upon *Costello-Roberts v UK*,[310] that it would not contravene Article 3[311] was correct. In a unanimous judgment the applicants' arguments were rejected and the House of Lords had no difficulty in applying the case law of the ECtHR to conclude that, although the Article 9 rights of the claimants were engaged, and were plainly being interfered with by the existence of the ban, such interference was necessary in a democratic society for the protection of the rights and freedoms of others. The state was entitled therefore to limit the practice of corporal punishment in all schools, in line with its positive obligations under Article 3, to protect the rights and freedoms of all children. Prohibiting only such punishment as would violate their rights under Article 3 would bring difficult problems of definition, demarcation and enforcement and would not meet the authoritative international view of what other international instruments required.[312] Even if it could be shown that a particular act of corporal punishment was in the interests of an individual child, it was clear, Baroness Hale said, that a universal or blanket ban may be justified to protect a vulnerable class; it was the vulnerability of the class which provided the rationale for the law in question.[313] What was particularly striking about this case, therefore, was the lack of consideration for the point of view of children:

> This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organisation, such as the Children's Rights Alliance, has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults.[314]

Meanwhile, the pressure for removal of the defence has intensified. In October 2008, the United Nations Committee on the Rights of the Child delivered its concluding observations on the UK:[315]

> The Committee is concerned at the failure of the State party to explicitly prohibit all corporal punishment in the home and emphasises its view that the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the Convention, since it would suggest that some forms of corporal punishment are acceptable.

The Committee responsible for monitoring implementation of the CRC thus called on the UK to 'prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, in England and Wales, Scotland, and Northern Ireland'.[316] This is the third time that this body has urged the UK to give children equal protection from assault: will it be the last?

[310] *Costello-Roberts v UK* (n 236).
[311] *Williamson* (n 307) Note 18 paras 10, 27 (Lord Bingham); paras 77, 80 (Baroness Hale).
[312] Such as the CRC: see *Willliamson* (n 307) para 86 (Baroness Hale).
[313] *Ibid*, para 80.
[314] *Ibid*, para 71.
[315] CRC Concluding Observations Report (2008) CRC/C/GBR/CO/4 para 40.
[316] *Ibid*, para 42.

6

Children's Rights

The issue of children's rights has divided family lawyers for decades.[1] For some they offer hope for respecting children as full human beings, rather than mini-slaves or 'superpets'.[2] For others talk of children's rights is dangerous, risking harm to children in the name of their 'liberation'. Others have talked of a 'deep ambivalence about the concept of children's rights within contemporary legal, political and social thinking'.[3] Nevertheless, few would deny that children have *some* rights.[4] The issue is therefore not so much whether children should have any rights, but rather which rights they should have. The debate about children's rights has largely centred on children's rights of autonomy: the right of children to make decisions for themselves.

Chapter 3 considered some of the theoretical issues that arise concerning children's rights—in particular, the tension between protecting children from harm and allowing children the right to make decisions for themselves. That material will not be repeated here. Instead, this Chapter will consider how an approach based on the ECHR to children's rights might differ from that taken currently in English law. It will not be possible to consider every possible ramification of adopting a child's rights approach; however, four broad issues will be considered: children's autonomy rights in the medical setting; questions of how to balance the interests of parents and children; corporal punishment; and access to the courts.

Children's Rights under the ECHR

It is remarkable how few cases before the ECHR have specifically addressed the issue of children's rights to autonomy.[5] Remarkable, but readily explicable. Few children will have the stamina, money, or time to bring a case to the ECtHR. Where children's rights are brought to the Court's attention this is normally done in a case where an adult is seeking to rely on children's rights to pursue their own agenda.[6] That said, of course, in many cases

[1] L Houlgate, *Children's Rights, State Intervention, Custody and Divorce* (London, Edwin Mellen Press, 2005); M Freeman, 'Why it Remains Important to take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5; D Archard and C Macleod, *The Moral and Political Status of Children* (Oxford, Oxford University Press, 2004); J Fortin, 'Rights brought home for children' (1999) 62 *MLR* 350; J Dwyer, The Relationship Rights of Children (Cambridge University Press, 2006); J Fortin, *Children's Rights and the Developing Law* (2003, Cambridge University Press); M Freeman, *The Moral Status of Children* (Oxford, Oxford University Press, 1997).
[2] J Holt, *Escape from Childhood* (New York, EP Dutton Publishers, 1975).
[3] S Harris-Short and J Miles, *Family Law* (Oxford, Oxford University Press, 2007), 625.
[4] Of course, there are those who deny the existence of rights for anyone and for them there will be no rights for children.
[5] U Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, Ashgate, 1999).

involving the enforcement of an adult's rights a child's rights will be enforced at the same time.[7] Still the lack of detailed consideration has led one leading commentator to complain of the 'pitifully inadequate response thus far by the European institutions to the equally independent rights of children under the Convention'[8] and another to talk of the ECHR's 'relatively poor reputation' in protecting children's rights.[9]

The starting point for a consideration of children's rights under the ECHR is that children have all the same rights under the ECHR that adults do.[10] An argument that, for example, children have no rights under Article 8 will simply not get off the ground. The ECtHR has readily held that children have the right to protection under Articles 3 and 8.[11] Further, there are plenty of cases considering the discrimination against children on the basis of the marital status of their parents.[12] However, there are two major gaps in the protection of children's rights.

First, as discussed in Chapter 3, simply matching the rights of children to adults may mean that children's rights are not adequately protected.[13] Children may require more rights than adults.[14] Rights to education and financial support may be appropriate to children, of a kind not appropriate for adults. Indeed it has been argued that the Convention was clearly designed with adults in mind.[15] Indeed it is interesting to note the recent supportive comments made in the Grand Chamber in *Sahin v Germany* about the CRC:

> The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child.[16]

This could be read as at least implicitly recognising that the ECtHR does not deal with the rights of children in a completely satisfactory way.

One area where children's rights are not seen as necessarily identical to adults is the area of privacy. Children's rights to privacy have been protected under Article 8. In *Murray v Big Pictures (UK) Ltd*[17] proceedings were brought by Joanne Murray (better known as JK Rowling) to protect the privacy of her young son, David. She sought an injunction to prevent further publication of a photograph of David in a street, and from the taking of photographs in similar circumstances. His Article 8 rights played an important part in determining the level of protection to which he was entitled. It was held:

> It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child. That is the context in which the photographs of David were taken.[18]

Second, the ECtHR has been reluctant to recognise that children have rights to autonomy. As seen in Chapter 3 it is the right to autonomy which is a key marker on whether a legal system protects children's rights, as opposed to protecting their interests. The leading case on children's autonomy rights in the ECtHR is *Nielsen v Denmark*,[19] which concerned a 12-year-old boy who had been detained in a psychiatric ward for over five months. There was no evidence that he was suffering from a psychiatric disorder, but his mother had approved his detention. Proceedings were brought on behalf of the boy challenging the detention. His application failed by nine votes to seven. His Article 5 rights were not engaged because the detention was justified by the responsible exercise of the mother's parental rights. The Court explained that:

> family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty ... Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life.[20]

That is a very broad interpretation of the rights of parents.[21] Under it children's rights are virtually entirely subsumed within the rights of parents.

There is precious little other litigation on the autonomy rights of children. In *X v the Netherlands*[22] a 14-year-old runaway failed in a claim that the police had interfered in her rights by being returned home. This fell within the state's margin of appreciation. Hence, in *X v Denmark*[23] parents who complained that the state had failed to return their runaway child to them lost too. It was within the state's margin of appreciation how to respond to such a case.

Where weight is given to the views of children by the ECtHR, this is often expressed as a pragmatic consideration. Hence in *Damnjanovicì v Serbia*[24] the children's resistance to moving from their father back to their mother was seen as justification for the state not enforcing a custody order in the mother's favour. The case was not seen, as it might have been, as a case about children having the right to determine with which parent they should live.

[7] J Herring, *Family Law* 4th edn (Harlow, Pearson, 2009), 402.
[8] A Bainham, 'Contact as a Fundamental Right' (1995) 54 *CLJ* 255, 258.
[9] U Kilkelly, 'Effective protection of children's rights in family cases: an international perspective' (2002) 12 *International Law and Contemporary Problems* 335, 336 refers to the 'relatively poor reputation' of the ECHR's protection of children's rights.
[10] *Nielsen v Denmark* (1989) 11 EHRR 175.
[11] See, eg, *A v UK (Human Rights: Punishment of Child)* [1998] 2 FLR 959; *Nielsen v Denmark* (1989) 11 EHRR 175, and the wider discussion in ch 7.
[12] *Mazurek v France* [2000] ECHR 34406/97.
[13] J Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *MLR* 299.
[14] J Herring, 'Children's Rights for Grown-Ups' in S Fredman and S Spencer (eds) *Age as an Equality Issue* (Oxford, Hart, 2003)
[15] G Douglas, 'The Family and the State under the European Convention on Human Rights' (1988) 2 *International Journal of Law and the Family* 76.
[16] *Sahin v Germany* [2003] ECHR 340, para 39.
[17] *Murray v Big Pictures (UK) Ltd* [2008] 2 FLR 599.
[18] Para 57.
[19] *Nielsen v Denmark* (1989) 11 EHRR 175.
[20] Para 61.
[21] R Taylor, 'Reversing the retreat from *Gillick*? *R (Axon) v Secretary of State for Health*' [2007] *Child and Family Law Quarterly* 81.
[22] (1975) 76 D and R 118.
[23] (1978) D and R 81.
[24] (Application no 5222/07), [2009] 1 FLR 339.

Nielsen[25] was relied upon by Sue Axon in her claim in the English courts that a parent had the right to be informed of and involved in discussions between a girl and her doctor over an abortion decision.[26] Silber J read *Nielsen* as a case concerned only with Article 5 and parental decisions over a child's liberty and a place of residence, and so not of application in relation to other kinds of decision. With respect it is hard to see anything in the decision of the ECtHR which justifies such a narrow reading, particularly as the case was primarily argued in relation to a parent's Article 8 rights. Further, if a parent has control over a child's liberty, it would seem that any rights a child has can be rendered effectively meaningless.

Nielsen appears to indicate that respect for a child's family life involves giving legal weight to the decision of her parent. Similarly in *Glass v UK*[27] the failure to consult with his parents was found to be an interference with David Glass's Article 8 rights. These views reflect a controversial understanding of the *Gillick* decision which is that a parental right under Article 8 only exists for the benefit of the child.[28] As a child grows in maturity so the parental right dwindles. Sibler J adopted such a view in *Axon*[29] and held:

> As Lord Scarman explained [in *Gillick*], a parental right yields to the young person's right to make his own decisions when the young person reaches a sufficient understanding and intelligence to be capable of making up his or her own mind in relation to a matter requiring decision, and this autonomy of a young person must undermine any Article 8 rights of a parent to family life.[30]

Silber J's claim that the right to family life itself ends when the child reaches maturity is controversial and seems doubtful. It certainly does not sit with the case law that a parent can consent to treatment for a child even when a child refuses.[31] In any event it means there is no recognition that a parent has a major interest in what happens to a child, even if mature.[32] To take but one example the decision of a 13 year old to take a pregnancy to term is highly likely to impact on the family life of her parents. That is not to say that she should not have the right to make the decision, but to suggest that the parents do have an interest in what is decided, even if their rights are readily overridden by the more significant right of the girl to decide the course of the pregnancy. Of course it will often, even always, be the case that the decision of a mature child will justify an interference in the parent's right, but that is not the same thing as saying that the parent has no right. As Rachel Taylor[33] points out, in *Hokkanen v Finland*,[34] when it was found that the state was not required to enforce contact in a case where a mature 12-year-old child did not want to see her father[35] the ECtHR held that the father's rights were justifiably infringed, rather than saying that he had no rights.

[25] (1989) 11 EHRR 175.
[26] *R (Axon) v Secretary of State for Health* [2006] 2 FCR 131.
[27] [2004] 1 FCR 553.
[28] See further S Gilmore, 'The Limits of Parental Responsibility' in R Probert, S Gilmore and J Herring (eds), *Responsible Parents and Parental Responsibility* (Oxford, Hart, 2009).
[29] *R (Axon) v Secretary of State for Health* [2006] 2 FCR 131.
[30] *Ibid*, at para 130.
[31] Discussed above at p 230.
[32] Of course, children have a major interest in the medical treatment of their parents too: see J Herring, 'Relational Autonomy and Family Law' in J Wallbank, S Choudhry and J Herring (eds), *Rights, Gender and Family Law* (London, Routledge, 2009)
[33] *Ibid*.
[34] [1996] 1 FLR 289.
[35] Although there had been a breach in the earlier failure to enforce the contact orders.

The ECtHR has been far more comfortable with the notion that parents have rights over their children than the English courts have. While under the CA it is responsibilities of parenthood which are emphasised and rights are mentioned merely as an aspect of parental responsibility, under the ECHR the rights of parents are regularly protected.[36] Baroness Hale in *Williamson*[37] has explained why it is important to recognise that parents have rights over their children:

> Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and the primary right to do this. The state steps in to regulate the exercise of that responsibility in the interests of children and society as a whole. But 'the child is not the child of the state' and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities. A free society is premised on the fact that people are different from one another. A free society respects individual differences. 'Only the worst dictatorships try to eradicate those differences': see *El Al Israeli Airlines Ltd v Danielowitz* [1994] Isrl LR 478 at para 14 per Barak J. Often they try to do this by intervening between parent and child. That is one reason why the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) restricts the power of the state to interfere in family life (Art 8) or to limit the manifestation of religious or other beliefs (Art 9) and requires it to respect the religious or philosophical convictions of parents in the education of their children (First Protocol, Art 2).[38]

The protection of children's rights under the ECHR is, therefore, still something of a work in progress. There is general acceptance that children have the same rights that adults do. However, rarely has the ECtHR enforced the independent rights of children: nearly all the cases have involved parents seeking to enforce the rights of children on their behalf. In particular there is little discussion on the extent to which children have autonomy rights. This reflects the fact that the ECHR was not created with children's rights as a primary issue of concern. In the light of this it is, perhaps, not surprising that the ECtHR has acknowledged the significance of the CRC.

United Nations Convention on the Rights of the Child

The primary focus of this book is on the ECHR, but it will outline briefly the CRC. The CRC has been signed by the UK government but this does not mean that it is enforced directly. There are no legal proceedings in any court or tribunal that could be brought on the basis that a child's CRC rights have been interfered with. This is not to say that the CRC is without legal significance. The UK courts do occasionally refer to the Convention to support a particular interpretation of the law,[39] as does the ECtHR.[40] Although it is

[36] Eg *Hokkanen v Finland* [1996] 1 FLR 289.
[37] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.
[38] Para 72.
[39] Eg *Re H (Paternity: Blood Tests)* [1996] 2 FLR 65; *Re L, V, M and H* [2000] 2 FLR 334; *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571; *Mabon v Mabon* [2005] EWCA Civ 634; *Payne v Payne* [2001] EWCA Civ 166; *In re B (Children)* [2008] UKHL 35.
[40] Eg *Saviny v Ukraine* (Application No 39948/06); *V v UK* (Application No 24888/94); *Güveç v Turkey* (Application No 70337/01).

not possible to point to a case where the Convention seems actually to have affected the result reached, it is generally referred to to help justify a conclusion which the court would probably reach in any event.[41] The significance of the CRC may therefore be in political and educational terms rather than legal enforceability,[42] although the impact it can play on local authorities and non-governmental organisations dealing with children should not be overlooked.[43]

The CRC seeks to provide an authoritative statement of the rights of children.[44] The very fact that there is a special convention on the rights of children acknowledges that there is something about children and their rights that cannot simply be assumed to match those of adults. In the preamble to the Convention we find this statement:

> the child, by reason of his physician and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

The list of rights in the Convention need, however, to be treated with care. First, some of these rights listed should be regarded as aspirations for children, rather than purporting to grant legal rights that can be enforced. Second, many of the rights will depend on the cultural and socio-economic circumstances of the individual country. To take an obvious example, the contents of rights to health care will vary depending where in the world the child is.

This has led to a questioning of whether the Convention is of any value at all.[45] Bainham has emphasised the value of educative and symbolic value of the Convention, even if unenforceable.[46] Critics have also complained that it is a conservative Convention which emphasises the protection of children over their empowerment and replicates rights from existing human rights instruments, rather than developing a child-centred approach to rights.[47]

The Convention applies to all children below the age of 18 'unless, under the law applicable to the child, majority is attained earlier'.[48] The most important rights mentioned include the rights to life[49] and identity; the right to 'be known and be cared for by his or her parents';[50] a right to expression;[51] and rights to protection from abuse or violence.[52]

[41] Although see U Kilkelly, '*The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*' (2001) 23 *Human Rights Quarterly* 308, who argues that the CRC has played a significant role in the development of the ECtHR jurisprudence.

[42] There are also regular reports by the UN Committee on the position of the rights of children in the UK, which may be of political significance. Although see M Freeman, 'The End of the Century of the Child?' (2000) 53 *Current Legal Problems* 505 for criticism of the government's response to them.

[43] J Williams, 'Incorporating children's rights: the divergence in law and policy' (2007) 27 *Legal Studies* 261.

[44] See P Alston, S Parker and J Seymour, *Children, Rights and the Law* (Oxford, Oxford University Press, 1992); L LeBlanc, *The Convention on the Rights of the Child* (Lincoln, University of Nebraska Press, 1995); G van Bueren, *The International Law on the Rights of the Child* (Amsterdam, Kluwer, 1998); Freeman, *The Moral Status of Children* (n 1); D Fottrell (ed), *Revisiting Children's Rights 10 Years of the of the UN Convention on the Rights of the Child* (The Hague, Kluwer, 2000).

[45] D McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) *International Journal of Law and the Family* 132.

[46] A Bainham, *Children: The Modern Law* (Bristol, Jordans, 2007), 77.

[47] See the discussion in Freeman, *The Moral Status of Children* (n 1) ch 7.

[48] Article 1.

[49] Article 6.

[50] Article 7.

[51] Article 12.

[52] Article 19.

At the heart of the Convention is Article 3(1), which states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[53]

As Andrew Bainham has noticed, there are two notable differences from this and the welfare principle in the CA.[54] First, the interests of children are expressed to be primary, rather than paramount. Second, they are only *a* consideration and not *the sole* consideration. Indeed the difference with the welfare principle is more apparent, as stated in Article 3(2):

> State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Further, there is support for parents' rights under the Convention in Article 5:

> States Parties shall respect the responsibility, rights and duties to parents, or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

These provisions indicate the difficulties in finding an appropriate balance between the interests of children and adults; and indeed the difficulties in separating them out. The CRC provides no real guidance in achieving the balance, although is perhaps more open about the fact there is a balance that needs to be struck than either the CA or the ECHR.

Children's Rights under the Children Act 1989

In Chapter 3 the differences between welfare-based and rights-based approaches were discussed. At first sight English law is clearly welfarist. Section 1 of the CA states:

> When a court determines any question with respect to—
>
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration.

However, to conclude from this provision that English law is welfarist, rather than rights-based, would be to over-simplify the issue.[55]

First, in many cases making an order which will promote the welfare of a child will also protect his or her rights. So an order removing a child from abusive parents can be justified not only as promoting his or her welfare, but also as protecting his or her rights.[56] Indeed

[53] Article 3(1).

[54] A Bainham, 'Can we Protect Children and Protect Their Rights?' (2002) 22 *Family Law* 279.

[55] See further the discussion in ch 3.

[56] See ch 7.

it is noticeable that rights supporters do not suggest that there are a large number of cases where a rights-based approach would produce a different result from that reached using a welfare analysis.[57] It would only be borderline cases where there would be a clear difference in outcome.[58]

Second, even under the welfare principle the court will attach weight to the wishes of a child. Indeed section 1(3) of the CA lists factors which a court should take into account when considering what order would best promote the welfare of the child. The very first of these are 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'.[59] However, there are dangers in reading too much into this provision. First, courts do not normally hear the children directly, but rely on reports from court officers. However, there are concerns over the extent to which court reports accurately reflect the views of children.[60] Further, as Alison Diduck has argued, children's wishes are filtered through the welfare discourse:

> a child's wishes and feelings are more likely to be respected if they conform to adult (and universal normative rather than individualised) ideas of welfare and suggests that law here takes the romantic developmentalist view of its child.[61]

Third, the courts have been willing to use rights-based arguments where the welfare principle is seen not to apply.[62] This indicates that the courts acknowledge that there is a difference between a welfare and a rights-based approach. To give just one example in *R (on the application of Begum) v Head teacher and Governors of Denbigh High School*[63] the House of Lords considered a school dress code which prevented Sabina Begum from wearing a jilbab: a coat-like garment she believed she was require to wear by her religion. The case was analysed in HRA terms. It was accepted that she had the right to manifest her religion under Article 9 of the ECHR. A child had just as much a right to do this as an adult. However, it was held that there was no interference with her rights because she was free to go to another school which had dress codes which would have allowed her to wear the jilbab. Even if that had not been so, any breach of her Article 9 rights were justified in order to protect the freedoms of other pupils at the school (particularly girls) who might otherwise feel pressurised into wearing the jilbab against their wishes.

As these points demonstrate, there is certainly scope in the law for the use of ECHR rights and it would be wrong to say there is no protection of rights of children in the law. It also demonstrates the rather selective use of the HRA and the rights-based approach that it mandates. On the other hand there are dangers that academics keen to promote a more rights-based approach to children have over-egged the significance of children's rights in

[57] See J Herring and R Taylor, 'Relocating Relocation' [2006] *Child and Family Law Quarterly* 517, arguing that even in the controversial relocation case law a rights-based approach would not produce a different result from that currently reached by the courts using the welfare principle.

[58] S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *OJLS* 453.

[59] CA, s1(3)(a).

[60] J Fortin, 'Children's Rights: Substance or Spin' [2006] *Family Law* 757; Baroness Hale, 'The voice of the child' (2007) *International Family Law Journal* 171.

[61] A Diduck, *Law's Families* (London, LexisNexis, 2003) 91.

[62] Eg *Clayton v Clayton* [2006] EWCA Civ 878.

the current law.[64] Indeed it is noticeable that despite the amount of academic attention paid to the notion of children's rights, the concept is rarely mentioned by the judiciary.

That may, however, be about to change. In *Mabon v Mabon* Thorpe LJ in the Court of Appeal stated:

> there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life.[65]

And:

> this case provides a timely opportunity to recognise the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally.[66]

Certainly, gone are the days when it would be simply assumed that fathers made the best decisions about children's upbringing and that the courts should be very reluctant to interfere in such decisions. That kind of view was well exemplified by *In Re Agar Ellis*:

> this Court holds this principle: that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child.[67]

There is no doubt that the courts will now make assessments of what is in a child's best interests and where necessary that will involve overruling the views of the parents.[68] But that leaves the question of whether this is done in the name of promoting welfare or rights. As already mentioned, the courts have held that by applying the welfare principle they are in effect protecting the rights of parties under the HRA. So, from the courts' perspective in many of the cases where the welfare principle is applied we see the courts protecting children's rights. What we see here is a reflection of the point expanded at page 121 that in many cases whether one applies the welfare principle or a rights-based approach the result reached will be the same, although it was argued at page 122 that this would not always be the same. So it is not possible to tell from most cases whether the courts are indeed taking a welfare or a rights-based approach. That said, it is clear that, as required by the statute, it is the language of welfare that predominates.

The rather precarious position of children's rights in English law is revealed by the fact that the Children's Commissioner has no obligation to promote children's rights. What is required is that he or she promotes an 'awareness of the views and interests of children in England'.[69] This is in contrast with the obligations imposed on children's commissioners in other parts of the UK, and indeed the world, where the promotion of children's rights is seen as a key part of the commissioner's role.[70]

[64] S Gilmore, 'The Limits of Parental Responsibility' (n 28).

[65] *Mabon v Mabon* [2005] EWCA Civ 634, applied in *Re C (Abduction: Separate Representation of Children)* [2008] 2 FLR 6.

[66] *Ibid.*

[67] *In Re Agar Ellis* (1883) 24 Ch D 317, 334.

[68] M Brazier, 'An Intractable Dispute: When Parents and Professionals Disagree' (2005) 13 *Medical Law Review* 412.

In seeking to determine whether a legal system does take a rights based approach or a welfare-based approach to children, there are three issues which are particularly revealing. First, there is the extent to which children are permitted to make decisions to pursue a course of action which will cause them harm. Second, the extent to which children's voices are heard in court cases. Third, the extent to which obligations are imposed on the state to protect children's interests. That third issue is addressed particularly in Chapter 7, and as a result this chapter will focus on the first two.

The Recognition of Autonomy Rights in Medical Cases

While 'autonomy issues' tend to be regarded as the touchstone of whether a legal system protects children's rights, it would be easy to overemphasise their significance. A child welfarist can readily accept that children should be able to make decisions for themselves, even causing them some harm. It may, on a broad assessment of welfare, be seen as a useful part of their educational development to learn from their mistakes. Indeed, it would be quite possible for a children's rights advocate to be less willing than a child welfarist to allow children to make decisions for themselves. This would be so where a children's rights advocate emphasised children's rights to protection from harm, the right to a safe environment or the right to discipline and/or where a child welfarist placed much weight on the benefit to children of developing their own personalities through making decisions for themselves and learning from their mistakes. So whether or not children can take harmful decisions is one factor and one factor only in considering whether a legal system takes children's rights seriously.

Cases involving the medical treatment of children have proved particularly revealing on the English courts' approach to autonomy rights. This case law has been well covered elsewhere,[71] and so will only be very briefly summarised here. In essence the current law is that if a child is found to be sufficiently competent to make the decision ('*Gillick* competent') then she is able to consent to receive medical treatment if the doctor has determined that that treatment is in her best interests. However, if a competent child refuses to consent, a parent with parental responsibly or the court can authorise the giving of treatment, thereby rendering it lawful. In determining whether a child is competent a judge will consider whether a child has sufficient maturity to understand the issues involved and make her own decisions.[72] Children suffering anorexia nervosa[73] or other mental disorders[74] have been found to lack capacity.[75] Similarly children raised in strict religious households may be found to lack a sufficiently broad experience of the world to be able to reach their own decisions on an issue.[76]

[71] Eg J Fortin, *Children's Rights and the Developing Law* 3rd edn (Cambridge, Cambridge University Press, 2009).

[72] *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810.

[73] *Re W* [1993] 1 FLR 64.

[74] *Re KWH (minors) (medical treatment)* [1993] 1 FLR 854.

[75] *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810. For arguments that even young children have capacity to make decisions see P Alderson, K Sutcliffe, K Curtis, 'Young Children's Rights' (2006) 91 *Archives*

Does the law in this area indicate a rights-based approach or not? Certainly the initial *Gillick* decision,[77] which recognised that children could effectively consent to receiving contraception, was seen by some as heralding the advent of a recognition of children's rights.[78] In retrospect the case law, as it has developed, cannot justify such a bold statement.

First, while it is true that the courts appear to acknowledge that children have the right to consent to medical treatment, it has denied them the right to refuse. In effect, the child has the right to say 'yes' or the right to say 'no'. To many rights-based advocates this is simply illogical and many have called for children to have the right to refuse treatment. There is, indeed, something odd about the law saying that if a child is competent to answer a question their answer will be respected only if they say 'yes'. As John Harris argues:

> The idea that a child (or anyone) might competently consent to a treatment but not be competent to refuse it is palpable nonsense, the reasons for which are revealed by a moment's reflection on what a competent consent involves. To give an informed consent you need to understand the nature of the course of action to which you are consenting, which, in medical contexts, will include its probable and possible consequences and side effects and the nature of any alternative measures which might be taken and the consequences of doing nothing.
>
> So, to understand a proposed treatment well enough to consent to it is to understand the consequences of a refusal. And if the consequences of a refusal are understood well enough to consent to the alternative then the refusal must also be competent.[79]

That implies that what is driving the respect shown to the child's choice is the fact that it is one that is approved of, rather than genuine respect for the child's decision.[80] However, the law is perfectly logical from a welfare perspective. If it is assumed that if the doctor wants to provide a treatment then that treatment will promote the child's welfare, it is not surprising that the law will allow either a competent child or parent to be able to consent. That is the best way to ensure that children receive the medical treatment they need. *Gillick* is, therefore, better seen as a case about restricting parents' rights, preventing a parent from vetoing treatment a child should receive, than a case about children's rights.

Second, it was emphasised even in *Gillick* that a doctor could rely on a child's consent only if the treatment was in the best interests of the child. There is nothing here, then, to suggest that children have the right to make mistakes which is the hallmark of true autonomy. Nevertheless it is easy to make too much of this remark. After all doctors should not give adults medical treatment which is harmful. To do so would probably be negligent and possibly criminal.[81] However, it may be that Lord Fraser was seeking to suggest that the issue was different for adults and children. In relation to adults, a doctor may provide treatment consented to by a patient from within a range of acceptable alternatives. It would not, for example, be in any sense unlawful for a doctor to perform cosmetic surgery on a patient with the patient's consent, even though the doctor may personally be of the opinion that the cosmetic surgery would not improve the patient's appearance or benefit them. However, Lord Fraser may have been suggesting that a child's consent is only effective if the treatment provided to the child is positively in that child's best interests and is the best

[77] *Gillick v West Norfolk & Wisbech HA* [1986] AC 112 (HL).

[78] J Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *OJLS* 161.

[79] J Harris, 'Consent and End of Life Decisions' (2003) 29 *Journal of Medical Ethics* 10, 15.

available treatment—and that that is a stronger requirement than one that the treatment does not cause the patient clear harm.

Does this analysis lead to the conclusion that the medical cases indicate that children's autonomy rights are not protected? Not necessarily. There are ways in which it might be argued that the law does protect children's rights. First, one way of interpreting the law is that although children's autonomy rights are protected, they are protected to a lesser extent than adults' rights. This would mean that although the weight attached to an adult's autonomy right is sufficient to justify allowing them to die, the weight attached to a child's right is not. Children's autonomy rights may be strong enough to allow them to make other harmful decisions but when it comes to medical decisions involving death or serious harm they are not. Such a view is problematic. If a child who is *Gillick* competent is as mature as an adult, should not her views count the same as an adult's? That might push one towards a second possible justification that we do not believe even a mature child is as competent as an adult. Where the decision involves death or serious harm there are higher standards of capacity than decisions which involve less harm.[82] This assumes that children have lower levels of capacity than adults. It does not provide an adequate response for those cases where the child in question has at least the same degree of understanding as an adult.[83]

The failure to grant competent children the same degree of capacity as adults in this arena indicates that children's autonomy rights are not protected to the same extent as an adult's. The current law on children's autonomy is best explained in terms of children's welfare, but may also be explained in terms of children having autonomy rights, but that they are only weakly protected.

Balancing Children's Rights and Adults' Rights

Jane Fortin has complained of the failure of the English court to address HRA issues in family law cases. She writes:

> By far the most common approach in this area of law is for the judiciary to omit any mention of the European Convention or of the rights of the players involved in the dispute. A second approach is for the family courts to pay lip service to the demands of the HRA by making a very brief passing reference to the rights of the parents and children under Article 8 of the European Convention. But even in these cases there is no attempt to analyse exactly what rights, within Article 8, each might have.[84]

These complaints have much validity. In particular there is a concern that where HRA reasoning is used there is little attempt to fashion the independent rights that children have. She points to the *Axon* case as one which was revealing because it was thought that a mother *might* have a case for requiring a doctor to disclose her daughter's abortion

[82] This may either be on the basis that issues with more serious consequences involve more complex issues; or the concept of 'risk-relative capacity' which recommends a sliding scale for capacity, depending on the severity of the issue at hand: See J Herring, 'Losing It? Losing What? The Law and Dementia' [2009] *Child and Family Law Quarterly* 3.

[83] For an argument that equalising the position of adults and children in this area should not necessarily be by

decision or even to be involved in the decision itself.[85] The very fact that such a possibility was entertained by her lawyers, and seriously considered by the court, reveals the failure to take account of the rights of children.

As noted in Chapter 3, a conflict between individuals' rights is almost bound to arise in any difficult family law case. The European Convention itself gives little guidance on how to deal with cases where the interests of children and adults clash. We have, however, now received some guidance from the European Court on this issue. It is clear that when weighing the competing rights of adults and children, children's rights should carry greater weight.

In *Hendriks v Netherlands*[86] it was held:

> the Commission has consistently held that, in assessing the question of whether or not the refusal of the right of access to the non-custodial parent was in conformity with Article 9 of the Convention, the interests of the child would predominate.[87]

Later decisions appear to take an even stronger line in favour of children. When considering clashes between parents' and children's rights, children's rights have been said to be of 'crucial importance' (*Scott v UK*[88]) or of 'particular importance' (*Hoppe v Germany*[89]). Such tests appear to leave room for the possibility that parents' interests could trump those of children, where parents' interests are very strong and children's interests weak. The strongest statement was in *Yousef v the Netherlands*,[90] where the Court held that children's interests were 'paramount':

> The Court reiterates that in judicial decisions where the rights under Art 8 of parents and those of a child are at stake, the child's rights *must be the paramount consideration.* If any balancing of interests is necessary, the interests of the child *must always prevail.*[91]

On first reading the *Yousef* approach appears to be very close to the welfare principle, as it seems to suggest that the interests of children will automatically outweigh any competing parental right. A closer reading, however, suggests that the Court did not intend to make such a radical departure from its previous approach. As Shazia Choudhry notes, the Court's use of the word 'reiterates' suggests that it did not intend to create a new principle.[92] Indeed, the case law Yousef cites in support of its formula[93] uses the crucial formulation. More recent cases have preferred the *Scott*[94] or *Hoppe*[95] formulation.[96] Even if the *Yousef*

[85] *Ibid.*

[86] (1982) 5 D & R 219.

[87] This was accepted as a statement of the correct approach towards the ECHR in *Re L (A Child) (Contact: Domestic Violence)* [2000] 2 FCR 404.

[88] [2000] 2 FCR 560, 572.

[89] [2003] 1 FCR 176, para 49.

[90] [2000] 2 FLR 118, para 118. See also *Marie v Portugal* [2004] 2 FLR 653, para 77 and *Monory v Romania and Hungary*, Application No 71099/01 para 83; *Zawadka v Poland*, Application No 48542/99 para 67.

[91] *Yousef v Netherlands* (Application No 33711/96) [2003] 1 FLR 210, para 73 (emphasis added).

[92] S Choudhry, 'The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998—A Missed Opportunity' [2003] *Child and Family Law Quarterly* 119.

[93] *Elsholz v Germany* [2000] 3 FCR 385, para 48; *TP and KM v the United Kingdom* [2003] 2 FCR 1, para 70.

[94] *C v Finland* [2006] 2 FCR 195, para 52.

[95] *Hasse v Germany* [2004] 2 FCR 1, para 93; *Suss v Germany* [2005] 3 FCR 55, para 88; *Hunt v Ukraine*

formulation is followed it is far from clear that the Court understood paramountcy in the sense it has been interpreted in English law to mean that the interests of children will always trump the interests of adults. The current approach of the European Court can be summarised in this way: where there is a clash between the interests of children and adults, special weight will be attached to the interests of children. This does not mean that the interests of children will always outweigh the interests of adults, but unless the interests are adults are significantly stronger than the interests of children, the weighing will result in protecting the interests of children.

More needs to be said, however, about this. First, how are the respective rights of adults and children to be weighed? How do we know if the rights of an individual are to count greatly or less so? As suggested in Chapter 3 the best way to deal with clashes between rights is to consider the values underpinning those rights. Sometimes in the case of family life it is the value of autonomy, the value to live one's life as one chooses, which is at the heart of the right claimed. So, the question for a court would then be the extent to which the proposed order leads to a blight on the person's opportunity to live out their version of the good life. This was discussed further in Chapter 3. But there are some important points to make here when the interests of children are taken into account.

Jane Fortin[97] has interpreted the ECHR case law to mean that adult rights will be protected unless to do so would be contrary to the best interests of the child. This suggests that any amount of harm to the child will automatically justify an interference in a parental right. This is not to say that she regards the ECHR approach as identical to a welfare principle approach. Under the welfare principle a parent would have no claim to a parental right, whereas under Fortin's approach parents would have rights they could claim, as long as protecting the parents' rights did not involve harming children. Fortin's approach has an appeal. It enables her to emphasise that parents' rights should never be used to pursue a result which harms children. Her approach, however, is hard to reconcile with the wording of Article 8 and with the wording used by the ECtHR, not least because it renders the balancing process under Article 8(2) irrelevant. The ECtHR has always emphasised that any interference with the interests of parents be proportionate and necessary. If any departure from welfare will justify an interference with the rights of parents then the notions of necessity and proportionality appear to have no role to play. Furthermore, the description of children's interests being of 'particular' or 'crucial' importance by the ECtHR seem to leave open the possibility that children's interests could be outweighed by those of adults.

This leads to the crucial question. Why is it that children's interests should be seen as being particularly important as compared to the interests of an adult? An order which is interfering in a child's right to private or family life is likely to be far more of a blight than an identical order on an adult's life. This is because a child is less equipped to deal with setbacks in their interests and life chances. They lack the practical possibilities of remaking life plans and the experience, maturity or even intelligence to develop alternatives. They may also lack the support of friends or family or the emotional maturity to deal with the situation. Consider, for example, a case where a person is going to be moved from a place where they have an established set of friends and community support to a place where they know no one. While this would be disturbing for anyone it is particular serious for a child,

who will be less equipped to find and develop new friends; less experienced to realise that any sense of loneliness and isolation will last for a relatively short time; and less equipped to rely on the support of existing friends.

For another example, let us consider a dispute over a child's surname. Both the child and an adult have strong views. For the sake of argument let us assume that to each of them the issue is equally important and both will feel upset to the same extent if they lose. Yet if the adult loses we might properly expect that he or she will have the intellectual, emotional and social support to see him or her through the disappointment. The child will have far less of these things. Further, the child is liable to suffer far more from embarrassment or bullying from the unwanted surname than an adult would.[98]

This leads us to conclude that generally speaking the interference in the interest of a child will be worse than the same interference in the right of an adult. However, and this is the key question, how does this fit into the reasoning of the ECtHR? Is the Court saying that generally interferences in children's rights will be far worse than the interference for an adult and so should be preferred; or is it saying that even taking on board the vulnerabilities of a child and even if the interference of the interests is similar, there is a reason for preferring the interests of the child over the interests of an adult? This is something that the ECtHR has not specifically addressed and thus we cannot know the answer to the question. However, it raises this question: are children's rights given an elevated status over adults because we believe that children are more vulnerable and less able to deal with breaches of their rights; or because children's rights are inherently more valuable and that even if the impact on their lives will be equal, children deserve a stronger protection of their rights by virtue of them being children? That is a question which the ECtHR is yet to fully explore and yet is central to a proper understanding of the special place that children's interests hold in ECtHR jurisprudence.

Reconciling Welfare and the HRA

Can the welfare principle be reconciled with an approach based on human rights?[99] Lord Justice Thorpe and Dame Elizabeth Butler Sloss, in *Payne*, both defended the welfare principle, finding that it was essentially the same as the approach of the ECtHR. In particular, Lord Justice Thorpe considered that:

> [the HRA] requires no re-evaluation of the judge's primary task to evaluate and uphold the welfare of the child as the paramount consideration, *despite its inevitable conflict with adult rights.*[100]

He supported this conclusion on the basis that:

> the jurisprudence of the European Court of Human Rights inevitably recognises the paramountcy principle, albeit not expressed in the language of our domestic statute. In *Johansen v Norway*

[98] See further J Herring, 'The Shaming of Naming' in R Probert, S Gilmore and J Herring (eds), *Responsible Parents and Parental Responsibility* (Oxford, Hart, 2009).

[99] J Eekelaar, 'Beyond the Welfare Principle' [2002] *Child and Family Law Quarterly* 237; H Reece, 'The Paramountcy Principle—Consensus or Construct?' (1996) 49 *Current Legal Problems* 267; N Lowe, 'The House of Lords and the Welfare Principle' in C Bridge (ed), *Family Law Towards the Millennium: Essays for PM Bromley* (London, Butterworths, 1997); J Herring, 'The Human Rights Act and the Welfare Principle in Family Law—

(1997) 23 EHRR 33, 72, para 78, the court held that: 'the court will attach particular importance to the best interests of the child, which … may override those of the parent'.[101]

Thorpe LJ's comments represent a misunderstanding of both Conventions. As Sonia Harris-Short notes, Thorpe LJ's quotation from *Johansen* is selective.[102] The actual words of the judgment in *Johansen* give a very different impression from the paraphrased quotation given by Thorpe LJ:

> a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. *In carrying out this balancing exercise*, the Court will attach particular importance to the best interests of the child, which, *depending on their nature and seriousness*, may override those of the parent.[103]

In taking this approach the Court of Appeal was following a well-established line of authority. In *Re B (Adoption: Natural Parent)*[104] Lord Nicholls stated:

> The court decides that an adoption order is best for the child in all the circumstances. I do not see how an adoption order made in this way can infringe the child's rights under Article 8. Under Article 8 the adoption order must meet a pressing social need and be a proportionate response to that need: see, for example, *Silver v United Kingdom* (1983) 5 EHRR 347, 376–377, paragraph 97(c). Inherent in both these Convention concepts is a balancing exercise, weighing the advantages and the disadvantages. But this balancing exercise, required by Article 8, does not differ in substance from the like balancing exercise undertaken by a court when deciding whether, in the conventional phraseology of English law, adoption would be in the best interests of the child. The like considerations fall to be taken into account. Although the phraseology is different, the criteria to be applied in deciding whether an adoption order is justified under Article 8(2) lead to the same result as the conventional tests applied by English law. Thus, unless the court misdirected itself in some material respect when balancing the competing factors, its conclusion that an adoption order is in the best interests of the child, even though this would exclude the mother from the child's life, identifies the pressing social need for adoption (the need to safeguard and promote the child's welfare) and represents the court's considered view on proportionality. That is the effect of the judge's decision in the present case. Article 8(2) does not call for more.

Despite the consistent judicial approach[105] there has been near-universal academic disapproval of it.[106] There are two key differences between the welfare principle and the approach in *Johansen*. First, the ECtHR clearly states that it is engaged in a balancing exercise between the interests of the parties. The welfare principle, on the other hand, does not admit such a balancing exercise; indeed the interests of the parents are strictly irrelevant to the decision unless they affect the welfare of the child. Secondly, the *Johansen* approach

[101] *Ibid*, paras 38–9; see also para 82.

[102] S Harris-Short, 'Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution' [2005] *Child and Family Law Quarterly* 329, at 355.

[103] *Johansen v Norway* (1997) 23 EHRR 33, para 78 (emphasis added).

[104] [2001] UKHL 70, para 31.

[105] Indeed it has become so widely accepted that it seems rarely to be argued that the welfare principle can be challenged under a human rights approach: certainly that is not an argument the courts have recently addressed.

[106] S Harris-Short, '*Re B (Adoption: Natural Parent)*, Putting the Child at the Heart of Adoption?' [2002] 14 *Child and Family Law Quarterly* 325, 336–8; S Choudhry, 'The Adoption and Children Act 2002' (n 92); J Eekelaar, 'Beyond the welfare principle' (n 99); J Fortin, 'Children's Rights: Are the Courts Now Taking Them More

implies that the interests of the child will not always override those of the parent but that this will depend on the 'nature and seriousness' of those interests. Again, this contrasts with the welfare principle, which demands that the welfare of the child prevails over the rights of the parents without regard to its nature and seriousness. As Bainham puts it:

> Adults rights to respect for private and family life *must* be respected and must not be interfered with unless the specific justification envisaged by Article 8(2) exist and only then when they are *necessary* and *proportionate* to a legitimate State aim. This is prima facie very much more prescriptive than merely leaving it to a court to decide at large what course of action is in the best interests of a child.[107]

If the welfare approach is incompatible with the HRA, the question remains what should be done. The courts are obliged by statute to apply the principle and such a statutory obligation takes precedence over their role under section 6 of the HRA. Nevertheless, section 3 of the HRA obliges the court to interpret the welfare principle, as far as possible, to be compatible with the parties' Convention rights. As Choudhry and Fenwick point out, one way in which the welfare principle can be interpreted compatibly with Convention rights is to interpret 'paramount' to mean 'most important'.[108] In other words, the interests of the child will be the most important consideration for the court but will not inevitably determine the outcome, particularly where there are weighty countervailing interests. On this interpretation, the welfare principle can be read compatibly with the approach of the ECtHR, to require a 'parallel analysis' balancing exercise between all the rights involved, but with particular importance given to the rights and interests of the child within that analysis.

Children's Rights and Corporal Punishment

The issue of corporal punishment has been one where the impact of the ECHR has been particularly significant.[109] Particularly because it is an area of law where the independent rights of children have been given explicit attention. In Chapter 5 this issue was considered from the point of view of parents' rights. In *A v UK*[110] the ECtHR considered the UK law at the time, which permitted a defence of 'reasonable chastisement' to a charge of assault on a child. The step-father in that case had caused injuries of sufficient severity to fall within the scope of Article 3, but still the jury had acquitted him, accepting the defence of reasonable chastisement. The case was taken in the child's name to the ECtHR, where it was found that the UK law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. It was held the beating breached the child's Article 3 rights. In assessing whether it did so the Court said that all the circumstances of the case had to be considered. This included the nature and context of the treatment; its duration; its physical and mental effects; and, in some cases, the sex, age and state of

[107] Bainham, *Children: The Modern Law* (n 46), 738.

[108] Choudhry and Fenwick, 'Taking the rights of parents and children seriously' (n 106).

[109] H Keating, 'Protecting or punishing children: physical punishment, human rights and English law reform' (2006) 26 *Legal Studies* 394; S Choudhry, 'Corporal Punishment and Parental Responsibility' in R Probert, S Gilmore and J Herring (eds) *Responsible*

health of the victim.[111] Thus, just because a form of conduct is not degrading treatment for one person does not mean that it cannot be so for another. The ECtHR confirmed that Article 3 imposed primarily a negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. However, there were positive aspects of the rights as well. In particular it was the responsibility of the state to protect one citizen from having her Article 3 rights infringed at the hands of another individual. The UK law at the time of *A v UK* failed to ensure the applicant protection of his Article 3 rights at the hand of his father. As a result of the decision the law in the UK was amended through section 58 of the Children Act 2004, which reads:

> (1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.
> (2) The offences referred to in subsection (1) are—
> (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);
> (b) an offence under section 47 of that Act (assault occasioning actual bodily harm);
> (c) an offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).
> (3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

In addition, shortly after the passage of the Act the Crown Prosecution Service amended the charging standard on offences against the person, which now states that the vulnerability of the victim, such as being a child assaulted by an adult, should be treated as an aggravating factor when deciding the appropriate charge. Injuries that would normally have led to a charge of common assault will now be charged as assault occasioning actual bodily harm under section 47 of the OAPA under which the defence of reasonable punishment will not be available. A subsequent government review of section 58 notes that the charging standard has clarified the boundary between what constitutes common assault and what constitutes assault occasioning actual bodily harm and takes into account the particular seriousness of an adult assaulting a child.[112] It also records the fact that the standard may have resulted in the removal of a certain amount of discretion from the police which has had the seemingly unintended result of providing *more* protection for children:

> However, it (the charging standard) means that the police sometimes have to record as assault occasioning actual bodily harm a crime which is not perceived as being particularly serious, best dealt with by children's social care rather than the criminal justice system, and which previously would have been recorded as common assault.[113]

As a result, it is certainly arguable that current UK law on the parental defence of reasonable punishment in relation to common assault is, in the absence of a further decision on the matter from the ECtHR, compatible with Article 3 of the ECHR, in that it is unlikely that behaviour which was merely a battery and which caused no actual bodily harm would infringe Article 3. The issue may not be entirely beyond doubt, however. A corporal punishment administered in highly degrading circumstances might reach Article 3 levels, even if only a battery occurred. Further, even if the corporal punishment is only a battery which does not reach Article 3 levels, it may still involve a breach of Article 8.[114]

[111] See among other authorities *Costello-Roberts v United Kingdom* [1995] 19 EHRR 112.

Access to Courts

A clear indication of whether a legal system would take children's rights seriously is the rights of access to children to the courts. If children have rights, but no effective means of bringing their complaints to the courts, then the claim that children's rights are only enforced at the convenience of adults is stronger, in which case the claims are better seen as adult rather than child rights. Indeed, the right of children to be heard in court proceedings does not need to be linked to the view that they have a right to be able to make decisions for themselves.[115]

On the face of the ECHR there appears to be a strong claim for children to have a right to bring cases to court. There is nothing in the wording of Article 6 to suggest that the right of access to the court does not apply to children. Such a claim may be bolstered by reference to Article 12(2) of the CRC, which requires states to provide children with:

> the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Indeed the UN Committee on the Rights of the Child complained that the UK had not effectively ensured that children were heard in private law proceedings about children.[116]

The ECtHR has had relatively little to say about the access of children to courts, nor their representation in court hearings, under Article 6.[117] Notably the Court has had more to say about the representation of children in court proceedings as part of the procedural protection of rights under Article 8.[118] In *Elsholz v Germany*;[119] *Sahin v Germany; Sommerfeld v Germany; Hoffman v Germany*[120] it was held that in private law cases concerning children the failure to either hear the child directly in open court or obtain an expert psychological assessment of the child's views would infringe the child's Article 8 rights. However, this approach was reversed by the decision of the Grand Chamber in 2003 in *Sahin v Germany; Sommerfeld v Germany*[121] which held that the earlier decisions had gone too far in saying that hearing the child or receiving an expert report was an essential requirement for Article 8. The court must ensure that the proceedings were fair, but how the child's views

[114] See further S Choudhry and J Herring, 'Righting Domestic Violence' (2006) 20 *International Journal of Law, Policy and the Family* 65.

[115] D Archard and M Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1.

[116] UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom and Northern Ireland* (2002), para 29.

[117] See also the European Convention on the Exercise of Children's Rights 1996, which has not been signed by the UK.

[118] Munby J, 'Making Sure the Child is Heard' [2004] *Family Law* 427.

[119] [2002] 2 FLR 486.

should be considered would depend on the child's age and maturity and an assessment of the specific circumstances of each case.

Children can bring proceedings either through a solicitor or through a next friend (normally one of their parents). To bring proceedings using a solicitor a child normally needs leave,[122] and this has proved problematic. Rarely have the courts given leave. A typical example of the case law is *Re C (A Minor) (Leave to seek Section 8 Order)*,[123] where the court refused to allow a 14 year old who wanted to go on holiday with her friend's family to Bulgaria against her parents' wishes. The issue was regarded as too trivial. If so then most issues relating to autonomy which a child might want to raise in a court will also be too trivial. The courts have also held that if the proceedings are complex or likely to cause emotional harm it will be better for the child not to be involved.

The courts appear to be more wiling to allow children to express their views when they wish to be involved in litigation between their parents. In *Re A (Contact: Separate Representation)*[124] Dame Butler Sloss P stated that the HRA had strengthened the claim for children seeking separate representation. While accepting that it was unusual for a child to have separate representation she held:

> There are cases where they do need to be separately represented and I suspect as a result of the European Convention ... becoming part of domestic law, and the increased view of the English courts, in any event, that the children should be seen and heard in child cases and not always sufficiently seen and heard by the use of a court welfare officer's report, there will be an increased use of guardians in private law cases. Indeed, in the right case I would welcome it. I hope with the introduction of CAFCASS in April of next year ... it will be easier for children to be represented in suitable cases.[125]

In *Mabon v Mabon*[126] the Court of Appeal overturned the decision of a judge that three 'educated, articulate and reasonably mature' boys aged 17, 15 and 13 should not be separately represented in a sharply contested residence and contact dispute. Thorpe LJ held that 'it was simply unthinkable to exclude these young men from knowledge of and participation in legal proceedings that affected them so fundamentally'.[127] He thought children should be involved in litigation if they wished, even if to do so might cause them some harm. He explained that 'the right of freedom of expression and participation outweighs the paternalistic judgement of welfare.'[128] In making these points he made specific reference to the children's rights under Article 8 of the ECHR and Article 12 of the CRC.

Despite the statement in *Mabon* a recent study found that separate representation is rarely ordered by courts. This is largely because the judiciary are aware that CAFCASS simply lacks the resources to represent children in as many cases as may be appropriate. Jane Fortin claims that 'children's rights are systematically downgraded for financial reasons'.[129]

[122] Rule 9.2A Family Proceedings Rules 1999, SI 1999/3491. Technically this is not necessary where the solicitor has found the child competent to give instructions, but where the child seeks an order under the CA, s8, which is the most likely section to be used, the application must be brought.

[123] [1996] 1 FCR 461.

[124] [2001] 1 FLR 715.

[125] Paras 21–2.

[126] [2005] 2 FCR 354.

[127] At para 52.

One concern is that increasingly couples are encouraged to engage in dispute resolution rather than taking cases to court. However, there are concerns that when the emphasis is on finding agreement between the parents the views of the child are not heard.[130] Even when cases do get to court there are serious concerns over the effectiveness of court welfare reports in accurately representing the views of children.[131] Indeed in one study in 2005 over a third of court reports did not reach the standards expected of government inspectors.[132] Another report by the government inspectorate found that some reports were recording the author's views of what was in the child's best interests rather than accurately reflecting the child's views.[133] A Cardiff University study found that children felt that their views were not being accurately reported.[134]

Conclusions

A delegation of children appearing before a special UN session on children's rights made this statement:

> We are not the sources of problems;
> We are the resources that are needed to solve them.
> We are not expenses; we are investments.
> We are not just young people; we are people and citizens of this world ...
> You call us the future, but we are also the present.[135]

As we have seen in this chapter such sentiments have led many to call for a greater recognition of the rights of children. To date the recognition of children's rights to protection in both the ECtHR and the English courts is stronger than that given to their autonomy rights. Indeed it is fair to say that within both the ECtHR and English courts there has been little attention given to the independent rights of children, which are often subsumed within claims to the rights of their parents. This Chapter has explored some of the ways the ECtHR and, through the HRA, English law, could develop an approach more focused on children's rights.

[130] HM Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings: Thematic review of the handling of domestic violence issues by the Children and Family Court Advisory and Support Service (CAFCASS) and the administration of family courts in Her Majesty's Courts Service (HMCS)* (London, HM Inspectorate of Court Administration, 2005) para 3.75.

[131] J Fortin, 'Children's Representation Through the Looking Glass' (2007) 37 *Family Law* 500.

[132] HM Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings*, at para 3.41.

[133] HM Inspectorate of Court Administration, *Safeguarding Children in Family Proceedings* (London, HM Inspectorate of Court Administration, 2005) para 2.29.

[134] G Douglas, M Murch, C Miles and L Scanlan, *Final Report for the Department of Constitutional Affairs: Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991* (London, Department of Constitutional Affairs, 2006), ch 3, esp at para 3.84.