Making Sense of Children Rights:
Transforming the Precedents of the
European Court of Human Rights Concerning
Corporal Punishment of Children

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Introduction
In this study, I shall attempt to examine the question of potential role of supranational human rights case law standards in transforming the precedents of the European Court of Human Rights (hereinafter referred to as Court or European Court) concerning corporal punishment of minors.

Corporal punishment can be defined, for the purposes of this article, as any punishment in which physical force is used and intended to cause some degree of pain and discomfort with a view

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1 Although the European Court of Human Rights is not bound to follow its previous judgments in a technical sense, it does not depart, without good reason, from its own precedents in the interests of legal certainty and foreseeability. For the use of term “precedent” within the context of European Convention on Human Rights, see, D. J. Harris- M. O’Boyle- C. Warbrick, Law of the European Convention on Human Rights 18 (1995).
to change, control or punish the child’s behaviour for disciplinary objectives.²

The European Commission³ and Court of Human Rights have examined the issue of corporal punishment several times under Articles 3, 8 and Protocol No. 1 Article 2 of the European Convention on Human Rights (hereinafter, referred to as Convention or ECHR)⁴. Almost all cases were brought against the United Kingdom. This paper shall not deal with the corporal punishment in the context of Protocol No. 1 Article 2 - right to education and parental right to have children educated in conformity with their religious or philosophical convictions - since no issue arises unless the religious or philosophical convictions of parents or additional issues such as suspension of a child from school, come to the agenda.⁵

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² Definitions are almost similar. See, General Comment No. 8 of the Committee on the Rights of the Child, CRC/C/GC/8, Advanced Unedited Version, 2006, at para. 11 (“The Committee defines “corporal” or “physical” punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”); Council of Europe, Eliminating Corporal punishment: A Human Rights Imperative for Europe’s Children, 20–21 (November 2005) (“corporal punishment is any punishment in which physical force is used and intended to cause some degree of pain and discomfort”); Cynthia Price Cohen, Freedom From Corporal Punishment: One of the Human Rights of Children, II New York Law School Human Rights Annual 96 (1984) (“Corporal punishment can be roughly defined as a painful, intentionally inflicted physical penalty, administered by a person in authority, for disciplinary purposes”); Susan Bitensky, Spare the Rod, Embrace our Humanity: Toward A New Legal Regime Prohibiting Corporal Punishment of Children, 31 University of Michigan Journal of Law Reform 359 (Winter 1998) (“the currently nonprosecutable use of physical force with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child’s behavior”); David Orentlicher, Spanking and Other Corporal Punishment of Children By Parents: Overvaluing Pain, Undervaluing Children, 35 Houston Law Review 149-150 (1998) (“the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child’s behavior”). It is interesting to note that the Committee on the Rights of the Child does not make any emphasis to the disciplinary purposes of the corporal punishment in its definition.

³ Although the Commission was abolished by the Protocol No. 11 to the European Convention on Human Rights on 01/11/1998, its decisions are still important.


⁵ Full analyses of case-law of the Court and Commission with regard to corporal punishment can be found in Haydar Burak Gemalmaz, Avrupa İnsan Hakları Sözleşmesinde ve Türk Hukukunda Çocuğun Bedensel Cezaya Karşı Korunması/Protection of Children Against Corporal Punishment under the European Convention on Human Rights and Turkish Law (Turkish) (2005).
One contemporary problem with regard to corporal punishment under the ECHR remains whether corporal punishment is in breach of the integrity and dignity of the child per se. Therefore, this examination will focus on the integrity of the child within the meaning of Articles 3 and 8 of the Convention.

Supranational human rights case law reveals that, contrary to the ideas introduced by one commentator\(^6\) and some supervisory bodies\(^7\), the Court and the Human Rights Committee\(^8\) are the only bodies which do not accept corporal punishment as a violation of child dignity per se.\(^9\) Although several commentators have criticized Court’s approach case by case, its jurisprudence is still valid. One may ask if it is possible to force the Court to change its jurisprudence with regard to corporal punishment. The present author argues that the supranational human rights case law standards shall play an important and a decisive role in transforming the precedents of the European Court of Human Rights\(^10\) concerning

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\(^6\) Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, very recently has argued that European Court of Human Rights has condemned corporal punishment of children in all circumstances absolutely. She further suggests that the Court has ruled that domestic law allowing such reasonable chastisement failed to provide children with adequate protection since such protection must include an effective deterrence. See Speech of Maud de Boer-Buquicchio at the closure of the conference “Raising children without violence”, held in Berlin on 21 October 2005. www.coe.int. (Access date: 22/10/2005).

\(^7\) Very recently in June 2006, The United Nations Committee on the Rights of the Child considers the European Court’s jurisprudence on the corporal punishment as condemning it in all circumstances. The Committee, however, does not take into account the distinction made by the Court between reasonable and excessive corporal punishment. And accordingly it failed to identify the true approach of the European Court to corporal punishment of minors. See, GENERAL COMMENT NO. 8 of the Committee on the Rights of the Child, CRC/C/ GC/8, Advanced Unedited Version, 2006, at para. 28.

\(^8\) The Human Rights Committee was established by the International Covenant on Civil and Political Rights (ICCPR) of 1966. To the present author’s knowledge, there is no individual communication dealing with the corporal punishment of minors decided by the Human Rights Committee. The Human Rights Committee, however, dealt with the issue in its General Comments Nos. and 7 (16) dated 1982 and 20 (44) dated 1992. It stated that “in the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure”. See also comment of Dominic McGoldrick, The Human Rights Committee 365 and footnote 45 (1994).


\(^10\) In his recent article, Mowbray deals with the transformation of the jurispru-
corporal punishment.\textsuperscript{11} This argument does not presuppose that corporal punishment of minors is morally unacceptable on the basis of research conducted by the relevant scientific circles.\textsuperscript{12} This argument asserts that either morally acceptable or unacceptable, the Court should modify its judgments in accordance with the supranational human rights case law standards.\textsuperscript{13}

\textsuperscript{11} In terms of the potential role of the supranational human rights case law standards in transforming the precedents of the European Court of Human Rights in general and particularly with regard to children rights, legal doctrine rightly emphasizes the role of the international human rights instruments in interpreting the Convention. For example see, Ursula Kilkelly, \textit{The Best of Both World for Children’s Rights Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child}, 23 HRQ 308-326, particularly at 316-319 (2001). In her article she also emphasized the relevant Concluding Observations of the Committee on the Rights of the Child which were cited by the European Commission on Human Rights. But her main ideas dealt with the provisions of the Convention on the Rights of the Child. See also Concurring Opinion of Mr. J. Loucaides in \textit{A v. UK}, (App. No.25599/94), Report of the Commission of 18 September 1997.

Thus two differences can be observed. While the former approach is based on case law standards the latter is based on instruments. Secondly, transformation of precedents is to a certain extent different from mere interpretation. It is relatively easy to reconcile the provisions of the ECHR and the Convention on the Rights of the Child (or any other human rights treaty in context) by way of interpretation. On the other hand, it is not easy for any tribunal to modify its established precedents. The former argument further suggests that the relevant tribunal is obliged to modify its previous judgments. See, infra Part II.


\textsuperscript{13} Such an approach has to be considered important since in some legal opinions, it is argued that there is no scientific proof which provides information that mild corporal punishment is harmful, and accordingly legal ban of right to administer corporal punishment is unjust. See the dissenting opinion of Mr. Lucien François to the decisions of European Committee of Social Rights in applications of 17/2003, \textit{World Organisation against Torture v. Greece}; 18/2003, \textit{World Organisation against Torture v. Ireland} and 21/2003 \textit{World Organisation against Torture v. Belgium}. 
In section I of this paper, by referring to the Strasbourg organs’ jurisprudence with regard to corporal punishment, the defects and weakness of its capacity in protecting children against violence shall be examined. In the second section, by taking into account of the principles governing the interpretation and application of the Convention, the basis of the potential role of the supranational human rights case law standards in transforming the judgments of the European Court of Human Rights shall be analysed. In the third section, the quality and quantity of supranational case law, which absolutely prohibits corporal punishment, shall be reviewed in order to determine whether these standards are sufficient in the transformation of the judgments of the European Court.

1) Problem: Corporal Punishment of minors does not per se violate Article 3 or Article 8

As noted, the Court has consistently held that corporal punishment of minors is not in a breach of the Article 3 or Article 8 of the Convention categorically. If any treatment is to fall within the meaning of Article 3, the act or omission (treatment) in question should reach the minimum threshold of severity. Otherwise, it cannot be considered within the ambit of Art 3 of the Convention. In order to assess whether an act or omission in question reaches the minimum threshold, the Court takes into account of the nature of the act/omission (treatment), the status of victim (age, state of health, sex etc.). Therefore, the assessment is relative.\textsuperscript{14}

\textsuperscript{14}Duffy suggests that this feature can be properly called as “relative nature of Article 3”. See, P.J. Duffy, Article 3 of the European Convention on Human Rights, 32 ICLQ 316, at 320-321 (1983). It should be noted that the term “relative” was used by the Court in its judgment in the case of Ireland v. UK (Judgment of 18 January 1978) at para. 162. The relativistic approach is still authoritative in the assessment of the compatibility of the treatment/omission in question. The following judgments can be cited as examples: Assenov v. Bulgaria (No.90/1997/874/1086), Judgment of 28 October 1998, para.88 (concerning
This approach entirely has been applied in cases concerning corporal punishment of minors. Accordingly, Article 3 does not cover some forms of corporal punishment. Therefore, the Court makes a distinction between two types of corporal punishment: i) mild/moderate/normal/reasonable ii) excessive.

The case law of the Court explicitly reveals such a distinction. For example, in the *Tyrer* case concerning judicial corporal punishment, while finding a violation of Article 3 of the Convention, the Court emphasized the nature of the punishment (flogging) and the age of the victim (male child). Moreover the Court specially emphasized the institutionalized nature of the punishment. Quite recently, in the *A v. UK* case, the Court held that, since the brutal effect of the treatment proved by the medical report, the treatment in question was excessive and therefore could not be accepted. In the latter case, the Commission also found a violation by recoursing relative approach. However, one of the Commissioner, Mr. Loucaides, in his concurring opinion, criticized the relativistic approach taken by the Commission and stated that it was not necessary to examine whether or not in the circumstances of the present case the corporal punishment inflicted on the applicant caused him physical injury, pain or any other effect so as to decide whether the punishment attained such a level of seriousness that it constituted degrading treatment within the meaning of Article 3. Mr. Loucaides further argued that

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corporal punishment is nothing less than a deliberate assault on a person’s dignity and physical integrity. (...) Beating any person as a method of punishment for whatever wrongdoing on his part (...) is nowadays an unacceptable form of punishment and it amounts in my view to inhuman and degrading treatment. The number, intensity or hardness of the strokes or the fact that they do or do not cause physical injuries are, in my view, immaterial factors in determining whether corporal punishment amounts to inhuman and degrading treatment. The nature of such punishment in itself is a sufficiently severe blow to and degradation of the personality of the individual as to amount to such treatment.

Moreover, he cited the relevant provisions of the Convention on the Rights of the Child and added that

this is indicative of the increasing supranational trend of rejecting and banning the use of physical violence against children in any form and for any purpose including punishment because of the inhuman nature of such violence. And I believe that it is high time to reconsider the existing approach regarding corporal punishment of children as established by the jurisprudence and to adopt the view that such punishment, regardless of the degree of its severity, is by its very nature inhuman and degrading treatment.17

When the case brought before the Court, it did not prefer to convert its approach to corporal punishment on the basis of Mr. Loucaides’ arguments. Accordingly, it accepted the validity of former judgments in which it did not find a violation of the Articles 3 or 8 of the Convention. In the Campbell and Cosans case, the Court stated that, although the threat of corporal punishment creates apprehension or disquiet, these two feelings do not reach the threshold. The Court observed that the mere existence of disciplinary legislation concerning corporal punishment provokes tension and alienation in a child but again these two were different categories from humiliation and degradation.18

17 A v. UK, (App. No.25599/94), Report of the Commission of 18 September 1997, Concurring Opinion of Mr. J. Loucaides. It should be noted here that Mr. Loucaides relied on the international instruments and domestic tendency. He did not take into account of the international case law standards since at that time international case law standards were not clearly established.

18 Campbell and Cosans v. UK, Judgment of 25 February 1982, Series A No. 48, paras. 26, 30. In this case the Court held that when the risk of being subjected to any treatment contrary to Article 3 is real and immediate, the mere exis-
Similarly, in the Costello-Roberts case, the spanking of a boy with gym shoes was not considered as a violation of Article 3. The Court held that, although the protection of the body (integrity of person) is also covered by Article 8 (private life aspect) of the Convention\(^ {19} \), this kind of corporal punishment, which was administered in private and consisted of three strokes and did not have any long term effect, did not fall within the scope of the said Article\(^ {20} \). One may argue that such an approach clearly indicates the Court’s different understanding of children rights, namely paternal, and its unwillingness to take into account of the supranational case-law standards in this particular context.

It can further be speculated that if corporal punishment is considered to fall within the ambit of Article 8 (if it is severe but not reach to threshold under Article 3), the limitation clause comes into the agenda.\(^ {21} \) Thus, mild/moderate/reasonable corporal punishment does not violate Art. 8 of the Convention per se as well.

The case law of the Court leaves room for inconsistent applications. In this regard, the Court has made a distinction with respect to Articles 3 and 8 between adults and children and this distinction

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19 While Article 3 seeks the minimum threshold in order to cover the treatment in question, Article 8 does not require any threshold. Therefore, it is possible to say that Article 3 can be considered as *lex specialis* of Article 8 with respect to the right to physical and mental integrity of person. Since Article 3 is *lex specialis*, the scope of protection is narrower than the Article 8’s scope of protection. Also see, Karl Hanson, *Violence against Children - The Debate on Corporal Punishment before the European Commission and Court of Human Rights (1978-1998)*, www.childrighteducation.org/english/hansonart.html, last date of access: 04/04/2003. In its recent judgments, the Court has confirmed its *lex specialis* approach. For example, with regard to ill-treatment allegations occurred in a state penal institution, the Court stated that “(t)here may therefore be circumstances in which Article 8 could be regarded as affording protection in respect of conditions of detention which do not attain the level of severity required by Article 3”. See, *D.G. v. Ireland*, App. No.39474/98, Judgment of 16 May 2002, para.105. With regard to sexual abuse of children see, *D.P. and P.J. v. United Kingdom*, App. No.38719/97, Judgment of 10 October 2002, para.118-119.


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is different from the distinction legitimately used in the identification of threshold. Thus, one may ask whether this distinction is considered as discrimination on the ground of age since corporal punishment applied to children cannot be categorically challenged under the Convention. At this point, it is also worth mentioning the applications brought by parents who alleged that the ban of their right to chastisement was in breach of the Articles 8 (respect for family life), 9 (right to religion) and Article 2 of the Protocol 1 (right to education) to the Convention. Strasbourg institutions, particularly the Commission has stated that the ban of corporal punishment did not constitute an interference with said Articles and accordingly was not in breach of the Convention. A strange situation, thus, exists. On the one hand, the domestic legal right to chastisement or to administer mild corporal punishment, if available, does not violate any child right set forth in the Convention. On the other hand, the domestic ban of the right to chastisement does not violate any parental right included in the Convention. It is paradoxical that none of these two entirely opposite propositions (right to chastisement and ban of right to chastisement) are in violation of Convention.

On the basis of the Strasbourg institutions’ approach, one may ask when it is permissible for parents to smack their children? In this case, how many slaps are enough to establish the violation of the Convention? Or is it enough to establish the violation when the face of the child becomes flushed? Or is it possible to accept to use violence on babies? Who draws a distinction between moderate/mild/reasonable use of corporal punishment and excessive ones,

22 As stated by Mr. Pinheiro, Independent Expert for the UN Secretary-General’s study on violence against children, “how can hitting children be ‘reasonable’? We should all be ashamed that many states grant children less legal protection from physical violence than adults”. See, statement by the Independent Expert, Mr. Paulo Sérgio Pinheiro to the Europe and central Asia regional consultation for the United Nations Secretary-General’s study on violence against children, 5 July 2005, Ljubljana, www.violencestudy.org (last access: 15/03/2006).

It should be noted here that the Committee on the Rights of the Child, as early as 1994, has stated the discriminatory character of the corporal punishment of children on the basis of age under Article 2 of the Convention on the Rights of the Child, which prohibits discrimination. See, Bitensky, supra note 2, at 398-399.

and how? It should be recalled that it is always possible to cause dangerous effects on the health of the victim by administering corporal punishment. It may rightly be argued that mental or emotional effects of corporal punishment are not properly considered by the Court.

Moreover, the ability and capacity of the European judge in assessing the degradation or humiliation degree of the treatment in question should be questioned. In the Tyrer case, it is held that it is enough that the victim is humiliated in his/her own eyes, even if not in the eyes of others. It is highly uncertain that how the European judge, whose age and upbringing conditions are entirely different from the victim child, can assess with enough sensibility whether the child humiliates with his/her own eyes. One may cite the dissenting opinion of Judge Fitzmaurice in Tyrer case in this context. Judge Fitzmaurice reminded his upbringing conditions and added that conditions of execution of corporal punishment were unhealthier than those of Tryer’s punishment. Despite these disadvantaged conditions, he emphasized that neither he nor his friends felt degraded or debased. Furthermore, one should remind the male dominant gender profile of the Court in assessing feelings or emotions of the girl victims.

In short, sense of children’s rights is lacking in the European Court’s relevant jurisprudence. As Bitensky has rightly stated as a conclusion that “article 3 of the European Convention has given rise to an adjudicative approach that may reflect normative tension and transition. The case law reveals that the European Court of Human Rights and the European Commission of Human Rights have read article 3 to tolerate some milder or less degrading corporal punishments. (…). It is, therefore, an open question whether the court will find in a future case that all corporal punishment children violates article 3 regardless of the severity of the punishment.”

24 British politicians abused the inconsistency of Court and tried to enforce the mild use of corporal punishment as legal. For the concrete examples, see, Anne McGillivray, ‘He’ll learn it on his body’: Disciplining childhood in Canadian Law, 5 International Journal of Children’s Rights 193, at 238-239 (1997); Jane For tin, supra note 9, at 361.
25 Tyrer case, para. 32.
26 He, therefore, implicitly found the conclusion of the majority “ridiculous”. See, dissenting opinion of Sir Gerald Fitzmaurice, para. 12. His dissent was annexed to the main Tyrer judgment.
27 It should be noted that last two paragraphs’ intention is to show the European Court’s inconsistency. The adverse affects of corporal punishment are not decisive in the argumentation of this paper.
28 Bitensky, supra note 2, at 411-412. See also, Bitensky, supra note 9, at 157.
II) The Basis of Transformation

In order to suggest proper solution to the theoretical weaknesses of the European Court of Human Rights' relativistic approach to corporal punishment cases, one may consider supranational human rights case law standards as a transformer. This Part of the study, therefore, discusses the interpretative methods the Court employ to modify its precedents and, tries to find whether and under what circumstances these interpretative methods must require the Court to follow the jurisprudence of other supranational human rights supervisory bodies on a particular subject.

Although the methods of interpretation used by the Court are generally classified under different names, such as, textual interpretation of the Convention, teleological interpretation, evolutive/dynamic interpretation, autonomous meanings of the Convention terms, it is also possible to accumulate these methods into two main category for the purposes of identifying the potential role of supranational human rights supervisory bodies in transforming the European Court’s precedents.

A) The Principle of Effectiveness

The principle of effectiveness is one of the main principles in interpreting the Convention by the European Court. According to this principle, the Convention creates real rights not illusory and theoretical ones. To a certain extent, Article 34 of the Convention


provides a normative basis for deriving such a principle. Article 34 states that Contracting Parties should not in any way restrict the effective implementation of right to complaint. By analogy, this procedural effectiveness rule may also be applicable in substantial issues and thus requires applying Convention rights effectively. Moreover, the Contracting States emphasized their intention to render/make human rights enforceable in the Preamble. It follows that, the principle of effectiveness has been become an interpretive means in order to provide the compliance with the object and purpose of the Convention. As the Court stated very recently, “the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications”.

The principle of effectiveness is contrary to formalism. According to this principle, the limitations of rights and reservations to a treaty should be narrowly interpreted. On the other hand, the scope of the rights should be widened as much as possible to the extent to derive positive obligations of the State under the Convention rights. Furthermore, this principle necessitate for the Court to take into account of the special circumstances of the applicant and the case.

The principle of effectiveness, however, cannot provide a basis for unlimited interpretations. Although the principle restricts the margin of appreciation of State Parties, it does not entirely abolish it.

**B) Evolutive/Dynamic Interpretation: A Reference to National and Supranational Standards**

The second approach regarding the interpretation of the Convention is evolutive/dynamic interpretation. This approach was first introduced into the reasoning of the Court through *Tyre* case, which dealt with corporal punishment of minors.

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31 Ost, supra note 29, at 294; Harris *et al*, supra note 1, at 15; Merrills, *supra* note 29, at 76-77, 98. It is also worth mentioning that one can also consider teleological interpretation as evolutive interpretation in determining “present day conditions”. It is hard to draw clear distinctions between methods of interpretation used by the Court. See, literature cited supra note 29.


33 Ost, *supra* note 29, at 303; Merrills, *supra* note 29, at 98.

34 *Mowbray*, *supra* note 10, at 75-78.

35 *van Dijk - van Hoof*, *supra* note 29, at 74-75.
The basic method of evolutive interpretation is to make reference back to national legal systems of the State Parties. As the Court has stated in *Tyrer* case, “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.” By doing this, the Court seeks whether or not an emerging trend, which indicates a consensus between member States of the Council of Europe, exists on the subject matter before it. Consensus is one of the objects set forth in the Preamble. A State Party that breaches the consensus is found in violation of the Convention. If no consensus exists, the margin of appreciation is relatively wide.

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36 *Tyrer* case, para. 31.
37 In some cases, the Court also includes information concerning other domestic legal orders outside the Europe. See, *Goodwin v. The United Kingdom*, Application No. 28957/95, Judgment of 11 July 2002, paras. 55-57. At para. 58, the Court also made reference to the Article 9 of the Charter of Fundamental Rights of the European Union of 2000. Also see, *Hirst v. The United Kingdom* (No.2), GC, Application No. 74025/01, Judgment of 6 October 2005, paras. 35-39.
38 Thomas A. O’Donnel, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HRQ 474, at 479-484 (1982); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht 240, 279-280, 306-307 (1996). Although “comparative method” has been frequently used by the Court, it has been critised as being superficial. In this regard, the lack of certain criteria for the selection of States for comparison, lack of the collection of empirical data and proper analyses of it and lack of the quantitative element which indicates whether a consensus exists would undermine the credibility of the comparative activity. As Brems put at page 285 of her study, “[(i)ke for margin analysis in general, the Court should elaborate a methodology for its consensus analysis, identifying criteria that play a role, in order to increase the transparency and predictability of its approach].” Also see, Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell International Law Journal 133 (1993); Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 Notre Dame Law Review 1217 (1998).
39 The Court has stated that “[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”. *Ireland v. UK*, Judgment of 18 January 1978, para. 239; *Mamatkulov and Abdurahulov Askarov v. Turkey*, GC, App. Nos. 46827/99 and 46951/99, Judgment of 04/02/2005, para. 100.
and therefore the possibility of the compliance with the Convention is wider.\textsuperscript{40}

The method, which is also known as "comparative method"\textsuperscript{41}, is very useful in order to describe the present-day conditions with regard to subject matter before the Court.\textsuperscript{42} The reference to national legal or societal order of member States of Council of Europe in interpreting and applying the Convention has its source in the principle of subsidiarity.\textsuperscript{43}

In short, the dynamic interpretation ensures that the Convention is a living instrument. This means "that certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture or as outside the minimum level of severity may be classified differently in future". Therefore, the Court has held that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."\textsuperscript{44}

\textsuperscript{40} See, \textsl{Rees v. UK}, (No.2/1985/88/135), Judgment of 17 September 1986, Series A No.106, para.37. See also, O'Donnel, \textsl{supra} note 38, at 479; Bernhardt, \textsl{supra} note 29, at 67 and decisions cited in fn. 6 and 7; Helfer, \textsl{supra} note 38, at 141; Eval Benvenisti, \textit{Margin of Appreciation, Consensus and Universal Standards}, 31 New York University Journal of International Law and Politics 843, at 851 (1999) ("In the jurisprudence of the ECHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions").

\textsuperscript{41} Cf. Carozzo, \textsl{supra} note 38, at 1219 and fn. 8 (He has not considered this activity of the Court as "method" or "analysis" since he argued that "there appears to be little analysis and even less method involved").


\textsuperscript{44} See, \textit{mutadis mutandis}, \textsl{Selmouni v. France}, Application no. 25803/94, Judgment of 28 July 1999, para. 101. According to Mowbray, "the judgment in Selmouni reveals that the 'living instrument' doctrine can be used to update the application of Convention rights to reflect modern, higher expectations of member States". Mowbray, \textsl{supra} note 10, at 64.
The second aspect of the application of dynamic interpretation is to make reference to international norms and case law. This kind of reference to international norms and case law can easily be considered natural. Firstly, several provisions of the Convention, including the Preamble, make reference to international law.

Secondly, Article 53 (formerly 60) of the Convention imposes a limitation on the interpretation of the ECHR. According to this provision, which is known as “no-pretext” or “most-favourable-treatment” clause, “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” The principal addressee of mentioned Article is domestic authorities, especially domestic tribunals. Therefore, if a State Party has also ratified any other human rights instruments which are wider in scope than the ECHR, such as the Convention on the Rights of the Child, that State Party is bound by the provisions of the latter. Although this does not mean that the Court can supervise the compatibility of State Parties’ acts or omissions under the

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45 Matscher, supra note 29, at 63-81. For the Court’s reference to international instruments in the margin of appreciation context, see, Brems, supra note 38, at 286-288.

46 Articles 7/1, 15/1, 35 (former 26), Protocol No.1 Article 1.

47 Almost all international human rights instruments have similar provisions. For example, Art. 5(2) of International Covenant on Civil and Political Rights, Art. 29(b) of Inter-American Convention on Human Rights, Art. 32 of European Social Charter.

48 Thus, it is possible for the applicants to raise allegations concerning the violation of Article 53 (formerly 60) of the Convention. But only in a few cases, the applicants invoked that Article. The Court generally did not make any clear assessment with regard to parties’ submissions concerning Article 53, or did decide that other articles have absorbed the allegations concerning Article 53. See, Yakovlev v. Russia, App. No. 72701/01, Admissibility Decision of 19 October 2004 and Judgment of 15 March 2005 (under Article 6, not clear); Ocone v. Italy, App No. 48889/99, Admissibility Decision of 19 February 2004 (under Article 13); Piscane v. Italy, App No. 70573/01, Admissibility Decision of 9 February 2004 (under Article 13).

On the other hand, Article 53 may provide a defense for the respondent Governments. In some cases, Governments tried to respond the allegations of the applicants by referring to Article 53 (formerly, Article 60). Strasbourg organs did not clearly deal with the Governments’ arguments and make any description on the nature of mentioned Article. See, Evert A. Alkema, The Enigmatic No-pretext Clause: Article 60 of the European Convention on Human Rights, in Essays on the Law of Treaties-A Collection of Essays in Honour of Bert Vierdag 41-56, at 46-48 (Jan Klabbers-René Lefeber eds., 1998).
latter human rights instruments\(^{49}\), at least by analogy and since the aim of the Article is to protect human rights as possible as coherent, it provides a basis for making a reference to relatively wider provisions of the other instruments and case law for the purposes of interpreting the European Convention itself.\(^{50}\)

Moreover, Article 31/3 (c) of the Vienna Convention on the Law of Treaties of 1969 envisages that during interpretation any relevant rules of international law\(^{51}\) applicable in the relations between the parties shall be taken into account.\(^{52}\) Since supranational human rights law is an integral system, and since most of the Convention rights are also included by other major human rights instruments and there is growing jurisprudence on those rights through the activities of relevant supervisory bodies, it can fairly be suggested to

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\(^{49}\) Alkema, supra note 48, at 44 (“Neither can Article 60 have the effect that supervisory body of one treaty is obligated to apply the more favourable norms of another treaty”).

\(^{50}\) See in this line J. De Meyer, “Brèves réflexions a propos de l’Article 60 de CEDH”, in F. Matscher H. Petzold (eds.), Protecting Human Rights: The European Dimension, Studies in Honour of Gerard J. Wiarda, 125-129 (1988), quoted in Alkema, supra note 48, at 44. According to Alkema’s research on the operation of Article 53 of ECHR, there is no case-law of the Court as proposed as of 1998. My research confirmed his observation and has revealed that from 1998 to 2005 there is no case-law as well. Cited case-law in supra note 48 reveal that the Court has not yet used Article 53 in such a way proposed in the main text of this Study.

It should be noted that the Inter-American Commission on Human Rights has gone further than this proposal. The Inter-American Commission has used, among others, Article 29 (b) of the Inter-American Convention on Human Rights, which is identical to Article 53 of the European Convention on Human Rights, in directly applying provisions of international humanitarian law conventions, rather than in interpreting the Inter-American Convention (See, Abel-la v. Argentina, Case No.11.137, 18 November 1997, Report No. 55/97, Annual Report of the IACHR 1997, para.164-165). The Inter-American Court of Human Rights, however, rejected Commission’s that argumentation (See, Las Palmaras case, Preliminary Objections, Judgment of 04/02/2000, para.28-34). Hence, it is possible to argue that the Inter-American Court leave room for interpreting the Inter-American Convention in the light of other supranational human rights instruments and case-law under Article 29 (b) of the Inter American Convention.

\(^{51}\) In his very recent and detailed study, McLachlan states that “(t)he formulation refers to rules of international law in general. The words are apt to include all of the sources of international law, including custom, general principles, and, where applicable, other treaties;” (emphasis added). See McLachlan, The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention, 54 ICLQ 279, at 290 (2005).

\(^{52}\) As Orakhelashvili rightly states that “(i)t is a method that has been neglected both in the ‘doctrine’ and in practice over the decades”. Orakhelashvili, supra note 29, at 536. See, also, Gemalmaz, supra note 5, at 73.
use related instruments and jurisprudence in the determination of the scope of rights set forth in the ECHR.\(^{53}\)

Likewise, the European Court of Human Rights continuously refers to either supranational norms\(^{54}\) or case law standards.\(^{55}\) For example, in order to solve the question of applicability of the exhaustion of domestic remedies rule in the context of inter-state

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53 Empirical data provided by late Professor Charney can be considered as a strong support to this kind argument which is based on Article 31/3 (c) of the Vienna Convention on the Law of Treaties. He observed that most of the international tribunals, including European Court of Human Rights and Inter-American Court of Human Rights, have adopted similar reasoning on the several issues of international law (treaty interpretation and reservations, sources of international law, state responsibility, compensation for violations, exhaustion of local remedies, nationality and international maritime boundaries) even in the absence of explicit reference to the decisions of other tribunals. He concluded that “... these tribunals are clearly engaged in the same dialectic. The fundamentals of general international law remain the same regardless of which tribunal is deciding the issue.” See, Jonathan I. Charney, Is International Law Threatened by Multiple International Tribunals?, 271 Recueil des Courses 101, 347 (1998).


Moreover, it should be noted that despite the Court’s reference to the relevant Articles of the Convention on the Rights of the Child with regard to corporal punishment in A v. UK case, it failed to state that corporal punishment is in breach of the ECHR \textit{per se}. Accordingly, one can conclude that the Court could not use the opportunity to convert its previous approach to corporal punishment. Cf. Kilkelly, supra note 11, at 318-319.

55 The judgments which will be given as examples in the main text are selected with a view to identify the transformation/modification process of the precedents of the European Court of Human Rights. The European Court’s other judgments in which references made to other supervisory bodies’ jurisprudence will not be indicated since they are not directly connected to the modification of its precedents. Main reason of European Court’s reference to this jurisprudence is to support its line of reasoning. In his recent article, Nathan Miller has revealed the interaction between nine judicial or quasi judicial bodies, including European Court of Human Rights. According to his research, as of 2002, the European Court of Human Rights has referred to the decisions of other tribunals in eight instances. See, Nathan Miller, An International Jurisprudence? The Operation of “Precedent” Across International Tribunals, 15 Leiden Journal of International Law 483, at 489, 503 (2002).
cases, the Court explicitly referred to the International Court of Justice judgments.\footnote{Austria v. Italy, Yearbook, Vol.4, p. 148. Merrils argues that “since the protection of human rights is relatively recent development in international law and has been mainly brought about by treaty, the majority of references to general international law in the Court’s case-law have concerned points of jurisdiction or procedure”. Merrils then added rare examples in which references to general international law by the Court can be found as to the merits of the case before it. Merrils, supra note 29, at 203, 205.}

In the Lithgow case, as to the question of calculation method of valuation of the nationalized property, the Court held that there was no standardized practice international case law on the issue of valuation of nationalized property in question.\footnote{Lithgow and others, Series A No. 102, para. 134.} The Court, thus, leaves room in order to accept the decisive role of the international/supranational uniform case-law practice as a basis of its judgment on the merits.

Similarly in the Cruz Varas case, the Court, among others, mentioned the existing case-law concerning binding effect of interim measures. Since the Court observed that at the relevant time there was no existing case-law standards on the binding force of interim measures indicated by international human rights organs, it concluded that the interim measures indicated by the European Commission on Human Rights could not be regarded binding upon States.\footnote{Cruz Varas et al. v. Switzerland, App. No.155576/89, Judgment of 20 March 1991, Series A. 201, para. 97-104, 101 ("the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform rule exists").}

On 06/02/2003, the Court has changed its precedent.\footnote{Since the Court stated that former case law of it dealt with the interim measures indicated by the European Commission on Human Rights, technically speaking, the rule established in the Cruz Varas case is still authoritative.} In the case of Mamatkulov and Abdurasulovic Askarov v. Turkey\footnote{Mamatkulov and Abdurasulovic Askarov v. Turkey, First Section, App. Nos. 46827/99 and 46951/99, Judgment of 06/02/2003. On 04/02/2005, Grand Chamber approved the judgment of First Section under this statement: “The Court reiterates in that connection that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which states that account must be taken of “any relevant rules of international law applicable in the relations between the parties. (...) Thus, the Convention must be interpreted so far as possible consistently with the other principles of international law of which it forms a part. (...).”. Mamatkulov and Abdurasulovic Askarov v. Turkey, GC, App. Nos. 46827/99 and 46951/99, Judgment of 04/02/2005, para. 111.} the First Section of the Court reviewed the existing case law standards

\footnote{On 06/02/2003, the Court has changed its precedent. In the case of Mamatkulov and Abdurasulovic Askarov v. Turkey the First Section of the Court reviewed the existing case law standards...}
concerning interim measures in very detail (paras 39-52). According to the Court, “the Convention must be interpreted so far as possible consistently with the other principles of International Law of which it forms a part”. Since it observed that all other major human rights bodies give interim measures binding force upon States and all of their reasoning is almost identical, the Court accepted the binding force of interim measures (paras. 101-103).

Following this judgment, the Court reaffirmed its approach concerning relationship between fair trial guarantees and death penalty. In the Öcalan case on 12/03/2003, one month after the Mamatkulov and Abdurasulovic Askarov v. Turkey, the First Section of the Court, among others, widely inspired by the supranational human rights case law as to the validity of imposition of the death penalty in the context of Articles 2 and 3 by violating fair trial guarantees under Article 6 (paras 60-64). Having referred to the existing case-law of Human Rights Committee and Inter-American Court of Human Rights (para. 203), the First Section of the Court first stated that “to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed” and accordingly held that “the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment” (paras. 199-213).

C) Interim Result and Discussion

In the light of the above analyses of the underlying principles and the existing case law, two processes can be concluded. i) decision making process which can be properly called as “jurisprudential interaction or reciprocal influence” ii) process of the harmonization of the law of human rights instruments which can be properly called “jurisprudential standardization”.

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62 The Court also has made references to domestic developments observed in the member States of CE and other non-binding soft law instruments both in the international and regional level.
63 On 12 May 2005, the Grand Chamber explicitly reaffirmed First Section’s this kind of interpretation of the Convention. Öcalan v. Turkey, Grand Chamber, Application no. 46221/99, Judgment of 12 May 2005, paras. 60, 166-175.
64 Growing literature on this “jurisprudential interaction and standardization” can be observed. Although the terms used vary depending on the authors, all of them confirm this development. See, Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 University of Richmond Law Review 99, 103-106 (1994) (horizontal communication between supranational judicial bodies); Thomas Buergenthal, Proliferation of International Courts and Tribunals:
Naturally, to recourse the jurisprudence of supranational human rights law in order to transform the precedents and approach of the European Court is not an unlimited doctrine. When there is a tension between the approach and judgments of the European Court and other supervisory bodies’ jurisprudence on a particular subject which cannot be settled by mere reinterpretation of these opposite jurisprudence, jurisprudential interaction and standardization should meet two requirements: clear establishment and widespread acceptance.

Some methodological elements pertaining to clear “establishment and widespread acceptance” can be identified: First element is institutional. In this regard, the primary problem is determining the supervisory bodies which are to be considered as a part of supranational human rights law. Since it is assumed that human rights are universal, any supervisory body can be taken into account regardless of its location and jurisdiction (general or specific). Moreover, it will be better if it can be established that the diversity of underlying principles governing different bodies at different regional and international levels do not make any significant difference in determining any particular issue’s compatibility with human rights. As the rights of children have been protected by all human rights treaties both general and specific in nature, supervisory bodies of these treaties may rule on any aspect of the children rights. Therefore, it is impossible to exclude any supervisory body, and consequently jurisprudence of any of them must be surveyed with regard to subject in question. However, specific supervisory bodies should be given priority in the process of searching, and particular weight has to be given in assessing the transformative value of their jurisprudence, since, at least as a presumption, such bodies are specialized ones on a particular subject. When the children rights are in question, attention should be given to the jurisprudence of

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Orakhelashvili has put the similar requirement with regard to a specific case (Al-Adsani), by stating that “(t)he existence of legal rules can not, however, be assumed; it must be established through clear and concrete evidence”. See, Orakhelashvili, supra note 29, at 557.
the Committee on the Rights of the Child under the Convention on the Rights of the Child since it is a specialized institution and its jurisdiction covers almost all over the world.

One potential problem, however, may arise on whether the scope of the term “jurisprudence” covers quasi judicial and non-judicial (but not political) supervisory bodies’ activities. What kind of outcomes or activities could be regarded as forming “jurisprudence”? Does “jurisprudence” include activities, such as, “decisions”, “concluding observations”, “general comments/recommendations”, “advisory opinions”, other than “judgments”? When the current structural and procedural development of the supranational human rights law is taken into consideration, it is fair to suggest that both quasi judicial and non-judicial supervisory bodies should be given an authority to establish “jurisprudence” within the meaning of supranational human rights law. In some recent cases, it is possible to observe the Court’s explicit references to the general comments and concluding observations/comments of the certain UN Treaty Bodies. Although these European Court judgments did not pertaining to the modification of its precedents and accordingly, references to general comments and concluding comments did not play a transformative role, these references, nevertheless, may be considered as a clue for determining the scope of the term “jurisprudence” within the meaning of supranational human rights law. It follows that, “decisions”, “concluding observations”, “general comments/recommendations”, “advisory opinions” are to be considered as adequate to constitute “jurisprudence”.

Second element is related to the quality of the jurisprudence. The jurisprudence of supranational human rights law on the subject in question with which the European Court should follow must be obvious; there should not be any dispute on the substance of the issue, it should not be possible to interpret this jurisprudence differently.

Third element is quantitative. This element refers to the number of supervisory bodies which the Court should take into account.

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66 For example, in the Hirst case, the Court made reference to the General Comment No. 25(57) of the Human Rights Committee (Hirst v. The United Kingdom (No.2), Application No. 74025/01, GC, Judgment of 6 October 2005, paras. 26–27). Similarly, in the Tekeli case, the Court mentioned the accumulation of some concluding comments of the Committee on the Elimination of Discrimination against Women (CEDAW) concerning women’s family name in the event of marriage (Unal Tekeli v. Turkey, Application No. 29865/96, Judgment of 16 November 2004, para. 31).
Let’s concretize the quantitative element: Should the European Court of Human Rights require full jurisprudential standardization which means that all relevant supervisory body (except the Court) should come to the same conclusion as to whether corporal punishment of children violates human rights of children *per se*. Or, is it enough to establish that the majority of the supervisory bodies rule that corporal punishment violates human rights of children *per se*? In that case, how many of them are considered sufficient to establish the jurisprudential standardization?

The European Court’s judgments do not shed light on this issue. While in some cases the Court relied on the jurisprudence of five supervisory bodies, in other cases it is seen that the Court relied on jurisprudence of only two bodies. Thus, it is not easy to identify the level of numeric requirement which the Court seeks in order to modify its own judgments. As I put before, other judgments in which the Court made reference to other tribunals’ decisions are not significant here since these judgments did not pertaining to the transformation of former precedents of the Court. In any case, the numeric requirement does not constitute an obstacle for my argumentation since at least five supervisory bodies establish the jurisprudential standardization on corporal punishment of children as shown in the following Part.

Once these three requirements have met, the European Court of Human Rights is forced to change its jurisprudence/precedents. When jurisprudential interaction and standardization are used inconformity with mentioned requirements, they may render the determination and assessment process of the Court on a particular issue more objective. Therefore, it can fairly be argued in the light of the cited judgments of the European Court that the effect of the supranational case-law goes beyond “persuasive authority” and

67 *Mamatkulov and Abdurasulovic Askarov v. Turkey*, First Section, App. Nos. 46827/99 and 46951/99, Judgment of 06/02/2003, paras. 45-51 (The Court gave examples from the jurisprudence of Human Rights Committee, Committee against Torture, Inter-American Court of Human Rights and Inter-American Commission of Human Rights and International Court of Justice. It should be emphasized that International Court of Justice is not a human rights body in principle, although some cases before it include human rights dimension. Another important facet of European Court’s survey is the diversity of selected systems. European Court’s selection covers both regional and international systems.).


69 It is generally accepted that reference to the judgments and decisions of the other supervisory institutions has the effect of “persuasive authority”. See,
has at least reached the degree of “decisive authority”, if it cannot be called as “coercive authority”. As Trindade has put, “(i)nterpre-
tive interaction has, in a way, contributed to the universality of
the treaty law on the protection of human rights. This has paved
the way for a uniform interpretation of the corpus juris of contem-
porary international human rights law” (emphasis original). As a
result, it is unavoidable for the Court to modify or transform the
old-fashioned understandings and consequently judgments.

In short, it may be suggested that the Convention should so far as possible be applied and enforced in harmony with other rules and especially with jurisprudence of supranational human rights law of which it forms part, including to those relating to the protec-
tion of children against corporal punishment.

III) Sufficiency of Supranational Case-Law Standards as a Transformer

Having described the circumstances under which the supra-
national case law standards play a transformative role, it is time to focus on the relevant jurisprudence of other supervisory bodies. Accordingly, the following Part of the Study shall discuss whether mentioned jurisprudence is sufficient to activate the jurispruden-
tial interaction and standardization.

A) Jurisprudence of the Committee on the Rights of the Child

The Convention on the Right of the Child\(71\) (herein after referred to as CRC) is the most comprehensive international instrument which covers rights and freedoms of children. It not only includes civil and political rights (also known as “first generation rights”) but also covers economic, social and cultural rights (also known as “second generation rights”). The components of these rights, especially second generation rights, have been strengthening by some elements of third generation rights. Instead of this classical

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Slaughter, supra note 64, at 124.

Trindade, supra note 64, at 312. Thomas Buergenthal provides similar expla-
nation in the context of proliferation of international tribunals. He argues that each tribunal has an obligation to take into account of the case law of other institutions and to be open to jurisprudential interaction. According to him, when a court is not going to follow the others’ jurisprudence, it should give proper reasons for it under the terms of generally accepted methods of interna-
tional legal analysis and discourse. See, Buergenthal, supra note 64, at 274.

Adopted and opened for signature, ratification and accession by General As-
sembly resolution 44/25 of 20 November 1989; entry into force 2 September
1990, in accordance with article 49.
classification of rights, it is possible to classify those rights differently by taking into account of the peculiarities of children: survival rights, membership rights, protective rights and empowerment rights.\(^\text{72}\) Therefore, CRC deals with corporal punishment within the framework of its several provisions on different categories. These categories have been connected to each other through the monitoring activity of the Committee on the Rights of the Child. The first and main provision is Article 19, which states:

**Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

As seen, the scope of the provision has been much widened since its aim is to prevent child abuse.\(^\text{72}\) In short, Article prohibits all forms of violence. By its very definition, corporal punishment is a form of violence and accordingly, falls within the ambit of this Article. Therefore, Article 19 of the CRC prohibits corporal punishment categorically, as it includes “all forms violence”\(^\text{74}\) and as applied by the Committee on the Rights of the Child. In June 2006, by adopting a specific General Comment No. 8 concerning “The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment”, it stated that “(t)here is


\(\text{74}\) Bitensky, *supra* note 2, at 394. She has written that “article 19, paragraph 1 prohibits parental corporal punishment of children would seen evident as semantic matter since the provision requires nations to protect children against ‘all forms of violence’”. According to the author, Article 19(1) of the CRC draws a distinction between “injury and abuse” and “other forms of violence”.
no ambiguity: “all forms of physical and mental violence” does not leave room for any level of legalized violence against children.”\textsuperscript{75}

The second provision concerning corporal punishment of minors has been set forth in the Article 28 (2) of the CRC. This Article limits school discipline. According to mentioned provision “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention”. The Committee on the Rights of the Child accepts the idea that corporal punishment is not in conformity with the human dignity of the child. In its General Comment No. 1 concerning “Objects of Education”, the Committee stated that corporal punishment per se is in contradictory with the dignity of child. According to the Committee, “(c)hildren do not lose their human rights by virtue of passing through the school gates. (…) Education must also be provided in a way that respects the strict limits on discipline reflected in article 28 (2) and promotes non-violence in school. The Committee has repeatedly made clear in its concluding Observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline. Compliance with the values recognized in article 29(1) clearly requires that schools be child-friendly in the fullest sense of that term and that they be consistent in all respects with the dignity of the child”.\textsuperscript{76}

\textsuperscript{75} General Comment No. 8 of the Committee on the Rights of the Child, CRC/C/ GC/8, Advanced Unedited Version, June 2006, at para. 18.

See, also former statements of the Committee, Concluding observations of the Committee on the Rights of the Child with regard to Initial Report of the United Kingdom, CRC/C/15/Add.34, 27/01/1995, para.16 (For analyses see, Ursula Kilkelly, The UN Committee on the Rights of the Child-an evaluation in the light of recent UK experience, 8 Child and Family Law Quarterly105-120 (1996); Peter Newell, Ending physical punishment of children, 5 The International Journal of Children’s Rights 129, at 132-133 (1997). It should be noted that in the A v. UK, the European Commission on Human Rights referred to the Child Committee’s Concluding Observations.).


\textsuperscript{76} HRI/GEN/1/Rev.5, para. 8, pp. 255-262, reproduced in Hodgkin-Newell, supra note 75, at 434-437.
In this context, it should be reminded that European Court made a reference to Article 28 (2) of the CRC in the case of Costello-Roberts with regard to responsibility of the state concerning corporal punishment in the private schools – horizontal effect of ECHR. However, the European Court did not refer to the same Article in the merits of its judgment and did not find a violation.\textsuperscript{77}

The third norm of the CRC concerning corporal punishment is Article 37 (a), which reads as follows:

\textbf{Article 37}

States Parties shall ensure that:

\textbf{(a)} No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (...).

This provision covers the classical prohibition of torture and other ill treatments. The difference between Article 19 and Article 37 (a) is application time and place. While Article 19 is in the first place applicable in situations of domestic violence, Article 37 (a) is applicable in situations of state/public violence.\textsuperscript{78}

Article 19 of the CRC is also applicable in school disciplinary proceedings since Article 28 (2) refers to the human dignity of the child and others rights in the CRC.\textsuperscript{79} With regard to human dignity of child, Bitensky has argued that corporal punishment raises violations of another articles: Article 2 which prohibits discrimination, Article 3 which declares that “(i)n all actions concerning children...”\textsuperscript{77} (No. 89/1991/34/414), Judgment of 25 March 1993, para.27.

\textsuperscript{78} For example, see the Committee’s Day of General Discussion on “State Violence against Children” and “Violence against Children, within the family and in schools”. For extracts and assessment see, Hodgkin-Newell, \textit{supra} note 75, at 261–262, 265–266. Also see, CRC/C/15/Add.152, 9 July 2001, \textit{Concluding Observations of the Committee on the Rights of the Child: Turkey}, para.39, 45–48, www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15/Add.152 (last access: 25/11/2001). Expressions of the Committee in its recent General Comment on corporal punishment support this distinction since it considers Article 19 as a complementary element of Article 37. The Committee also has stated that although legislation of many States incorporated Article 37 into domestic law under the terms of child protection laws which render “ill-treatments” or “abuse” or “cruelty” an offence, such legislative developments do not generally guarantee the child protection against all forms of corporal punishment and other cruel or degrading forms of punishment, in the family and in other settings. See, General Comment No. 8 of the Committee on the Rights of the Child, CRC/C/GC/8, Advanced Unedited Version, June 2006, at paras. 18, 30.

\textsuperscript{79} The Committee on the Rights of the Child requests the State Parties to indicate what kind of specific measures they take in order to eliminate disciplinary measures contrary to Articles 19, 37 (a) and 28 (2). See, UN Doc. CRC/C/58, 1996, p. 32, para.109.
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(...) the best interests of the child shall be primary consideration”, Article 12 which set forth the principle of participation of children and Article 24(3) which provides that “State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. 80

B) Jurisprudence of the Other Human Rights Monitoring Bodies

Beside the CRC, there are several human rights instruments, which are considered as prohibiting corporal punishment per se by relevant monitoring bodies. Surprisingly, except the Convention against Torture81, all other instruments, which prohibit corporal punishment, are related to economic, social and cultural rights.

The Committee against Torture (CAT) has held that corporal punishment of children is not in conformity with Article 16 of the Convention against Torture which prohibits other forms of ill-treatments rather than torture. In its concluding observations, the CAT suggests State Parties to abolish corporal punishment either as a judicial or as a disciplinary sanction.82

In its General Comment No. 13 of 1999, Committee on Economic, Social and Cultural Rights—monitoring organ of International Covenant of Economic, Social and Cultural Rights (ICESCR)83, 80 Bitensky, supra note 2, at 398-400.

81 Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984; entry into force 26 June 1987, in accordance with article 27/1.

82 See, Summary record of the first part of the 133rd meeting: United Kingdom of Great Britain and Northern Ireland. 08/02/93, CAT/C/SR.133. (Summary Record), para.7-8; Concluding observations of the Committee against Torture (Dependent Territories): United Kingdom of Great Britain and Northern Ireland, 26/06/93, A/48/44, para. 275, 282; Concluding observations of the Committee against Torture: Canada. 26/06/93, A/48/44, para. 298, 307.

In fact, the attitude of the CAT with regard to corporal punishment of minors does not clear. The expressions used in its reports, however, provide a basis to conclude that it prohibits corporal punishment per se. In this context it should be noted that the CAT does not make any emphasis to the distinction between mild/moderate and excessive corporal punishment. Moreover, the CAT requires State Parties to indicate what kind of measures they take in order to abolish corporal punishment at home and schools. See in this line Bitensky, supra note 2, at 407. The personal attitudes of the members of the CAT also support this kind of thinking. Some the members have stated that corporal punishment could not be accepted as a legitimate measure under the Convention against Torture. See, Bartman, supra note 12, at 295 and fn. 76.

83 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27.
referring to guiding principle of international human rights law indicated in the preambles of the Universal Declaration of Human Rights, ICCPR and ICESCR, held that corporal punishment is in violation of the individual human dignity.\textsuperscript{84} According to the Committee on Economical, Social and Cultural Rights, State Parties should establish a disciplinary regime compatible with the ICESCR both in public and private schools.\textsuperscript{85}

Similarly, European Social Charter of 1961\textsuperscript{86} and Revised European Social Charter of 1996 should be mentioned in this context. Especially Article 17 (2) of the Revised European Social Charter set forth protection for children in education. The monitoring body of both Charters, namely Independent Experts of European Social Rights Committee interprets this provision on various occasions. According to the Independent Experts, Article 17 of the European Social Charter and Revised Charter requires the protection of children against all forms of ill treatments, including corporal punishment at home and at school.\textsuperscript{87} Here the Independent Expert referred to the Committee on Economical, Social and Cultural Rights’ General Comment No. 13 of 1999, judgments of European Court of Human Rights (A v. UK), and Articles 19 and 37 of the CRC. Independent Experts has continuously criticized the States whose legislation or at least practice leaves room for mild corporal punishment and held that this situation is in breach of the Article 17 of the European Social Charter and Revised Charter.\textsuperscript{88}

Case law of the Independent Experts under the collective complaint system reveals that despite its reference to the case law of


\textsuperscript{85} Again doubts arise with regard to the scope of the prohibition. Since Committee on Economic, Social and Cultural Rights clearly referred to the decisions of the Committee on the Rights of the Child concerning corporal punishment one can conclude that Committee on Economical, Social and Cultural Rights absolutely prohibits all forms of corporal punishment.

\textsuperscript{86} Turin, adopted: 18/10/1961, entry into force: 26/02/1965.

\textsuperscript{87} Conclusions XV-2 Vol 1, 2001.

\textsuperscript{88} See, among others, Poland Conclusions XVI-2, Vol 2 (2003) 660, 661; Republic of Slovakia Conclusions XVI-2, Vol 2 (2003) 805, 806; French Conclusions 2003, Vol 1 (September 2003) 176, 178. Moreover, several documents emphasize that State Parties should prohibit all forms of violence, including corporal punishment through their legislation and should establish both criminal and civil law sanctions against perpetrators. See, Children’s Rights under the European Social Charter, Information Document prepared by the Secretariat, \url{www.esc.coe.int}, 5-6; Digest of the Case Law of the ECSR, June 2004, Document prepared by the Secretariat, \url{www.esc.coe.int}, 73. It is important to note that these cited documents prepared by the Secretariat are not binding on the Expert Committee.
European Court of Human Rights, all forms of corporal punishment absolutely is not inconformity with the Charter. On 09/12/2003 the Committee declared five applications introduced by World Association against Torture concerning corporal punishment of minors admissible. Very recently, in December 2004 (made public in May 2005), the Committee delivered its decisions on the merits. For example it found that legislations and practices of Greece, Ireland, Belgium concerning corporal punishment is in breach of Article 17. On the other hand, the Committee concluded that legislations and practices of Italy and Portugal could not be considered in violation of Article 17. In some of its decisions, it can be easily observed the “jurisprudential interaction or reciprocal influence” and “jurisprudential standardization” as suggested above for the European Court of Human Rights.

Advisory Opinion of the Inter-American Court of Human Rights on the Legal Status/Juridical Condition and Human Rights of the Child should be mentioned. Although Advisory Opinion has not explicitly dealt with the corporal punishment; it is possible to argue that the Inter-American Court of Human Rights considers all forms of violence as an infringement of the human dignity of child since the Court accepts the validity of the jurisprudence of the Committee on the Rights of the Child on the issue. It concluded that “the


90 It should be mentioned that the independent Expert Committee in its decisions took into account of Article 19 of the CRC, Article 3 of the ECHR and related case law under it and several Council of Ministers’ and Parliamentary Assembly’s Recommendations and Resolutions on the corporal punishment and abuse of child.

91 In the Committee’s words, “when it stated the interpretation to be given to Article 17 ...., it was influenced by an emerging international consensus on the issue (corporal punishment, B.G.) and notes that since this consensus is stronger. As regards its reference to the UN Convention on the Rights of the Child, the Committee recalls that this treaty is one of the most ratified treaties, and has been ratified by all member states of the Council of Europe including Ireland, and therefore it was entirely appropriate for it to have regard to it as well as the case law of the UN Committee on the Rights of the Child” (emphasis added). 18/2003, World Organisation against Torture v. Ireland, para. 61.

States Party to the American Convention have the duty, pursuant to Articles 19 and 17, in combination with Article 1(1) of that Convention, to take positive steps to ensure protection of children against mistreatment, whether in their relations with public officials, or in relations among individuals or with non-State entities.  

Lastly, it is worth mentioning the outcomes of the Special Rapporteur on Torture of the UN Commission on Human Rights concerning corporal punishment of children. Former Special Rapporteur (Theo van Boven) has emphasized that any form of corporal punishment is contrary to the prohibition of ill-treatments. While doing this statement, the Rapporteur surveyed all related supranational human rights case law present at that time (2001). Present Rapporteur (Manfred Nowak) confirmed the findings of its predecessor and stated in the light of the decisions of the UN Commission on Human Rights that “corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture”.

C) Interim Result and Discussion

Above survey and my discussions on some ambiguous points reveal that, contrary to the jurisprudence of the European Court of Human Rights, mentioned supranational supervisory/monitoring bodies have held that corporal punishment of minors categorically violates the human dignity of children. These jurisprudential standards on corporal punishment of children are clearly established and received widespread acceptance. The Committee on the Rights of the Child, which deserves particular attention under the

94 Special Rapporteur’s references to the jurisprudence of the Human Rights Committee and the European Court on Human Rights were confusing since these two bodies’ case-law has not required State Parties to ban corporal punishment absolutely. Despite this fact, Special Rapporteur explicitly stated that “any form of corporal punishment of children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment”. See, Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment and punishment, paras. 46-53, UN General Assembly, A/57/173, 2 July 2002.
95 See, Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment and punishment, paras. 26-28, UN General Assembly, A/60/316, 30 August 2005. It is important to keep in mind that the Special Rapporteur in principle has dealt with the corporal punishment of adults. Therefore, his analyses concerning child corporal punishment is superficial and accordingly his references to the jurisprudence of the Human Rights Committee and the European Court on Human Rights remain uncertain.
doctrine of “jurisprudential interaction and standardization”, has consistently condemned corporal punishment. No reservations or declarations made by the European States to the related provisions of the Convention on the Rights of the Child with regard to corporal punishment of minors and accordingly the jurisprudence of the Committee on those provisions is authoritative for those States. The Committee on the Rights of the Child is not alone in its radical approach to corporal punishment. In universal level, both treaty bodies, such as the Committee against Torture and the Committee on Economic, Social and Cultural Rights, and a thematic institution -Special Rapporteur on Torture- share the Committee on the Rights of the Child’s radical approach. In the regional level, European Social Rights Committee, both in its examination of State Reports and case law under collective complaint system, adopted this approach. One may include the Inter-American Court of Human Rights into this classification, despite lack of explicit discussion in its Advisory Opinion on general children rights.

Diversity of supervisory bodies, thus, does not make any differences on the issue. As at least five supervisory bodies are of the same view that corporal punishment violates human dignity of children per se, there is no doubt that quantitative element of jurisprudential interaction and jurisprudential standardization has met. Consequently, there is nothing for the European Court of Human Rights to prevent it to follow this jurisprudence under the doctrine of “jurisprudential interaction and standardization”.

In addition to supranational standards, there is a considerable legal tendency in abolishing all forms of corporal punishment in Europe. In national level, more than fifteen States has prohibited all forms of corporal punishment.\footnote{Sweden (1979), Finland (1984), Norway (1987), Austria (1989), Cyprus (1994), Latvia (1998), Croatia (1999), Bulgaria (2000), Iceland (2003), Hungary (2004), Ukraine (2004), Romania (2005). For these information, see, Council of Europe, supra note 2, at 45-58. For detailed information on the legal development in Sweden (1979), Finland (1984), Denmark (1985), Norway (1987), Austria (1989), Cyprus (1994) and Italy, see, Bitensky, supra note 2, at 362-386; Bartman, supra note 12, at 296-301. The Committee on European Social Rights held that legislation and practice in Italy and Portugal is sufficient to cope with corporal punishment of minors. In Denmark in 1985, the legal amendment had been made towards abolition, but this amendment as understood and applied by legal doctrine and judiciary was not effective in protecting children against corporal punishment (See, Linda Nielsen-Lis Frost, *Children and The Convention: the Danish Debate*, in Children’s Rights: A Comparative Perspective 65, at 77 (Michael Freeman ed. 1996)). But in May 1997 a new amendment, which included a clear ban, was implemented.} By taking into account of the
quality and the quantity of the Member States that prohibit corporal punishment, it is possible to conclude that a domestic tendency and accordingly progress towards “consensus” has been emerged.97 In the Council of Europe, continuous efforts can be observed to this end.98 These developments may easily articulate to the doctrine of

97 In the Staffor case, the European Court has stated that “Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (it) is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. (...) having regard to the significant developments in the domestic sphere, the Court proposes to re-assess “in the light of present-day conditions” what is now appropriate interpretation and application of the Convention”. Staffor v. The United Kingdom, App. no. 46295/99, Judgment of 28 May 2002, para 68-69.

supranational jurisprudential interaction and standardization and increase the transformative effect of it.

**Conclusion**

In the light of the foregoing considerations, I have come to the conclusion that it is possible to force the European Court of Human Rights to modify its jurisprudence with regard to corporal punishment of children. In this context, the supranational human rights case law standards shall play decisive and even coercive role in transforming the precedents of the European Court. A new approach is also necessary in order to create coherent European protection of children since European Social Rights Committee offers a wider protection under the European Social Charter. The doctrine of “jurisprudential interaction and standardization” also provides a privilege for the Court of abstaining to give value judgments concerning the morality of corporal punishment.

It should be noted that, acceptance of corporal punishment as a violation of human rights does not necessarily requires the prosecution and punishment of parents and legal guardians. Only in exceptional situations, such as continuing use of corporal punishment due to the ineffectiveness of the lower remedies, prosecution and punishment of parents and legal guardians should be used as an intervention of last resort.

Therefore, the most important facet of the ban is to help parents and children through voluntary positive interventions with a view to eradicate such a treatment which constitutes a violation of human/child dignity. In addition to this individualistic aim, the ultimate goal of its *de iure* eradication is mass education of parents and children, consequently the society as a whole. This will be very important achievement in recognizing dignity of children. It may serve as a tool for cultural change.

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99 As to the role of legal ban of corporal punishment in changing public and parental attitudes, it should be noted that different opinions and research exists. Joan E. Durrant argues that “the Swedish ban has been highly successful in accomplishing its goals”, including altering public attitudes towards the practice of corporal punishment. See, Durrant, *Evaluating the Success of Sweden’s Corporal Punishment Ban*, 23 Child Abuse and Neglect 435 (1999). On the contrary, Julian V. Roberts, after assessing the opinions of Durrant and others, contends that “the Swedish ban on corporal punishment did not affect public attitudes. Declining support for corporal punishment led Swedish legislators to amend the law; amending the law did not result in a change in public at-
Global campaigns for eliminating corporal punishment will be supported by such a modification. In this context, it is worth noting the inter-governmental efforts and non-governmental campaigns.\textsuperscript{101}

The problem of corporal punishment is deep and does form a part of domestic violence. It has been administrated from times of Ancient Greek in western culture, from times of traditional cultures such as India and China.\textsuperscript{102} Muslim culture and law is not an exception.\textsuperscript{103} In short, historically and ideologically almost none of the systems is free from or totally against to “legal” violence against minors.\textsuperscript{104}

Total abolishment of corporal punishment of minors has to be given an utmost priority to survive the future of the world. In the final analysis, the elimination of corporal punishment can be perfectly considered as first step to create a global climate for peace, understanding and co-operation.\textsuperscript{105}

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\textsuperscript{100} UN Secretary-General’s study on violence against children (www.violencestudy.org) and Council of Europe’s campaign (www.coe.int).

\textsuperscript{101} Global Initiative to End All Corporal Punishment of Children (www.endcorporalpunishment.org)

\textsuperscript{102} Thomas Woody, Life and Education in Early Societies 302 (1949).

\textsuperscript{103} Woody, supra note 102, at 120, 163.

\textsuperscript{104} Gemalmaz, supra note 5, at 2-3.

\textsuperscript{105} Greven, supra note 12; George Ryley Scott, The History of Corporal Punishment (1996) (this book includes information concerning all kind of corporal punishment, including flogging); Brian D. Gallagher, A Brief Legal History of Institutionalized Child Abuse, 17 Boston College Third World Law Journal 1 (1997); Pollard, supra note 12, at 579-580.

In this context, it should be worth noting that Socialist Bloc introduced a proposal which explicitly include a prohibition of corporal punishment during the preparatory works of Declaration of Children Rights of 1959. This proposal “met with considerable opposition”. See, Micheal Freeman, Introduction: Children as Persons, in Children’s Rights: A Comparative Perspective 2 (Michael Freeman ed. 1996).

\textsuperscript{106} Gemalmaz, supra note 5, at 245; General Comment No. 8 of the Committee on the Rights of the Child, CRC/C/GC/8, Advanced Unedited Version, 2006, at para. 3 (According to the Committee, eliminating corporal punishment “is also a key strategy for reducing and preventing all forms of violence in societies”).