW)). Child-specific, for children are explicitly accorded some rights under these treaties: e.g., Art. 10 (3) ICESCR provides for special measures of protection and assistance for all children and young persons; Art. 6 (5) International Covenant on Civil and Political Rights (ICCPR) does not allow for the imposition of the death penalty on minors; Art. 14 (1) and (4) ICCPR pays particular attention to “juvenile persons” in the context of fair trial guarantees, and Art. 24 ICCPR ensures the right to protection, name and nationality to every child (similarly, Art. 29 CMW guarantees the right to a name, to birth registration and a nationality). Art. 7 CRPD is dedicated to children with disabilities, and Art. 25 International Convention for the Protection of All Persons from Enforced Disappearance (ICED) deals with children who have been affected directly or indirectly by enforced disappearance.

At the regional level, three continents have developed their own human rights framework and machinery. Within the Organization of American States, there is no children’s rights specific instrument, but the American Convention on Human Rights (1969) contains an
explicit provision on children (Art. 19 on the right to protection), and also guarantees the rights of the family (Art. 17) and the right to a name (Art. 18) and nationality (Art. 20). The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) similarly contains rights that are highly relevant to children (e.g. Art. 13 on the right to education; Art. 15 on the formation and protection of families), as well as a child-specific provision (Art. 16 deals with protection, non-separation from the mother and education). Both the Inter-American Commission and the Inter-American Court monitor the treaty, also under an individual complaints mechanism.\(^3\) The African Union has its African Charter on the Rights and Welfare of the Child (1990), which is monitored by the African Committee of Experts on the Rights and Welfare of the Child. The latter has become active in recent times, and has dealt with a couple of complaints.\(^4\) In addition, the African Charter on Human and Peoples’ Rights, in its Art. 18, ensures the protection of children’s rights “as stipulated in international declarations and conventions”.

Within the Council of Europe, the general human rights treaty on civil and political rights, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), does not explicitly reference children’s rights, but its monitoring body, the European Court of Human Rights, has developed an impressive body of case-law on the topic.\(^5\) We will highlight some of these cases in the sections that follow. The Revised European Social Charter (RESC, 1996) contains two explicit provisions on children’s rights, Art. 7(10) on the right to protection (particularly in the context of work) and Art. 17 on the right to social, legal and economic protection. The latter was inspired by the CRC. Other relevant Council of Europe treaties include the European Convention on the Exercise of Children’s Rights (1996), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) and the European Convention on the Adoption of Children (Revised) (2008). Mention should also be made of the European Union Charter of Fundamental Rights of 2007, which contains a general children’s rights provision (Art. 24) in addition to one that prohibits child labour and offers protection at work (Art. 32). This Charter is now binding on the EU and its member states, and the Court of Justice of the European Union increasingly relies on the Charter in its case-law.

The fact that treaties are internationally binding on States that have ratified them does not automatically mean that they can be invoked in the domestic legal orders. In dualist systems, the treaty needs to be incorporated into domestic law. In monist systems, the treaty is directly applicable in the domestic legal order (no incorporation is needed), but that does not mean that it can also be directly invoked by individuals in legal proceedings. Often, additional requirements must be fulfilled in order to grant treaty provisions direct effect, e.g. that the provision has a clear and unequivocal meaning. In addition, the findings of monitoring bodies, with the exception of those of courts, are not legally binding.\(^6\) All this means that, notwithstanding the existence of a mainly impressive legal framework and monitoring system, the human rights of children as laid down in international (treaty) law often lack strong legal implementation and proper realization in domestic legal orders.

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\(^4\) Available at http://caselaw.ihrda.org/acerwc/ (last accessed 5 March 2014).

\(^5\) That case-law can be found in a separate database, Theseus, available at www.coe.int/t/dg3/children/WCD/simpleSearch_en.asp (last accessed 5 March 2014).

\(^6\) For a dismissal of the binding–non-binding dichotomy, see Schabas (2011).
2. General obligations and principles

In what follows, we will mainly focus on the CRC in order to clarify the general obligations incumbent on States parties, as well as to highlight the general principles informing children’s rights law. Much of this is by and large applicable to other treaty regimes too.

The general obligation incumbent on States, as defined in Art. 4 CRC, is to take “all appropriate” measures, legislative, administrative and other (Rishmawi, 2006). In addition, Art. 42 and 44.6 CRC impose obligations of children’s rights education for children and adults, and of wide dissemination of the state report. What these appropriate measures may mean in practice has been spelt out in the CRC Committee’s General Comment No. 5. The second paragraph of art. 4 CRC makes clear that the general obligation is not the same for all rights. This differentiated general obligation means in practice that States have much more leeway in the implementation of economic, social and cultural rights. For the latter, the State is required to take all appropriate measures to “the maximum extent of their available resources” only (Alston, 1994, p. 7; Cantwell, 1992, p. 27). In the CRC Committee’s view, “[t]he second sentence of article 4 reflects a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of ‘progressive realization’ of such rights.” (CRC, 2003, p. para. 7).

So, whereas the CRC is very comprehensive in scope, and covers civil, political, economic, social and cultural rights, it is relatively weak in the protection of economic, social and cultural rights. The practical consequences of this differentiation should not be overstated though. Interpretative work of monitoring bodies, and in particular of the Committee on Economic, Social and Cultural Rights, as well as scholarly analysis have meanwhile clarified the meaning of progressive realization. First of all, the obligation of progressive realization does not mean that a State can endlessly postpone realization: it is under an obligation to take immediate steps towards full realization. Moreover, there is a strong presumption that retrogressive measures are not permitted. Finally, minimum core obligations need to be realized immediately (Committee on Economic, 1990; Vandenhole, 2003). Interestingly, the available resources not only include domestic resources, but also those that are available through international cooperation.

Whether there is a legal obligation to cooperate for development is highly contested though (Vandenhole, 2009a).

Whereas the CRC itself does not make reference to general principles, the CRC Committee has identified in its Reporting Guidelines four over-arching general principles,7 which are reflected in CRC provisions: the right to equality and non-discrimination (Art. 2 CRC); the best interests of the child (Art. 3 CRC); the right to life, survival and development (Art. 6 CRC); and respect for the views of the child, sometimes also referred to as the right to participation (Art. 12 CRC). The best interests principle in particular is believed to have a scope of application beyond the CRC, but all or some of these general principles have meanwhile been introduced in children’s rights provisions in other treaties. However, some scholars have questioned the conceptual underpinning for these general principles, and challenged their vagueness and versatile meaning (Tobin, 2011).

Compared to non-discrimination clauses in other (older) human rights treaties, the CRC’s non-discrimination provision is broader in that it also offers protection against discrimination on the basis of status, activities, expressed opinions, or beliefs of a child’s parents, legal guardians or family members. Moreover, it explicitly lists the parent’s or legal guardian’s race, and the

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7 Available at file:///H:/G9118171.pdf (last accessed 5 March 2014).
children’s ethnic origin and disability as prohibited grounds (CRC, 2006). In line with general human rights law, the prohibition of discrimination in the field of economic, social and cultural rights can be argued not to be limited by article 4 CRC, and to be of immediate effect.8

The best interests of the child was introduced to international law as a new interpretation principle by the CRC (Freeman, 2007, p. 1). Its meaning and application remain challenging, notwithstanding attempts to clarify them, most recently by the CRC Committee itself (CRC, 2013). The interests of the child can be understood in different ways: as basic interest, developmental interest or autonomy interest (Eekelaar, 1992), or also in light of children’s needs, potential harm to children or their wishes and feelings (Freeman, 2007, p. 31). In light of the interdependence and interaction between the different rights in the CRC, the best interests of the child are to be understood in light of all other rights and general principles, so that children themselves should have a say in defining what is in their interest (Archard and Skivenes, 2009). It is noteworthy that in Art. 3 CRC, the best interests of the child are only “a primary consideration”, not the primary or paramount consideration. The best interests of the child are therefore often to be balanced with other interests (Freeman, 2007, p. 60). In other CRC provisions, in the African Charter on the Rights and Welfare of the Child (Art. 4) and in the approach of European instruments, the best interests of the child are often considered the primary consideration; they therefore seem to prevail over the interests of others.

The right to life, survival and development in Art. 6 CRC is unique in its formulation. Other core human rights treaties protect the right to life only, without mentioning survival and development. The reference to survival was intended to emphasize the positive obligations incumbent on states parties to prolong children’s lives. Survival is closely related to a healthy development of children, and thereby introduces obligations of fulfilment (Nowak, 2005, pp. 12–14 and 36–37). The development of children is to be understood holistically (CRC, 2003, para. 10), and is closely related to the concept of human development as advocated in the 1980s by the World Health Organization and UNICEF (Nowak, 2005, p. 7 and 14).

Finally, the right to participation is a cluster of rights, with at its core the right to express one’s views and the right to have that view being taken into account (Archard, 2006, p. v; CRC, 2009). The right to express one’s views is limited to children who are capable of forming their views, and extends only to matters that affect them. The right to have the views expressed taken into account is qualified by references to age and maturity (Ang et al., 2006, p. 14). Quite often, the right to participation is balanced with or pitched against the best interests of the child (Ang et al., 2006, p. 18). Whereas the Committee suggests a harmonious coexistence of both general principles (CRC, 2009, 2013), in reality, an adult’s defined best interests principle tends to prevail in e.g. family or migration matters.

3. Some themes

In what follows, we discuss some substantive themes in the area of children’s rights: juvenile justice; family and alternative care; and education. The selection of these themes is pragmatic: for these topics, a fair amount of case-law is available. The availability of international case-law may be indicative of the importance of these themes. The ambition is not to offer a comprehensive legal analysis, but rather to illustrate what a legal approach of children’s rights looks like. We mainly draw on the case-law of the European Court of Human Rights (ECtHR).

8 Contra: (Besson, 2005, p. 455).
3.1. Juvenile justice

Juvenile justice questions have been the subject of extensive soft law standard-setting, often prior to, and outside the realm of children’s rights law (see in particular the Beijing Rules, Riadh Guidelines, Havana Rules and Vienna Guidelines). Some basic principles have been codified in the CRC, and further elaborated upon in the CRC Committee’s General Comment on children’s rights in juvenile justice (CRC, 2010). Art. 37 CRC deals with the prohibition of torture and the right to freedom. Deprivation of liberty is a measure of last resort and shall be used for the shortest appropriate period of time. Art. 40 CRC offers fair trial guarantees in case of infringement of penal law. This provision is characterized by an inherent tension: whereas it “seeks to establish a child-centred criminal justice system focusing on the child’s welfare which is not necessarily one safeguarded by lawyers […]”, it also “recognizes that traditional juvenile justice is dependant [sic] upon lawyers.” (Van Bueren, 2006, p. 8). Given the focus of Art. 40 on child-centred criminal justice, some due process guarantees found in general human rights law were not repeated in the CRC. On the other hand, reintegration, rather than rehabilitation “as an undesirable form of social control”, is the stated aim of child-centred criminal justice (Van Bueren, 2006, p. 12). Reintegration does not attribute responsibility solely with the individual, but takes also the social environment into account (Van Bueren, 2006, p. 12). The approach to juvenile justice in the CRC may be indicative of the possibility in principle to include contextual factors in a legal rights approach, and may help to dismiss claims that legal rights framing inevitably entails individuation of social problems.

In the case-law of the European Court of Human Rights, several questions of juvenile justice have arisen. As to deprivation of liberty by keeping minors in pre-trial detention, the Court has expressed “its misgivings about the practice of detaining children in pre-trial detention” (Güveç v. Turkey, 2009, para. 109). It acknowledged that in light of international standards, deprivation of liberty must be a measure of last resort and that alternative methods must be considered first. As to the conditions of detention, the Court held that the compounded effect of the applicant’s age (a minor), the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and the failure to take steps with a view to preventing his repeated attempts to commit suicide, amounted to inhuman and degrading treatment (Güveç v. Turkey, 2009, para. 98).

On the difficult question of the minimum age of criminal responsibility, the European Court of Human Rights has been far less leading. Admittedly, the CRC offers no other guidance than that States parties have to establish a minimum age of criminal responsibility. It remains silent on the appropriate age for setting that minimum. The CRC Committee has suggested that twelve is the absolute minimum (CRC, 2010), but the 2010 Council of Europe Guidelines on Child-Friendly Justice only suggest that it should not be too low (Europe, 2010). The Court held in 1999 that the attribution of criminal responsibility to a 10-year-old was not in itself in violation of article 3 ECHR (T. v. UK, 1999). It is a matter of debate whether the Court would find differently had it to assess the question nowadays (Van Bueren, 2006, p. 27). Whereas the Court did not reject criminal responsibility of a young teenager as such (from the

9 For a thorough and extensive analysis, see Schabas and Sax (2006); Van Bueren (2006); Liefaard (2008, Chapter 14 in this Handbook).
11 It should be noted that the reference here to a welfare approach does not correspond necessarily with the welfare school of thought as defined by Hanson (2012, pp. 75–77)
perspective neither of the prohibition of inhuman or degrading treatment, nor of the right to a fair trial, it did require additional fair trial guarantees: it considers it essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (T. v. UK, 1999). Effective participation in one’s own trial was also at stake in more recent cases. In the Salduz-case, the Court has highlighted the importance of access to a lawyer in pre-trial proceedings, and emphasized “the fundamental importance of providing access to a lawyer where the person in custody is a minor” (Salduz v. Turkey, 2008, para. 60).

Finally, the Court has adopted a reintegration and child-oriented, welfarist criminal justice approach on the question of expulsion of a foreign juvenile offender. In balancing the right to respect for private and family life with public interest considerations of crime prevention and control, it argued that a State has to take into account its obligation to facilitate reintegration of juvenile offenders into society. That duty stems from the best interests principle, and makes severing of family and social ties through expulsion a measure of last resort. In case of non-violent crimes, the obligation to facilitate reintegration makes it extremely difficult to justify expulsion of juvenile offenders who have been living in the country since their childhood (Maslov v. Austria, 2008, paras. 83–84).

In sum, no radical child welfare approach has been taken to juvenile offenders in children’s rights law, with the notable exception of expulsion of foreign offenders who are settled migrants. Instead, additional or stronger procedural guarantees have been devised, and the exceptional character of deprivation of liberty has been emphasized.

### 3.2. Family and alternative care

The CRC recognizes children’s right to respect of family life (Art. 16), and protects them against separation from their parents against the latter’s will (Art. 9). It gives parents the primary responsibility for the upbringing and development of the child (Art. 18), including with regard to the conditions of living (Art. 27). At the same time, the CRC imposes an obligation on States to take all appropriate measures to protect children from all forms of violence, abuse or neglect while in the care of parents (Art. 19). It is therefore acknowledged that separation from parents may be necessary for the best interests of the child (Art. 9 CRC). In 2009, the UN Guidelines on Alternative Care were adopted, which provide detailed guidance on alternative care (UN General Assembly, 2010).

The delicate balance between protection against violence, abuse or neglect, and respect for family life, has also been at stake in the case-law of the European Court of Human Rights. The State is under a positive obligation to provide children protection (X., Y. and Z. v. United Kingdom, 1997), but must show restraint in taking children into care outside the family. As the mutual enjoyment by parent and child of each other’s company is considered a fundamental element of family life, placement into care is a measure of last resort, and a temporary measure that is to be discontinued as soon as circumstances permit, with the ultimate aim of family reunion. A State enjoys a large margin of appreciation with regard to the necessity of taking a child into care – in particular in emergency situations – but has less policy space in case of further limitations to family life, e.g. by restricting parental rights of access (H.K. v. Finland, 2006). Procedurally, parents and (older) children are entitled to information and involvement...
in the decision-making process (H.K. v. Finland, 2006; Saviny v. Ukraine, 2008). The European Committee of Social Rights’ approach to placement is very much in line with the Court’s one (CRC, 2009, p. 6). This strong preference for the preservation of natural family life is fully understandable in light of horrendous practices whereby “unworthy” parents were and are deprived of their children because of poverty or ethnic origin. There is also evidence that the lack of a family life is particularly harmful to young children, and that institutional care is therefore not beneficial for them: “More than 50 years of research provides convincing evidence that institutional care is detrimental to the cognitive, behavioural, emotional, and social development of young children”. (Kilkelly, 1999). But beyond these elements, the strong preference for biological family life may need further justification.

Importantly, no placement is justifiable exclusively on the basis of material deprivation. The mere possibility of a more beneficial environment does not on its own justify removal from the parents; such a precarious situation needs to be addressed by less radical means (Saviny v. Ukraine, 2008, para. 50). Whether the promotion of family life creates an entitlement to a particular standard of living at public expense is unsettled in the Court’s case-law (Saviny v. Ukraine, 2008, para. 57), although some support for such an entitlement – under circumscribed circumstances of inability and financial incapacity – could be found in a combined reading of Art. 9 (no separation of children from parents) and 27 CRC. The latter provides that States must take appropriate measures to assist parents to implement the right of the child to an adequate standard of living, and must “in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”.

A challenging issue in the context of family life (and beyond) is whether parents are entitled to slap or smack their children (corporal punishment). In recent years, the language and legal qualification of “violence against children” has become dominant. The children’s rights law position on violence against children is generally straightforward and condemnatory. The CRC Committee has clarified the meaning of Art. 19 CRC – which prohibits all forms of violence against children – with regard to corporal punishment and other cruel or degrading forms of punishment in 2007, and more generally in 2011 (CRC, 2011). The degrading nature of punishment seems to be the decisive element, and underlying it, the human dignity and physical integrity of the child (CRC, 2007, paras. 11, 16 and 26). Whereas the Committee seems to favour criminal law prohibition, it does not plead primarily for prosecution of parents, nor for the separation of children from parents: “the aim should be to stop parents from using violent or other cruel or degrading punishments through supportive and educational, not punitive, interventions”. (CRC, 2007, para. 40). The European Committee of Social Rights (ECSR), for its part, has consistently interpreted Art. 17 RESC as prohibiting any form of violence against children, regardless of place, perpetrator (parents, teachers, …), or purpose (punitive, educational, …). The prohibition of all forms of violence must have a legislative basis. Adequate, proportionate and dissuasive sanctions are required. Several states have been held not to be in conformity with Art. 17 RESC for lack of an explicit legal prohibition of all forms of violence against children, including for educational purposes, thus not offering sufficient guidance to parents and others to model their conduct on the prohibition in Art. 17 RESC (World Organisation against Torture (OMCT) v. Belgium, 2004, paras. 39, 46 and 48).

The ECtHR has struggled somewhat with the legal qualification of the issue, as the ECHR does not contain any prohibition on violence. Its entry point has been Art. 3 ECHR (prohibition of torture, inhuman or degrading treatment or punishment), which requires however a minimum threshold of severity in order to be applicable. The modalities and severity of corporal punishment, rather than a blanket ban, took therefore a prominent place in some of the older cases on corporal punishment in the penal system and schools. In 1998, in a case of severe
beating of a nine-year-old boy by his stepfather (so, within the family), the Court found the UK in violation of article 3 ECHR for failure to provide adequate protection. In the circumstances of the case, the stepfather had been acquitted on defence of reasonable chastisement (A. v. UK, 1998).

In sum, corporal punishment in the family has received much attention in children’s rights law. The strong calls for adequate protection through legal prohibition (criminally or otherwise) and dissuasive sanctions have been accompanied sometimes with softer calls for educational and supportive measures towards the parents. This brings us to the heart of the matter: what are the effects of principled and legitimate calls for the prohibition of corporal punishment on children and parents? Do they lead to the demonization of parents? Do they undermine practices of positive discipline? Do they work inhibitively towards physical intervention or use of force when a child is in danger, or forms a real danger for others? How to respond to corporal punishment, punitively or supportively? And what comes first: legislation or change in public attitudes towards corporal punishment as an educational method?13

Other issues that have received considerable attention in human rights litigation are adoption (Todorova v. Italy, 2009) and parental abduction (Shuruk and Neulinger v. Switzerland, 2010). They raise difficult questions on the protection of family life, consent and best interests of the child.

3.3. Education14

The right to education is guaranteed and protected in general human rights treaties (see, e.g., Art. 13 ICESCR) as well as in the CRC (Art. 28). As a right that is generally considered to belong to the category of economic, social and cultural rights,15 it is subject to the general obligation of progressive realization. Nonetheless, the UN Committee on Economic, Social and Cultural Rights (CESCR) has argued that the right to primary education has to be realized immediately, inter alia on the basis of the stronger wording of Art. 13 (2) ICESCR (CESCR, 1999, para. 51). Unfortunately, Art. 28 CRC contains regressive language on this point; it explicitly submits the right to primary education to the progressive realization obligation too. Whereas that is legally speaking not problematic for states that are a party to both treaties, as the most conducive provision to the realization of children’s rights prevails (see Art. 41 CRC), it has undoubtedly negative consequences for states that are only a party to the CRC, and it risks weakening the public and political perception.

European litigation on the right to education concerns inter alia educational freedom of parents, which we will not discuss further, and questions of inclusive education and accessibility of education for undocumented children. Inclusive education, which is at the intersection of the right to education and non-discrimination, has been discussed with regard to two groups in particular, i.e. children with disabilities and Roma children. With regard to children with disabilities, integration into mainstream schools should be the norm, and teaching in specialized schools the exception (Art. 24 CRPD; Art. 15 RESC) (Autism Europe v. France, 2003, paras. 48–49; European Action of the Disabled (AEH) v. France, 2013). This is a matter of

13 Evidence on the effects of a legal ban on physical punishment in Sweden suggests that there is no demonstrable effect of law reform on public attitudes (Roberts, 2000).

14 Basic literature on the right to education includes Verheyde, 2006; Beiter, 2006; Quennerstedt, Chapter 12 in this Handbook.

15 Albeit that it also contains clear aspects of a civil rights nature, i.e. the right to educational freedom of parents.
availability and accessibility of education. Of course, in many cases children with disabilities will have special needs that need to be accommodated; this is a question of adaptability of education. In this regard, the CRPD refers to reasonable accommodation, whereas the ECSR has argued that real (substantive) equality requires that appropriate measures be taken to take account of existing differences (Mental Disability Advocacy Center (MDAC) v. Bulgaria, 2008, para. 51). This was concluded to mean that in case of justified special education for children with disabilities, “the children concerned must be given sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools” (Mental Disability Advocacy Center (MDAC) v. Bulgaria, 2008, para. 36). Whereas inclusive education and mainstreaming strongly reflects the approach of children with disabilities as full members of society, and as human beings of equal worth, it does meet with resistance and does not always seem wanted by children with disabilities in the first place (for some of the conceptual and practical challenges, see inter alia Barton, 1997; Evans and Lunt, 2002).

The question of segregation versus integration of Roma children in schools has been adjudicated upon in various concrete contexts, ranging from explicit policies for special schools for Roma children, to concrete practices of separate premises for Roma children or special classes for pupils with language deficiencies. The Court has consistently labelled differentiation on the ground of ethnic origin suspect, given its affiliation with racial discrimination. This means that differential treatment that is exclusively or decisively based on ethnic origin will not be objectively justifiable (D.H. v. Czech Republic, 2007; Sampanis v. Greece, 2008). The organization of special classes to address language deficiencies required the most sophisticated analysis. The Court held that temporary placement in separate classes due to lack of adequate command of language does not automatically amount to discrimination. However, when a measure disproportionately affects members of a specific ethnic group, appropriate safeguards need to be in place. These relate to the initial placement in these language classes (are there specifically designed tests; is the insufficient language command immediately addressed?), the curriculum offered (is it specifically designed to address the language deficiencies; are special language lessons offered?), and the transfer and monitoring procedure (what is the time-frame to move on to the “ordinary” classes?). The Court also emphasized the need to structurally involve social services in order to take positive measures that encourage school attendance and prevent drop-out, as well as the importance of involving the parents. Most recently, the Court held that maintaining a situation in which a school is exclusively attended by Roma children and refraining from taking effective anti-segregation measures, cannot be objectively justified and is in violation of the right to education in combination with the prohibition of discrimination (Lavida v. Greece, 2013). In these cases, difficult questions arise with how to deal with the hostile attitudes of non-Roma parents, and with the acceptance of the situation by Roma parents. As to the latter, the Court has held that given the public interest at stake, a waiver of the prohibition of discrimination is not possible. One may wonder, of course, whether and to what extent a judicial decision can change realities on the ground, whether the Court is realistic in its approach, and whether there are other and better ways of integrating Roma pupils in mainstream education. Or even, whether that is for them the best option. What happens, e.g., when they are in mainstream schools, but do not receive appropriate attention and support within and outside school?

As to the availability and accessibility of education for undocumented migrants, the CMW guarantees to each child of a migrant worker, regardless of legal status, the “basic right of access to education on the basis of equality of treatment with the nationals of the State concerned” (Art. 30 CMW). However, at least partly because of the rights guaranteed to all migrant workers, regardless of legal status, this human rights treaty has not been ratified by any of the
Western states of employment of migrant workers. The CESC, confirmed in the late 1990s that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status” (CECR, 1999, para. 34). Likewise, the ECSR has argued that states are required to ensure “that children unlawfully present in their territory have effective access to education as any other child” (ESCR, 2012, p. 6). The CRC Committee too has held that every child, irrespective of status, should have full access to education [...] in line with articles 28, 29(1), 30 and 32 of the Convention and the general principles developed by the Committee” (CRC, 2003). The European Court of Human Rights had to decide whether a state can charge fees for secondary education to undocumented migrants, while that education is free to nationals and legally residing foreigners. The Court took a careful approach, and made clear that what was at stake was not whether and to what extent states can charge fees for education, but rather whether states may deny free education to a distinct group of people. It acknowledged that states may have legitimate reasons for curtailing the use of resource-hungry public services like education by short-term and illegal immigrants, who do not contribute to their funding. However, it argued that the right to education is a very particular type of public service, which benefits those using it but also serves broader societal functions. Second, because of the increasing importance of secondary education in a knowledge society, it did not grant a very wide margin of appreciation to the state in order to assess the proportionality between the differential treatment and the aim pursued. It concluded that the prohibition of discrimination in conjunction with the right to education had been violated, not without emphasizing the “very specific circumstances of this case”, i.e. the fact that the authorities had no substantive objection to the pupils’ presence on their territory, so that considerations relating to the need to stem or reverse a flow of illegal immigration were not applicable, and the fact that the pupils had not tried to abuse the educational system (Anatoliy and Vitaliy Ponomaryov v. Bulgaria, 2011, paras. 59–63). Whereas there is undeniably a strong and consistent tendency in human rights law to guarantee the right to education regardless of legal status,16 the careful and highly qualified approach of the Court shows that migration control policies cannot be excluded from the equation. Moreover, access to education alone will not be sufficient for undocumented children: as important is the kind of education that is offered, and there is also the reality that education is decisively influenced by other factors, such as housing but also the very status of irregularity itself (Vandenhole et al., 2011).

4. Social change through children’s rights law?

What does the above tell us about the importance of children’s rights law in practice? How effective is standard-setting through legislation and litigation to change social realities? How relevant are current standards for realities on the ground? And is it tenable under children’s rights law to only assign legal obligations to the domestic state?

This chapter attempts to move beyond the “implementation gap approach” that many legal scholars adopt, by pointing out challenges related to the legal framing of children’s rights as well as to the naïve way social change through children’s rights law is approached sometimes. What I mean with the “implementation gap approach” refers to the understanding of many practitioners and scholars that the main challenge for children’s rights is implementation. The

16 On the tendency to consider irregularity rather than nationality a justified ground of differentiation, see Vandenhole (2013).
standards and norms are presumed to be clear, appropriate and beyond doubt, the remaining challenge is to implement them properly. What can be criticized is the lack of implementation, the gap between the ideal norms and the realities, not the norms themselves. I do not want to question the often enormous implementation gap that exists. However, I believe that children’s rights scholarship should move beyond the “implementation gap approach”, by looking more into the way children’s rights have been (and could be) legally framed, and into the role of children’s rights law in social change.

The process of norm-setting, i.e. the creation of children’s rights legal standards, tends to be top-down and adult-driven. This approach has been challenged in emerging scholarship on “Children’s Rights from Below” (Liebel et al., 2012). In the latter approach, children’s rights are social practices that emerge from daily realities, in different social and cultural contexts; there is therefore a need to contextualize and to localize their meaning (Liebel et al., 2012, p. 2), and arguably also the way they are legally framed. This approach requires a new methodology, and close cooperation among sociologists, anthropologists and lawyers. Only in this way, the claims children make in their lived experience, their life-world – which have been called “living rights” (Hanson and Nieuwenhuys, 2013) – may be appropriately captured and legally articulated. This approach has mainly been explored in the area of child labour (Hanson and Vandaele, 2013; Liebel, 2013), but also to some extent with regard to child soldiering (Hanson, 2011) and harmful traditional practices (Vandenhole, 2012).

Another important challenge for legal scholarship on children’s rights is to develop a more sophisticated understanding of the role of law in social change. Commonly held assumptions by lawyers and others about impact and change through legal reform may not hold true, as e.g. borne out by evidence on the legal ban on corporal punishment in Sweden: legal reform did not affect public attitudes, nor did it accelerate decline in support for corporal punishment (Roberts, 2000). As a minimum, the limitations of law reform for implementing children’s rights need to be acknowledged (Goonesekere, 2008, p. 3).

The more general literature on human rights, litigation and social change offers important insights, that also apply to children’s rights law. I argued elsewhere that human rights law and litigation cannot be an autonomous vector of structural societal change, but that they rather need to be embedded in a broader strategy. In addition, human rights law faces intrinsic and ideological limits (Vandenhole, 2009b). For some, scepticism about the transformative nature of human rights law prevails (Koskenniemi, 2010). Empirically, it has become clear that the effectiveness of litigation in bringing about change needs to be contextualized, qualified and linked to broader policy provisions. In particular with regard to socio-economic rights of children, Nolan found that there are limits to judicial intervention, although its efficacy should not be dismissed too easily. Nonetheless, she admits that more empirical work needs to be done before any firm conclusions can be drawn (Nolan, 2011, pp. 187–188 and 258–259).

A final point relates to the exclusive focus under children’s rights law (as under human rights law) on the domestic state as the duty-bearer. Legal technically, children’s rights obligations apply to states only, and more in particular to the state that exercises jurisdiction over a child. Typically, that is the state the territory of which a child is on. Globalization, and in particular economic globalization, as a process of dispersion of power, has made it increasingly difficult to understand and tackle social challenges at a local or national level alone. These developments challenge the legal concept of children’s rights as entitlements towards the territorial state, and necessitate the widening of the duty-bearer side of children’s rights if they are to function as a leverage for social change (Vandenhole et al., 2014).
5. Conclusions

This chapter sought to familiarize readers with the international legal frameworks on children’s rights, by clarifying the general obligations incumbent on states and the general principles guiding the interpretation of children’s rights law, as well as by introducing some of the case-law on juvenile justice, family matters and education. It cautioned not to overestimate the transformative potential of a legal approach to children’s rights, be it through litigation or otherwise, and urged legal scholarship to move beyond an implementation gap understanding.

Undoubtedly, the legal codification of children’s rights, as reflected in the fairly impressive legal architectures globally and regionally, has its merits. That is commonly understood and accepted. What this chapter and the whole book teaches us, is that children’s rights should not be reduced to their legal codification. Moreover, critical legal scholarship should pay more attention to the limits and drawbacks of legal provisions and a legal approach, and increase insight in the complex ways in which children’s rights law and social realities interact.

Questions for debate and discussion

• What are the strengths and weaknesses, opportunities and threats of a legal approach to children’s rights?
• On which issues/questions could children’s rights law usefully learn from/draw on the insights in other disciplines?
• Which weaknesses can be identified in the legal framing of juvenile justice/placement into care/inclusive education?
• Can you think of other areas where the legal understanding of children’s rights is confronted with fundamental limits/inherent weaknesses?

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