



# REPORT ON THE PROTECTION OF CHILDREN'S RIGHTS

” International standards  
and domestic constitutions

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for Democracy through Law  
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# Introduction

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**A**t its 95th plenary session (8-9 March 2013) the Venice Commission decided to launch a study on “Children’s Rights in Constitutions” as a contribution to the Council of Europe Strategy for the Rights of the Child (2012-2015). The study is also designed as a response to a request made by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, dated 25 March 2013, on “How can children’s rights be included in national constitutions with a view to thus promoting their effective implementation”.

■ The present report was drawn up on the basis of comments from Co-Rapporteurs Ms Anne Peters and Ms Herdis Thorgeirsdottir, Mr Christoph Grabenwarter and Mr Jan Helgesen, and of the contribution by Dr Conor O’ Mahony, Professor Ursula Kilkelly and Dr Anne Lindboe, Children Ombudsperson of Norway acting as experts.

■ Preliminary discussions took place in the Sub-Commission on Democratic Institutions on 10 October and 5 December 2013 on 20 March 2014. The present report was adopted by the Venice Commission at its 98th Plenary Session (Venice, 20-21 March 2014).



# General Remarks

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**T**he adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 signalled international recognition of children as legal right-holders. In the intervening years, this recognition has permeated through other international instruments as well as through national legal systems at various levels, including at the constitutional level.

Children's rights are protected by other international instruments, including general human rights treaties such as the European Convention of Human Rights (hereafter ECHR) and its case law, as well as specialised instruments that deal with precise aspects of children's rights like adoption, child-friendly justice and juvenile detention, which have been developed by the Council of Europe<sup>1</sup>.

As societies continue to evolve dynamically and as new threats to children's well-being keep emerging, the question arises of whether the law and constitutions offer sufficient protection as they stand today. Europeans are experiencing one of the deepest economic crises since the Second World War; as recently pointed out by the Commissioner for Human Rights, the new political reality of austerity threatens over six decades of growing social solidarity and human rights protection across Council of Europe member states<sup>2</sup>. More specifically, poverty including child deprivation is growing and is likely to lead to negative long-term effects. In its 2012 annual report, the EU agency for Fundamental Rights underlined that "child poverty in the EU is an issue of growing concern"<sup>3</sup>, the percentage of children living in poverty or social exclusion is on the rise in a number of member states as a result of the impact of the economic crisis<sup>4</sup>. It is clear that against this background equal opportunities and children's rights are more than ever closely inter-related and must be properly addressed.

This study examines whether the current constitutional framework is sufficient to afford effective protection to children's rights. It therefore focuses on selected crucial elements of children's rights identified by the rapporteurs and consequently does not claim to constitute a comprehensive analysis of the whole range of ways in which children's rights are protected in constitutions.

With regard to the effectiveness of the protection afforded at constitutional level, here again the report draws on the guiding principles and legal enforcement tools to be found in Europe rather than providing an exhaustive analysis of the enforcement mechanisms and practices in all 47 member states of the Council of Europe. Considering the means and time frame allocated to this study it has been oriented towards offering a constructive contribution to the Council of Europe Strategy for the Rights of the Child (2012-2015).

The study starts by examining the main legacies of the United Nations Convention on the Rights of the Child (hereafter CRC) and by exploring what the Committee on the Rights of the Child has said about the obligations of state parties to protect children's rights in their domestic legal system. The study continues with the description of the ins and outs of constitutional protection through international law, which is followed by details of the ECHR and its case law along with a brief analysis of the impact made by the relevant EU Fundamental Rights provisions.

Exploring the issue of equal opportunities and rights of children in times of crisis will shed light on crucial elements of States positive obligation to fulfil their international commitments.

The study will then move on to the national level of the protection of children rights and analyse the constitutional protection of these rights in Council of Europe member states and look at their enforcement. Finally, the conclusions that can be drawn from this analysis will lead to recommendations that are deemed crucial in promoting the effective implementation of children's rights.

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1. See the Council of Europe Revised Convention on Adoption, CETS No 202; the Guidelines on Child-friendly Justice, adopted by the Committee of Ministers on 17 October 2010 and the European Rules for Juveniles Subject to Sanctions and Measures (Recommendation CM/Rec(2008)11).

2. Council of Europe Commissioner for Human Rights, "Safeguarding Human Rights in Times of Economic Crisis", issue paper November 2013.

3. Children falling victim to EU economic crisis, 18 June 2013, <http://www.eubusiness.com/news-eu/children-poverty.p8d>

4. Employment, Social Policy, Health and Consumer Affairs Council Conclusions on 'Preventing and tackling child poverty and social exclusion and promoting children's well-being', Brussels, 5 October 2012

# The guiding principles of the United Nations Convention on the Rights of the Child

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**T**he CRC recognises the status of children as autonomous rights-holders; it is the international law baseline for the protection of children's rights<sup>5</sup>. Through ratification, State Parties to the Convention have re-affirmed the "dignity of each and every child<sup>6</sup>, which the UN Committee on the Rights of the Child (hereinafter "the Committee") has described as "the fundamental guiding principle of international human rights law"<sup>7</sup>. Children have rights not because they are children, but because they are human beings.

■ The CRC makes it clear that children are the holders of rights, which states have the duty to uphold and protect. These particular circumstances informed the imperative for the recognition of the legal capacity of children and the legal expression of children's rights within international law<sup>8</sup>. They underpin the momentum towards introducing legal provisions dedicated to children's rights at national level.

■ Unlike most other instruments of international human rights law, the CRC acknowledges that the beneficiaries of the rights that it confers are dependent not just on the state to uphold their rights, but also on other adults (namely parents, carers and other family members).<sup>9</sup> The Convention acknowledges that children's development is best secured within a loving, safe family environment and notes that children sometimes depend on family members to exercise their rights and have them fully vindicated<sup>10</sup>. At the same time, it responds to the reality that children's needs can be ignored, diluted or trumped by the rights of the family (or those with parental responsibility)<sup>11</sup>, whose authority is often recognised in very strong terms under national law. The CRC designed as a useful tool for advocacy and greater awareness of a new understanding of children as independent right holders – children, however, need protection within their families. As stated in the Universal Declaration of Human Rights, the family is the basic unit of society. It is a social and legal construct and, in various countries, a religious construct<sup>12</sup>.

■ The rights-based approach encompassed by the CRC proceeds from an acceptance of the universal values of dignity<sup>13</sup> towards a declaration of individual children as autonomous rights-holders with the capacity to exercise those rights as the child's capacity evolves<sup>14</sup>. In this way, the status of the child as a rights-holder should not be confused with the reality that children frequently require representation, assistance and support to exercise their rights.

■ It has been recognised that the children's rights approach requires 'a paradigm shift towards respecting and promoting the human dignity' of the child, and recognising children as 'rights bearing individuals, rather

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5. The Convention was adopted by General Assembly Resolution 44/25 at the 61st plenary meeting on 20 November 1989 and has been ratified by 193 countries.

6. Committee on the Rights of the Child, 'The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment (Arts. 19; 28, paras 2; and 37, inter alia)' General Comment No. 8 (2nd March 2007) UN Doc. CRC/C/GC/8 para. 16. See also, M. Freeman, 'Why it remains important to take children's rights seriously' (2007) *The International Journal of Children's Rights* 15:5-23, 7.

7. Committee on the Rights of the Child, General Comment No. 8, *ibid*.

8. S. Detrich (ed.) J. Doek and N. Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the 'travaux préparatoires'* (Dordrecht: Kluwer Academic Publishers, 1992), 27.

9. U. Kilkelly, 'Children's Rights and the Family: Myth and Reality', *Studies: An Irish Review Quarterly*, Vol. 97, No. 385, Spring 2008 7-18.

10. See the Preamble, Article 5 and Article 18 for example.

11. See for example, Article 19 of the CRC which provides that children have the right to be protected from harm including at the hands of parents and carers.

12. UN Resolution 217 A (III), article 16 (3).

13. See M. Freeman, *The rights and wrongs of children* (London: Frances Pinter Publishers, 1983), chapter 2.

14. Committee on the Rights of the Child, 'Implementing child rights in early childhood' General Comment No. 7 (20th September 2006) UN Doc. CRC/C/GC/7/Rev.1, para. 3.

than perceiving them primarily as “victims”<sup>15</sup>. In contrast to the paternalistic, adult-based determination of children’s needs, the rights-based approach recognises the children’s capacity to contribute to the realisation of their rights<sup>16</sup>.

Moreover, according to the Committee on the Rights of the Child, a children’s rights approach aims to realise the rights of all children under the Convention by ‘developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (Article 4) and the capacity of rights holders to claim their rights’.<sup>17</sup> As with all human rights, the state is the primary duty-bearer under the CRC with respect to children’s rights. Parents as caregivers also have a role to play in the vindication of children’s rights either directly or in their role as advocates. The Committee has affirmed that states must ‘see their role as fulfilling clear legal obligations to each and every child rather than as a charitable process, bestowing favours on children’<sup>18</sup>.

The interdependence and indivisibility of human rights means that all human rights are respected and ensured ‘in a fair and equal manner, on the same footing, and with the same emphasis’<sup>19</sup>. The application of these principles to children’s rights is clear from the ‘extraordinarily comprehensive’ scope of the Convention, which ‘includes all traditionally defined areas of human rights – civil, political, economic, social and cultural’<sup>20</sup>. The substantive provisions of the CRC therefore affirm that ‘all human rights are universal, indivisible and interdependent and interrelated’<sup>21</sup>. Since its establishment, the Committee on the Rights of the Child has repeatedly focused attention on this core principle of international human rights law. In line with this, a holistic children’s rights approach demands implementation of Convention rights which advocate the exercise of children’s participation in decision-making – known as participation rights – on an equal basis with those which seek to protect children from harm – known as protection rights<sup>22</sup>.

At its first session, the Committee identified four general principles among the Convention’s provisions: non-discrimination (Art 2); the best interests of the child must be a primary consideration in all actions concerning the child (Art 3); the right of the child to life, survival and development (Art 6) and the right of the child to be heard in all decisions that affect him/her (Art 12)<sup>23</sup>.

These general principles both exist as individual rights, to which every child is entitled, while also serving to guide the implementation and interpretation of the Convention as a whole<sup>24</sup>. The Committee on the Rights of the Child has recommended that these provisions, in particular, be given legal standing and effect in domestic legal systems<sup>25</sup>.

In the context of Article 4 of the CRC, the Committee also expressly addressed the importance of constitutionalising children’s rights. In responding to suggestions by States that ‘the inclusion in their Constitution of guarantees of rights for ‘everyone’ is adequate to ensure respect for these rights for children’, the Committee stated that: ‘the test must be whether the applicable rights are truly realized for children and can be directly

15. Committee on the Rights of the Child, ‘Implementing child rights in early childhood’ General Comment No. 7 (20th September 2006) UN Doc. CRC/C/GC/7/Rev.1, para. 3.

16. See for example, *ibid*, para. 65.

17. *Ibid*, para.59.

18. Committee on the Rights of the Child, ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42,44, para. 6)’ (2003) General Comment No. 5, UN Doc. CRC/GC/2003/5, para 11.

19. Vienna Declaration and Programme of Action’ World Conference on Human Rights (Vienna: 14th -25th June 1993) (12 July 1993) UN Doc. G.A/CONF.157/23 para. 5.

20. S.Detrich (ed.) J. Doek and N. Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the ‘travaux préparatoires’* (Dordrecht: Kluwer Academic Publishers, 1992), 27. See also, D. McGoldrick, ‘The United Nations Convention on the Rights of the Child’ 5 *International Journal of Law and the Family* (1991) 132-169.

21. Vienna Declaration and Programme of Action, para. 5.

22. For example, the Committee recently drew attention to the importance of having regard to ‘the universal, indivisible, interdependent and interrelated nature of children’s rights’ when implementing the fundamental right and general principle of the Convention – the best interests of the child. See Committee on the Rights of the Child, ‘The right of the child to have his or her best interests taken as a primary consideration (art. para. 1)’ General Comment No. 14 (29th May 2013) UN Doc. CRC/C/GC/14, para 16.

23. Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (30th October 1991) UN Doc. CRC/C/5. See also updated version, Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (23rd November 2010) UN Doc. CRC/C/58/Rev.2, para. 23-27.

24. Committee on the Rights of the Child, ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42,44, para. 6)’ General Comment No. 5, para. 12.

25. See for example the Concluding Observations of the Committee on the Rights of the Child: Ireland CRC/C/15/Add. 85 February 4, 1998, para 25.

invoked before the courts<sup>26</sup>. Where states do include child-specific provisions in their national constitutions, the Committee has emphasised the importance of a rights-based approach and the general principles of the Convention:

“The Committee welcomes the inclusion of sections on the rights of the child in national constitutions, *reflecting key principles in the Convention*, which helps to underline the key message of the Convention – that children alongside adults are holders of human rights<sup>27</sup>.”

■ The Committee has noted that constitutionalising children’s rights, like broader measures of implementation, ‘does not automatically ensure respect for the rights of children<sup>28</sup>. Even so, the Committee has recognised that it is an important step ‘towards the full implementation’ of the rights in the Convention<sup>29</sup>.

■ This being said, it is important to examine whether indirect constitutional protection through international laws offers an appropriate response to the CRC’s demands.

## Indirect constitutional protection of children’s rights through international law

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**S**tates may choose to protect children’s rights by incorporating the Convention on the Rights of the Child (CRC), and the children’s rights provision of Art. 24 of the European Union Fundamental Rights Charter (EU FRC) of 2000/2007 into their domestic law.

■ A constitutional type of protection through international law will be achieved only if the CRC and/or Art. 24 EU FRC (for EU member states), is awarded a “constitutional” status and a “constitutional” effect within the domestic legal order.

### THE INCORPORATION OF THE CRC INTO THE DOMESTIC LEGAL ORDER

■ The legal effect of the CRC within a given national legal order comprises four distinct aspects: (1) The method of incorporation into the domestic legal order, e.g. by allowing for an automatic effect upon ratification (“monist approach”) or by requiring the adoption of a specific implementing treaty (“dualist approach”); (2) the normative rank assigned to the CRC; (3) the possible direct effect assigned to specific provisions of the CRC; (4) reservations.

■ While States are generally obliged to “respect and ensure the rights set forth in the (...) Convention (Art. 2 (1) CRC), the Convention does not stipulate how this must be done. Nor does the CRC say anything specific on its normative rank within the domestic legal order of state parties (status of constitutional law, of ordinary statutes, or the like); in fact such a statement would be unusual for an international law treaty.

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26. Ibid, para. 21.

27. Ibid, para. 21 (emphasis added).

28. Ibid

29. Ibid

■ The status of a convention in domestic law and the effect of international law within the national legal system – varies from one state to another. The formal normative ranking is important however for resolving normative conflicts between the CRC and domestic law<sup>30</sup>.

■ Most state parties normally only grant the CRC the status of domestic laws within their legal order, or at best in-between statute law and the constitution. Various reservations by state parties imply that these states consider their national constitutions to prevail over the CRC. This means that the CRC's normative effect may, in purely formal terms, be less powerful than that of a constitutional clause on children's rights in a national constitution.

■ As a rule, the ratification of the CRC does not therefore render the adoption of specific constitutional provisions on children's rights superfluous or redundant; even if these merely duplicate the Convention.

## ► Direct and/or indirect effects of the CRC in the domestic legal order

### Direct effect

■ Direct effect is understood as a legal mechanism according to which a domestic body (notably a court) may apply an international rule directly, as a result of which an incompatible rule of domestic law becomes illegal. A possible direct effect will not pertain to the CRC as a whole, but can only be identified clause by clause. Conversely, some states have on occasion summarily declared particular international treaties to have no direct effect, mostly by pointing to the overall "soft", "imprecise", or diplomatic/political characteristics of that treaty as a whole, or its lack of "normative density".

■ The decision as to whether a concrete treaty provision has a direct effect in a domestic legal order is most often answered by the domestic authorities, notably courts, which are confronted with that question in the course of the state's implementation of the CRC. The direct effect is most often invoked by a private person who seeks to rely on the treaty provisions and benefit from them.

■ Despite its occurrence in the course of domestic proceedings, the question of the direct effect is not a purely "domestic" question. National courts and authorities must rely on the acknowledged criteria of direct effect. A convergence of criteria is visible in states' practice.

■ When examining some of the core provisions of the CRC, it is interesting to note that the question of whether or not these clauses have a direct effect has been answered differently by different domestic courts.

■ The direct effect of Article 2 CRC (non-discrimination), for instance, seems to be disputed<sup>31</sup>. The Belgian Court of Cassation held against the direct effect of Art. 2(1) in the Belgian legal order but without providing any explanation<sup>32</sup>. By contrast, Art. 12 (respect for the views of the child), has been awarded direct effect within the Swiss legal order by the Swiss Federal Tribunal<sup>33</sup>.

■ The direct effect of the best-interest provision in Art. 3 (best interests of the child)<sup>34</sup>, which is a core provision, has been answered differently by various domestic courts. While Belgian institutions have held against a direct

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30. For example, the national laws on the judiciary in a given state may not grant children a hearing, contrary to the prescriptions of Art.12 CRC in the interpretation given to this principle by the Children's Rights Committee. Only if the CRC enjoys (in that particular country) a normative rank which is superior to that of domestic Acts (laws), the contrary domestic provision would have to give way and could not be applied by the domestic authorities.

31. Stefanie Schmahl mentions Art. 2(1) among the self-executing provisions of the CRC Stefanie Schmahl, *Kinderechtskonvention mit Zusatzprotokollen: Handkommentar* (Baden-Baden: Nomos 2013). Einleitung, para. 26 (p. 39). In contrast, Sharon Detrick mentions a number of CRC provisions to be self-executing, but the core provisions of Art. 2,3,6, and 12 are not included in her list Sharon Detrick, *A Commentary on the Convention on the Rights of the Child* (The Hague: Nijhoff 1999) (Detrick (note \*), p. \*28).

32. Belgian Court of Cassation, *DD v. HDP Compensation Fund for Family Allowances*, Appeal Judgment, Cass. No. S 060105 F/2008, ILDC 1114 (BE 2008), 26 May 2008, paras. 81 and 86.

33. Swiss Federal Tribunal, *BGE 124 III 90* (22 Dec. 1997).

34. Article 3 CRC: "1. 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. 2. States 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. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

effect in more recent decisions<sup>35</sup>, French<sup>36</sup> and Bulgarian<sup>37</sup> courts have assumed a direct effect in their legal order and the Dutch Council of State<sup>38</sup> has recently moved towards such recognition

■ The following arguments have been put forward in favour of a direct effect of Art. 3: first, the wording of the provision mentions not only lawmakers, but also “social welfare institutions, courts of law, administrative authorities”. Second, a teleological argument can be made: if the provision is to have any practical effect, it must first and foremost address those who apply the law. For these reasons, the intent of the State Parties to allow for a direct effect may be presumed.

■ A systematic consideration is that, unlike Art. 2(2) and 4 CRC, Art. 3 does not state that the state parties “shall take all appropriate measures to ensure”, but simply says that the best interests “shall be a primary consideration.” This is relevant for example in administrative decisions concerning foreign nationals (requests for residence permits; request for asylum; expulsions, etc.). The child’s interest must not only be one factor in the balancing exercise, but a “primary” one. This also means that the law-applying authority must give detailed justifications for deciding against the child’s best interests. It places an argumentative burden on the authorities and courts. Overall, a direct effect of Art. 3 CRC will entail both procedural and substantive consequences: it prescribes detailed reasoning and engagement, and in substance points in a specific direction<sup>39</sup>.

### Indirect effect

■ Besides or as an alternative to a ‘direct effect’ of some provisions of the CRC, its “indirect effect” is acknowledged in state practice. An indirect effect basically means that domestic law must be interpreted in the light of the CRC by the domestic authorities (principle of treaty-consistent interpretation). In this way, clashes between domestic constitutional law and international law are kept to a minimum. A number of Council of Europe member states constitutions prescribe that the domestic legal order must be interpreted in conformity with international law, and in many states case law also embodies such a principle. Some states prescribe an international-law friendly interpretation of domestic statutes, but only within the limits of constitutional principles.

### ► Reservations

■ The CRC has been notoriously weakened by reservations. Numerous reservations have been made, most often with regard to the provisions of Art. 14 (freedom of religion) and Art. 21 (adoption). It is also striking that a great number of objections have been raised especially by CoE member states; against the very sweeping reservations of other (mainly non-European) states, arguing that those reservations are inadmissible under international law, and especially that they are incompatible with the object and purpose of the CRC.

■ Among the members of the Council of Europe, Austria, Belgium, Croatia, Denmark, France, Iceland, Liechtenstein, Luxembourg, the Netherlands, Poland, Spain, and the UK have made reservations. However, only very few reservations lodged by member states of the Council of Europe concern the core provisions (Art. 2, 3, 6, and 12 CRC) or have a structural significance.

■ Overall, the high number and the extensions of reservations may be seen as seriously undermining the normative effects of the CRC. However, within the Council of Europe, the issue of reservations seems to be moving in a positive direction. While a number of CoE member states (Germany, the Czech Republic, Malta, Norway, Slovakia, Slovenia, Serbia and the United Kingdom) had initially made reservations, these states have now withdrawn them. This is a recommendable step which should be taken by other member states, too.

35. Belgian Court of Cassation, JH and SL v. PK, Appeal in cassation, Case No. C 10 0685 F, ILDC 1919 (BE 2012), 2 March 2012.

36. French Cour de Cassation, X v. Y, Cassation Appeal, Case No. 1810 (2005) Information Bulletin Court of Cassation 626, ILDC 770 (FR 2005), 14 June 2005.

37. Bulgarian Supreme Administrative Court, Kerezov v. Minister of Justice, Ministry of Health and others, Appeal, Administrative Case No 2829/2002, Judgment No. 9904, ILDC 606 (BG 2002), 6 Nov. 2002; Bulgarian Supreme Administrative Court, Neychev v. Head of District Directorate Police – Burgas and Head of the Directorate ‘Social Support’ – Burgas, Neychev, Cassation appeal, Judgment No. 1417, 10912/2007, ILDC 1243 (BG 2008), 7 Febr. 2008.

38. Dutch Administrative Jurisdiction Division of the Council of State, Judgment of 7 February 2012, No. 201103064/1/V2.

39. See General Comment No.14.

## ► International monitoring of the CRC

■ The CRC has the weakest type of monitoring mechanism in the field of international (human) rights; i.e. periodic State reports. (Art. 44 CRC). The establishment of stronger mechanisms initially faced strong resistance.

■ The Optional Protocol to the Convention on the Rights of the Child on a communications procedure was recently adopted. It has 45 signatories and 10 ratifications and came into force on 14 April 2014. The Optional Protocol foresees individual communications, inter-state communications, and an inquiry procedure for grave or systematic violations. The entry into force should constitute a significant improvement of the implementation of the CRC in those states which have ratified the optional protocol.

■ In conclusion, this brief analysis offers a mixed picture of the effectiveness of the CRC's provisions in the domestic legal order. While the doctrine is not uniform, especially not with respect to the Convention's direct effect, the implementation process in courts reveals a process in evolution.

## THE FUNDAMENTAL RIGHTS CHARTER AND THE PROTECTION OF CHILDREN'S RIGHTS

■ The EU Fundamental Rights Charter contains a specific provision on the rights of the child (Art. 24 EU FRC). Art. 24 notably endorses two of the CRC's fundamental principles, namely the right to be heard and the best-interest principle, and thus corresponds to Art. 3 and 12 CRC. Whether Art.24 contains individual fundamental rights of children or merely "principles" that may be taken into account by courts (notably by the ECJ) but may not be invoked by individuals is still the subject of discussion.

■ The normative rank of the EU FRC is important with regard to the constitutional protection of children's rights. The Charter has "the same legal value" as the EU treaties (Art. 6(1) TEU). It thus functions as EU primary law, and as such enjoys priority over domestic law of the EU member states. In the eyes of the ECJ, this priority even extends over domestic constitutional law. However, some EU member states' courts have refused the application of EU law when this would infringe the "constitutional identity" of the member state.

■ Art. 24 EU FRC is addressed, first and foremost, to the EU Institutions, but also to EU member states, when they are implementing Union law (Art. 5(1) FRC). A possible binding effect for private actors in the field of the protection of children's rights would also reinforce the impact of those provisions. Finally, for the sake of completeness of the overview, it is worth mentioning that the accession of the EU to the ECHR will not change the legal effect of the EU FRC for EU member states.

## THE EUROPEAN CONVENTION ON HUMAN RIGHTS

■ Although several of the guarantees offered by the ECHR are similar to rights enshrined in the Convention on the Rights of the Child (CRC), the ECHR does not explicitly mention children's rights. However, a guarantees of the ECHR refer to children in general or to special situations with which they might be confronted, such as Article 6(1), Article 5 (1) (d), Article 5 of Protocol No. 7 or Article 2 of Protocol No. 1. Other provisions have been explicitly applied to children by the European Court of Human Rights (hereinafter "ECtHR"). This is especially true for Article 3, Article 6 and Article 8. Children are therefore obviously rights holders under the ECHR.

■ Over the last decade the ECHR has had a growing impact on the evolution of children's rights in Europe. One reason for this development is that the ECHR is the international instrument in the field of human rights that has the most effective mechanism for enforcing the rights a Court which is open to individual applications and which delivers legally binding decisions<sup>40</sup>. When interpreting the rights of the Convention the ECtHR takes more and more account of other international and European instruments in the field of guarantee in question. This includes the CRC when it is consistent with the reasoning of the Court<sup>41</sup>.

40. See U. Kilkelly, 'Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in light of the Convention on the Rights of the Child' 23(2) Human Rights Quarterly (2001) 308-326.

41. The latest example can be seen in ECtHR, *Söderman v. Sweden*, Grand Chamber, Judgment of 12 Nov. 2013.

■ The ECHR is also characterised by its dynamic nature. The ECtHR has repeatedly stressed that the ECHR is a living instrument, which must be interpreted in the light of present-day conditions.<sup>42</sup> Keeping in mind the significant changes in social and family structures over the last decades, the dynamic character of the ECHR is of particular relevance to children's issues.

■ Article 1 determines the personal scope of application of the ECHR: member states shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Article 14 reinforces Article 1 by prohibiting discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The ECtHR considers discrimination based on the age of a person as falling under the scope of Article 14. The guarantees laid down in the ECHR apply to children in the same way as they do to adults. In the Convention case law, the concept of a minor or a child encompasses persons under the age of 18.<sup>43</sup>

■ The question of whether an embryo/foetus enjoys the protection of the right to life guaranteed by Article 2, has not been answered by the ECtHR<sup>44</sup> and is certainly one of the questions most disputed among member states. Other unanswered questions concern the end of childhood and the applicability of Article 5 (1) (d) to the detention of minors, Article 6 (1), second sentence, on the exclusion of the press and public from trials when required in the interest of juveniles, or Article 12, which guarantees the right to marry. In contrast to the CRC, the ECHR does not contain any provisions dealing with the end of childhood at a certain age limit. Member states enjoy a wide margin of appreciation in this matter.<sup>45</sup>

■ In order to be able to file a complaint before the ECtHR, a person must be a victim of a violation of rights safeguarded by the ECHR. There are no provisions of the ECHR that restrict children's access to the ECtHR. The parent's consent is not necessary for a child to be able to file a complaint. Nevertheless, most of the complaints concerning children's rights are filed by parents or other legal representatives on behalf of the child.<sup>46</sup>

■ The European Convention on Human Rights has been interpreted by the ECtHR to apply to children even though it contains few specific references to children's rights.<sup>47</sup> The absence of explicit children's rights provision limits the extent to which the ECHR can be interpreted to advance children's rights, although references to the CRC in its case law have enhanced its potential in this area.<sup>48</sup>

■ However, children's rights can be found in various ECHR provisions. For instance, while the right to liberty (Article 5 ECHR), in contrast to other human rights provisions, does not provide for any special regulations concerning the treatment of minors in case of deprivation of liberty<sup>49</sup>, the ECtHR has nevertheless developed case law on children's increased need for protection especially with regard to conditions of imprisonment.<sup>50</sup>

■ Again, in contrast to the CRC<sup>51</sup>, it is not explicitly laid down in the ECHR that member states have to protect children from any form of violence in all circumstances. Nevertheless, if a member state fails to protect children from violent or abusive actions, this might constitute a breach of the rights guaranteed under Article 3 or Article 8 ECHR.<sup>52</sup>

■ Article 3 prohibits torture, inhuman or degrading treatment or punishment. As Article 3 does not provide for exceptions or derogation, all interferences with Article 3 constitute a violation of this fundamental right.

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42. E.g. ECtHR, 25/4/1978, *Tyrer v UK*, No. 5856/72, §30 et seq.

43. ECtHR, 12/10/2000, *Koniarska v UK*, No. 33670/96.

44. Explicitly leaving the question unanswered ECtHR, 8/7/2004 (GC), *Vo v France*, No. 53924/00, §79 et seq; *Peukert*, Human Rights in International Law and the Protection of Unborn Beings, in: Matscher/Petzold (Hrsg), *Protecting Human Rights: The European Dimension*, Studies in Honour of Gérard J. Wiarda, 1988, 511 (515 et seq.).

45. U. Kilkelly, *The Child and the European Convention on Human Rights* (1999) 21 et seq.

46. ECtHR, 13/6/979, *Marckx v BEL*, No. 6833/74, §1.

47. See U. Kilkelly, *The Child and the ECHR* (Dartmouth: Ashgate, 1999) and G. Van Bueren, *Children's Rights in Europe: Convergence and Divergence in Judicial Protection* (Strasbourg: Council of Europe, 2007).

48. See U. Kilkelly, 'Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in light of the Convention on the Rights of the Child' 23(2) *Human Rights Quarterly* (2001) 308-326.

49. See Article 10 (2) (b), Art 14 (4) International Covenant on Civil and Political Rights; Article 37, Article 40 CRC.

50. See ECtHR 28/10/1998, *Assenov v BUL*, No. 24760/94, §137; ECtHR, 29/2/1988, *Bouamar v BEL*, No. 9106/80; ECtHR, 21/2/1996, *Hussain v UK*, No. 21928/93, §52 – 54; ECtHR, 2/3/1987, *Weeks v UK*, No. 9787/82; ECtHR, 21/2/1996, *Singh v UK*, No. 23389/94.

51. See Article 19 CRC.

52. ECtHR, 28/1/2014, *O'Keeffe v IRL*, No. 35810/09. §5144 et seq.

There is a breach of Article 3 ECHR, if the physical or mental violation of a child attains a minimum level of severity and disrespects a person's humanity.<sup>53</sup> In any event it must exceed the usual element of humiliation inherent in any punishment; it depends on all the circumstances of the case, including the nature and context of the punishment, the age or the state of health of the victim.<sup>54</sup> Violations which do not attain the minimum level of severity may not constitute a breach of Article 3 but they may be relevant under the scope of Article 8<sup>55</sup>.

Positive obligations can be derived from Article 3 ECHR.<sup>56</sup> Member states are obliged to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.<sup>57</sup> It is immaterial whether the real and immediate risk to physical or psychological integrity of an individual derives from the State or a third party.

The ECtHR has found not only that Article 3 ECHR requires member states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment by private individuals, but that children and other vulnerable individuals in particular are entitled to State protection, in the form of an effective deterrence, against such serious breaches of personal integrity.<sup>58</sup> The ECtHR has held that there was a violation of Article 3 because the national legal framework did not provide adequate protection of children from ill-treatment. It is shown that even the risk of violation of the physical or psychological integrity of an individual within the family can give rise to positive obligations for member states.

By contrast, Article 8 ECHR is an important article in the field of children's rights and the ECHR. The Court's case law already embraces many different situations with which children are confronted: e.g. family life in general, adoption, child abduction, decisions on custody, visiting rights or identity issues. Article 8 ECHR names four different spheres of protection: private life, family life, home and correspondence. Generally, all of them are equally applicable to adults and children. There are many situations which fall within the scope of Article 8 ECHR where not only children's rights are affected, but also the rights of other family members; a fair balance must therefore be struck between the different positions. Children may often require a greater amount of protection under Article 8 ECHR than adults.

Private life under Article 8 covers a person's moral and physical integrity, his privacy and the capacity of the individual to determine his or her identity. According to the ECtHR's case law, any medical intervention against the subject's will, or without the free, informed and express consent of the subject, constitutes interference in his or her private life.<sup>59</sup> For instance, a compulsory tuberculosis test for children,<sup>60</sup> or the administration of force-feeding or diamorphine to a seriously ill and handicapped child against the mother's firm opposition to this form of treatment.<sup>61</sup> In this context it must also be mentioned that questions concerning medically assisted procreation can also be regarded to come within the ambit of Article 8 ECHR.<sup>62</sup>

The right to respect for family life is guaranteed not only to parents but also to other family members and in particular children. The scope of the right to family life was soon extended by the ECtHR's case law from a marriage-based relationship with or without minor children to other de facto 'family' ties<sup>63</sup>. Cohabitation is therefore not a necessary requirement for Article 8 to apply under the head of "family life" nor for there to be

53. ECtHR, 18/1/1978, *IRL v UK*, No. 5310/71, §162; ECtHR, 22/9/1993, *Klaas v GER*, No. 15473/89, §§23 et seq (alleged ill-treatment of a detainee in the presence of his minor daughter); ECtHR, 27/8/1992, *Tomasi v FRA*, No. 12850/87, §114 (number and intensity of hits); ECtHR, 28/1/1994, *Hurtado v SUI*, No. 17549/90, §12 (refusal of medical care and sanitation despite of injuries); ECtHR, 25/4/1978, *Tyrer v UK*, No. 5856/72; ECtHR, 25/3/1993, *Costello Roberts v UK*, No. 13134/87, §31.

54. ECtHR, 23/9/1998, *A. v UK*, No. 25599/94, §20; ECtHR, 23/11/2009, *Ciğerhun Öner (No. 2) v TUR*, No. 2858/07, §§89 et seq.

55. ECtHR, 13/5/2000, *Juhnke v TUR*, No. 52515/99, §69 et seq.

56. U. Kilkelly, 'Protecting Children's Rights under the ECHR: the Role of Positive Obligations' 61(3) *Northern Ireland Legal Quarterly* (2010) 245-261.

57. ECtHR, 23/9/1998, *A. v UK*, No. 25599/94, §22; ECtHR, 10/10/2002, *D. P. and J. C. v UK*, No. 38719/97, §109.

58. ECtHR, 23/9/1998, *A v UK*, No. 25599/94, §23.

59. Assumption of a situation of coercion due to the particularly vulnerable psychological state of a female prisoner, ECtHR, 13/5/2008, *Juhnke v TUR*, No. 52515/99, §76 et seq.; ECtHR, 7/10/2008, *Bogumil v POR*, No. 35228/03, §73.

60. EComHR, 10/12/1984, *Acmanne*, DR 40, 251.

61. ECtHR, 9/3/2004, *Glass v UK*, No. 61827/00, §70 et seq.

62. Vgl ECtHR, 10/4/2007, *Evans v UK*, Nr 6339/05, §71; ECtHR, 1/4/2010, *S.H. a. o. v AUT*, No. 57813/00, §60; ECtHR, 4/12/2007, *Dickson v UK*, No. 44362/04, §66; *Gallus*, La procréation médicalement assistée et les droits de l'homme, RTDH 2008, 879 (887 et seq).

63. EComHR, 6/4/1994, *M.B. v UK*, No. 22920/93; EComHR, 3/7/1992, *C. v UK*, No. 14247/88.

a family tie between the parents and their child. The natural family relationship is not terminated if the child is taken into public care<sup>64</sup>; however, the relationship is terminated by adoption<sup>65</sup>.

■ Interferences with the right to respect for family life protected by Article 8 ECHR can be found in all measures that hinder the mutual enjoyment by parent and child of each other's company<sup>66</sup>. Member States enjoy a wide margin of appreciation for decisions on rights of custody and rights of access, because the ECtHR considers that the national authorities have the benefit of direct contact with all the persons concerned<sup>67</sup>. National authorities must strike a fair balance between the interests of the child and those of the parents<sup>68</sup>. Particular importance should be attached to the best interests of the child<sup>69</sup>, which may override the interests of the parents. In particular, a parent is not entitled under Article 8 to have such measures taken as would harm the child's health and development<sup>70</sup>. With a view to adoption the ECtHR has found that the child's best interest should always build the focus of the national authority's decision and that the key purpose of adoption was "to provide a child with a family and not a family with a child"<sup>71</sup>. It is also the child's opinion that should be taken into account concerning its adoption, once the child has attained the necessary maturity to give its opinion on the matter<sup>72</sup>.

■ The ECtHR has derived a number of positive obligations from Article 8. For instance, positive obligations have great importance with regard to protecting children and persons unable to give their consent against sexual assaults by creating criminal offences<sup>73</sup>. In particular, the ECtHR assumes a positive obligation deriving from Article 8 taken in conjunction with Article 14 to avoid discrimination between children born out of marriage and children born in marriage, and to provide legal recognition of family life where appropriate ties exist<sup>74</sup>.

■ The prohibition on discrimination guaranteed by Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights enshrined in the Convention, requires an examination of the effectiveness of equal opportunity. In addition, Protocol 12 (2000) to the ECHR, ratified by 18 States, expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law). According to the Explanatory Report to the Protocol, it was created out of a desire to strengthen protection against discrimination which was considered to form a core element for guaranteeing human rights.

■ The ECtHR has held that in Article 14, 'age' is included among 'other status'<sup>75</sup>. In the ECtHR's case law the protected ground of age relates simply to differential treatment or enjoyment based on the victim's age. Although age discrimination per se does not fall within the ambit of a particular right in the ECHR (unlike religion, or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases where the facts suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal-justice system.

64. ECtHR, 8/7/1987, *W. v UK*, No. 9749/82, §59; ECtHR, 24/3/1988, *Olsson (No. 1) v SWE*, No. 10465/83, §59; ECtHR, 22/6/1989, *Eriksson v SWE*, No. 11373/85, §58; ECtHR, 13/7/2000 (GC), *Scozzari a. Giunta v ITA*, No. 39221/98 a. o., §169.

65. EComHR, 11/7/1977, *X.*, No. 7626/76, DR 11, 160 (162); see further ECtHR, 28/10/1998, *Söderbäck v SWE*, No. 24484/94, §31; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78.

66. ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §52; ECtHR, 9/6/1998, *Bronda v ITA*, No. 22430/93, §51; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §43.

67. ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §49; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §62.

68. ECtHR, 27/11/1992, *Olsson (No. 2) v SWE*, No. 13441/87, §90; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §50; ECtHR, 12/4/2011, *Gluhakovic v CRO*, No. 21188/09, §56 et seq.

69. ECtHR, 25/2/1992, *Margareta a. Roger Andersson v SWE*, No. 12963/87, §95; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §48; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §64.

70. ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §49; ECtHR, 13/7/2000 (GC), *Scozzari a. Giunta v ITA*, No. 39221/98 a. o., §169; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §64.

71. ECtHR, 26/2/2002, *Fretté v FRA*, No. 36515/97, §42.

72. ECtHR, 22/6/2004, *Pini a. o. v ROM*, No. 78028/01 a. o., §§164 et seq; ECtHR, 25/11/2008, *Jucius a. Juciucienė v LTU*, No. 14414/03, §31. See also Berro Lefèvre, *Adoption et filiation. Droit à l'enfant ou droits de l'enfant?*, *Mélanges en l'honneur de Jean-Paul Costa*, 2011, p. 25 et seq.

73. ECtHR, 22/10/1981, *Dudgeon v UK*, No. 7572/76, §49; ECtHR, 26/3/1985, *X. a Y. v NED*, No. 8978/80, §27 et seq.

74. See ECtHR, 13/6/1979, *Marckx v BEL*, No. 6833/74, §45; ECtHR, 18/12/1986, *Johnston a.o. v IRL*, No. 9697/82, §74; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §86; ECtHR, 7/4/2009, *Turnali v TUR*, No. 4914/03, §46.

75. ECtHR, *Schwizgebel v. Switzerland* (no. 25762/07), 10 June 2010.

■ In sixty years the ECHR has become an instrument of international human rights law which applies to many different fields of law and covers all sectors of society. It was only a matter of time before the Convention developed in such a way as to also cover children and their specific human rights. Apart from the few rights that mention the situation of children explicitly, nearly every other Convention right has an impact on children. It is to be expected that the case law of the ECtHR will further develop “children’s rights content” without a specific legal basis focusing (only) on children.

## **BINDING NATURE OF THE CRC AND OF ART. 24 EU FRC ON PRIVATE ACTORS**

■ The binding effect for private actors is of utmost importance with regard to children’s rights. Risks for children emanate mainly from private persons, ranging from parents to private institutions.

■ As a rule, state constitutions are not addressed to private persons but contain rules that are binding on the state and its institutions. A so-called direct third party effect of (some parts of) constitutional law is rather rare and often controversial. Consequently the CRC, and in particular Art. 24 EU FRC, would, in this respect, constitute an added legal value for the protection of children’s rights – if these international norms directly addressed private actors. In other words, a “direct third-party effect” of the CRC provisions would have eminent practical significance.

### **► Binding nature of the CRC on private actors**

■ Generally speaking, the CRC – as an international human rights covenant – does not as a whole directly create obligations for private persons. On the other hand, it imposes obligations on the State Parties. In particular it obliges them to protect persons (children) under their jurisdiction from harm inflicted by private persons and institutions. This means that states are obliged to take positive action as opposed to merely abstaining from taking action. Also, some provisions of the CRC (Art. 5, Art. 18) explicitly mention parents’ “duties” or “responsibilities” towards their children. However, it is not clear that these duties derive directly from the Convention itself.

■ Likewise, the best interests clause of Article 3 CRC mentions private actors: “1. 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.” It is frequently assumed by legal writers that, owing to its wording, this provision entails a direct obligation (only) for private welfare institutions but not for all private actors, notably not for parents or guardians.

■ In the debate on business and human rights, the UN has adopted guiding principles (“Ruggie principles”). These apply to “transnational corporations and other business enterprises”. Some institutions commercially dealing with children (private schools, foster homes, etc.) might fall under their scope. The UN Guiding Principles (2011) establish three pillars. (1) Governmental obligation to protect; (2) business responsibility (principles 11-24); and (3) remedies. The Guiding Principles cannot create new hard international law obligations; their contribution is soft. To the extent that they are applicable, the Guiding Principles foresee that private actors carry some “responsibility” (which is less than hard legal obligations) for respecting and fulfilling the CRC.

■ Recently, the Committee on the Rights of the Child issued General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. Recognising that States have obligations regarding the impact of business activities and operations on children’s rights arising from the CRC and its Optional Protocols, the General Comment provides States with a framework for implementing the CRC as a whole with regard to the business sector whilst focusing on specific contexts where the impact of business activities on children’s rights can be most significant.

■ The Committee on the Rights of the Child recognizes that the business sector’s impact on children’s rights has grown over the past decades because of factors such as the globalized nature of economies and of business operations and the on-going trends of decentralisation, and outsourcing and privatizing of State functions that affect the enjoyment of human rights<sup>76</sup>. States must therefore ensure that all legislation, policies and programmes that deal with business issues are not intentionally or unintentionally discriminatory towards

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76. General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights.

children in their content or implementation; for instance, those that address access to employment for parents or caregivers, or access to goods and services for children with disabilities.

■ States are required to prevent discrimination in the private sphere in general and provide a remedy if it occurs<sup>77</sup>.

■ With regard to discrimination, as pointed out by the CRC Committee in an earlier General Comment, the right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights safeguarded by the Convention. This may require positive measures aimed at redressing a situation of real inequality. Concerns over inequality are particularly meaningful in times when governments have introduced social expenditure cuts that are directly felt by children and their families. These have undermined their access to adequate resources, limited their access to – and damaged the quality of – service provision (e.g. health, education, welfare), and restricted opportunities for children to participate fully in family and social life. In many countries child poverty has increased more sharply than poverty rates among the general population.

### ► **Binding nature of Art. 24 EU FRC on private actors**

■ The EU FRC as a whole is normally addressed to public institutions (notably the EU, and implementing member states), but not private actors. However, it has been asserted specifically for Art. 24 EU FRC that this provision is binding on private actors and directly creates obligations for them. This debate was triggered by the wording of the provision which specifically mentions “private institutions”, and endorses a “right to maintain ... contact with both his and her parents”. The prevailing view among legal writers seems to be that Art. 24 does not directly oblige private actors, but has an only an “indirect third party effect” by obliging public institutions to adopt laws and measures ultimately bringing private actors in line with the yardstick of Art. 24.

## **CONCLUSIONS ON INTERNATIONAL LAW**

■ In conclusion, the fact that, within the Council of Europe, the EU member states are (possibly in addition to the CRC and the ECHR) bound by Art. 24 EU FRC does not render the enactment of specific constitutional clauses on children’s rights superfluous.

■ The above analysis briefly shows to what extent member states of the Council of Europe have a positive obligation under international law and European law to respect, protect and fulfil the rights children should enjoy under international law. Because children are reliant on governance systems, over which they have little influence, to have their rights realised, the analysis of the national constitutional protection of children rights will complete the picture.

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77. General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights.

# The Constitutional Protection of Children's Rights in Europe

## CONSTITUTIONS THAT OMIT CHILDREN'S RIGHTS ALTOGETHER

Only three Council of Europe member states currently have no constitutional provision on children whatsoever: France, Norway and the United Kingdom.

In all three cases, however, this initial statement needs to be qualified. In France, pursuant to Section 55 of the Constitution, international treaties take precedence over domestic legislation, and this applies to the CRC (with regard to its self-implementing provisions). The Cour de Cassation has however held that at least some provisions of the CRC can be applied directly.<sup>78</sup> The Norwegian Constitution currently makes no reference to children, but discussions about reform leading to the adoption of a children's rights provision have been ongoing for some time. The discussion is part of the wider discussions on a possible inclusion of a more general human rights catalogue in the Norwegian Constitution. Moreover, the CRC forms part of the domestic legal order and takes precedence over conflicting national statutes.<sup>79</sup> The United Kingdom does not have a written constitution; however, the Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law, and there are many examples of the national courts giving effect to children's rights by interpreting national law in the light of Article 8 ECHR or declaring it incompatible with Article 8<sup>80</sup>.

## CONSTITUTIONS THAT CONTAIN PROVISIONS ON CHILDREN OR THEIR RIGHTS IN SOME FORM

### ► Scope of protection

In 43 Council of Europe member states, the constitution contains provisions relating to children or their rights in some form.

The most widespread provision is the *right to education*, which is contained in the constitutions of these 43 countries.

In seven states (Bosnia and Herzegovina, Cyprus, Denmark, Liechtenstein, Luxembourg, Monaco and the Netherlands), the provision on education is the only child-specific provision in the constitution, and in this sense education provisions could be viewed as the entry-level form of child-specific constitutional provisions.

The presence of a constitutional right to education has significant potential to advance the indivisible rights of children, and particularly their right to development, since education is a pre-requisite to the enjoyment of other rights<sup>81</sup> – most obviously, the child's right to development (emphasised throughout the CRC and recognised as a general principle by the Committee)<sup>82</sup>, but also specific rights such as the right to health. Moreover, a broad interpretation of education provisions can result in them having wide-ranging impact beyond the context of school education. This will particularly be the case for children with serious disabilities (who, for example, benefitted extensively from constitutional litigation based on the education provisions of the Irish Constitution)<sup>83</sup>, but also has the potential to impact on issues in other areas such as healthcare.

78. Lejeune case, Assemblée Nationale, Rapport n° 87 'Rapport fait au nom de la Commission d'enquête sur l'état des droits de l'enfant en France, notamment au regard des conditions de vie des mineurs et de leur place dans la cité 6 May' 1998 Journal Officiel 22; see Tobin, 'Increasingly seen and heard: the constitutional recognition of children's rights', South African Journal on Human Rights, vol. 21, 2005, pp. 96-97 and Innocenti Research Centre, Law Reform and Implementation of the Convention on the Rights of the Child (UNICEF: 2007), p. 7.

79. See L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries (UNICEF: 2012), pp. 58-59.

80. See, e.g., Re T (Paternity: Ordering Blood Tests) [2001] 2 FLR 1190; Mabon v Mabon [2005] EWCA Civ 634; Re P and others [2008] UKHL 38 and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, among many other examples. See further J. Fortin, "Accommodating Children's Rights in a Post Human Rights Act Era", Modern Law Review, vol. 69, 2006, pp.299-326.

81. See C. O'Mahony, 'Constitutionalism and Legislation in Special Educational Needs Law: An Anglo-Irish Comparison' Public Law, 2008, pp. 126-128.

82. See the Preamble and Articles 6, 18, 23, 27, 28, 29 and 32.

83. See C. O'Mahony, Educational Rights in Irish Law (Thomson Round Hall: 2006), Chapters 6 and 7.

■ That having been said, these provisions on education do not always set forth child-specific rights or even rights *per se*. A small number of constitutions (Croatia, Germany, Ireland, Italy, Liechtenstein, Luxembourg and the Netherlands) contain provisions on education that focus entirely on the rights and duties of parents and the state, without making any express reference to an individual right of the child to receive education.

■ In addition to a provision on the right to education, Azerbaijan<sup>84</sup> and Latvia<sup>85</sup> also include provisions that refer broadly to the rights of children, without expressly enumerating other specific rights.

■ The constitutions of other states such as the Republic of Moldova<sup>86</sup> and Romania<sup>87</sup> include an initial, broad statement that children are entitled to a special form of assistance in the pursuit of their rights, and further specify which particular rights children enjoy and which particular duties the state must fulfil in this regard.

■ The next most common child-specific provision after education concerns the equal status of children irrespective of parentage which can be found in 18 Constitutions, closely followed by the protection of children from economic exploitation. This is present in the constitutions of 17 member states.<sup>88</sup> Frequently (in ten constitutions), such a provision is combined with a provision requiring that children have equal status before the law. Article 3 of the Austrian Constitutional Act on the Rights of Children provides for a general prohibition of child labour.

■ In nine constitutions<sup>89</sup> both provisions (equal status and protection from economic exploitation) can be found.

■ The third child-specific right directly identified at constitutional level is the right to *protection from harm*. While some constitutions identify children as a vulnerable group in need of special protection, others acknowledge the right of the child to protection from harm and detail the duties imposed on the state to protect children from violence or abuse, including a rights-based approach to protecting children from exploitation. For example, the Constitution of Albania provides in Article 54(3) that “[e]very child has the right to be protected from violence, ill treatment, exploitation and their use for work, especially under the minimum age for work, which could damage their health and morals or endanger their life or normal development.” A similar approach can be seen in Hungary, which combines provisions on the first three issues<sup>90</sup> with a broader statement that “[e]very child shall have the right to the protection and care required for his or her proper physical, mental and moral development”<sup>91</sup>. The phrasing of special protection provisions varies: in Albania<sup>92</sup>, children have a right to protection; in Montenegro<sup>93</sup> and Slovenia<sup>94</sup>, children are guaranteed the right to protection; and in Portugal<sup>95</sup> it is an entitlement. In Poland, the Constitution states that “[e]veryone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation”<sup>96</sup>. In Serbia<sup>97</sup> and Turkey<sup>98</sup> it is phrased as a duty of the state to protect children from such treatment, while in Ukraine<sup>99</sup> the Constitution obliges the state to prosecute anyone who is guilty of violence against or exploitation of a child. In Belgium, the Constitution uses quite different wording to address a broadly similar point, providing that “[e]ach child is entitled to have its moral, physical, mental and sexual integrity respected”<sup>100</sup>. In Austria, a

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84. Article 17(vi).

85. Article 110.

86. Article 50(2).

87. Article 49(1).

88. Albania – Art 54(3); Armenia – Art 32; Azerbaijan – Art 17 (IV) and (V); Croatia – Art 64(2); Hungary – Art XVIII; “the former Yugoslav Republic of Macedonia” – Art 42; Malta – Section 16; Republic of Moldova – Art 50(4); Montenegro – Art 74; Poland – Arts 65(3) and 72(1); Portugal – Art 70(1); Romania – Art 49(3) and (4); Serbia – Art 64; Slovak Republic – Art 38(2); Slovenia – Art 56(2); Ukraine – Art 52 .

89. Albania, Republic of Moldova, Montenegro, Portugal, Romania, Serbia, Slovak Republic, Slovenia, Ukraine

90. Articles XV and XVIII.

91. Article XVI(1).

92. Article 54(3).

93. Article 74.

94. Article 56(2).

95. Article 69(2).

96. Article 72(1).

97. Article 64.

98. Article 41.

99. Article 52.

100. Article 22bis. See further L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (UNICEF: 2012), p. 37.

special provision of constitutional law provides for a right to education free from violence; corporal punishment, “Zufügung seelischen Leides”, sexual abuse and other forms of ill-treatment are explicitly forbidden.<sup>101</sup> In Spain, the Constitution includes a child protection provision,<sup>102</sup> but also stipulates that “[c]hildren shall enjoy the protection provided for in the international agreements safeguarding their rights”<sup>103</sup>.

■ The *right of disabled children to special care* is protected in some constitutions, either in the form of a right (Austria<sup>104</sup>, Croatia<sup>105</sup>) or in the form of an obligation of the state (for example Latvia<sup>106</sup>, Republic of Moldova<sup>107</sup> and Romania<sup>108</sup>).

■ The constitution of Turkey<sup>109</sup> makes explicit reference to the *right of the child to have and maintain a personal and direct relationship with his/her parents*, while the Serbian constitution contains a provision recognising a *child’s right to identity*<sup>110</sup>.

■ In twenty Council of Europe member states, the constitution addresses the family and the special protection of children. In a significant number of states, the provisions focus primarily on the family but make broad reference to the protection of children (without defining in any detail what that protection entails). The most common approach is to have a subsection of a general provision on the family that guarantees special state protection to parents and children; this approach can be seen in Bulgaria, the Czech Republic, Estonia, Iceland, Italy, Lithuania, “the former Yugoslav Republic of Macedonia” and the Russian Federation. The Bulgarian Constitution is somewhat more specific as it includes a specific obligation to protect abandoned children. The Greek Constitution contains a little more detail but not necessarily any more precision: its provision on the family begins by stating that “[t]he family ... as well as marriage, motherhood and childhood, shall be under the protection of the State” and continues by stipulating that “[f]amilies with many children ... are entitled to the special care of the State” and that the State “shall adopt special measures for the protection of youth”.

■ These provisions, like those concerning economic exploitation, acknowledge the vulnerability of children and their need for special protection, but only in general terms.

■ Some states have given constitutional expression to the general principles of the CRC, as explained above, in varying forms and combinations.

■ Non-Discrimination: a very common principle in national constitutions in the Council of Europe is the non-discrimination principle set out in Article 2 of the CRC. The requirement that children have equal status before the law, irrespective of the marital status of their parents, can be found in the constitutions of 16 states and is therefore one of the most common child-specific provisions. Such provisions are significant in that they recognise children’s status as rights-holders and because they address the question of children’s entitlement to equal treatment. This provision is commonly combined with the principle of protection from economic exploitation (in ten states).

■ Child development: the principle set out in Article 6 of the CRC – the child’s right to survival and development – features prominently in many European constitutions, although the importance of ensuring the adequate development of children takes many forms. Some constitutions stipulate that children have a right to the fullest possible development of their personality and potential (Austria<sup>111</sup>, Hungary<sup>112</sup>, Portugal<sup>113</sup> and Switzerland<sup>114</sup>);

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101. Article 5 of the 2011 Constitutional Act on the Rights of Children.

102. Section 39(2); see Picontó-Navales, “The Application of Spanish Child Welfare Law” *International Journal of Law, Policy and the Family*, vol. 12, 1998, pp. 180-201.

103. Section 39(4).

104. Article 6 Constitutional Act on the Rights of Children

105. Article 63(3): Physically and mentally handicapped and socially neglected children shall have the right to special care, education and welfare.

106. Article 110.

107. Article 50(3).

108. Article 49(2).

109. Article 41.

110. Article 64. See Kovaček Stanić, “Serbian Family Law: Rights of the Child” *International Journal of Children’s Rights*, vol. 17, 2009, p. 593.

111. Article 1 Constitutional Act on the Rights of Children.

112. Article XVI(1).

113. Article 69(1).

114. Article 11(1).

others refer to development by imposing duties on the state to protect children from specific dangers to their development, such as economic exploitation (Albania<sup>115</sup>, Austria<sup>116</sup>, Hungary<sup>117</sup>, Republic of Moldova<sup>118</sup> and Romania<sup>119</sup>). Other jurisdictions emphasise the importance of education for the development of children (Andorra<sup>120</sup>, Croatia<sup>121</sup>, Portugal<sup>122</sup> and Spain<sup>123</sup>).

■ **Right to be heard:** the principle set out in Article 12 of the CRC is not yet common in constitutions. To date, the right of children to be heard in decisions that affect them is set out in the constitutions of Austria<sup>124</sup>, Ireland<sup>125</sup> and Poland<sup>126</sup>, although it also features in the constitutional case law of some other states<sup>127</sup>. A specific application of the Article 12 principle – relating to the child’s participation in society – is to be found in several constitutions. Three states have provisions stating that public authorities have a duty to establish conditions that allow children to participate freely in society (Sweden) or the political, social, economic, cultural and sporting life of the country (Republic of Moldova<sup>128</sup> and Romania<sup>129</sup>). Finally, a principle relating to Article 12 – Article 5 which addresses the child’s evolving capacity – is present in several national constitutions. The concept of the evolving capacities of children features in constitutional provisions in seven states, namely Austria<sup>130</sup>, Finland<sup>131</sup>, Ireland<sup>132</sup>, Montenegro<sup>133</sup>, Slovenia<sup>134</sup>, Serbia<sup>135</sup> and Switzerland<sup>136</sup>.

■ **Best interests of the child:** it is perhaps surprising that the principle set out in Article 3 of the CRC – requiring that the best interests of the child be a primary consideration in all matters affecting the child – is set out in very few national constitutions. It is given explicit protection in the constitutions of just two member states – Ireland<sup>137</sup> and Serbia<sup>138</sup> – although it has featured in the constitutional case law of other states<sup>139</sup>.

### ► **Form of protection**

■ A review of the constitutions of the Council of Europe member states reveals that the traditional approach consists in focusing on the children’s need for protection, while a more recent and modern approach presents children as rights-holders. An intermediate approach consists in delegating this choice to the legislator.

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115. Article 54(3).

116. Article 5 (1) Constitutional Act on the Rights of Children combined with the protection from sexual abuse.

117. Article XVIII(1).

118. Article 50(4).

119. Article 49(3).

120. Article 20(1).

121. Article 63(2).

122. Article 73(2).

123. Section 29(2).

124. Article 4 Constitutional Act on the Rights of Children.

125. Article 42A.4.

126. Article 73(3).

127. See, e.g., Long, “The Impact of the UNCRC on the Italian Legal System” *International Journal of Children’s Rights*, 2009, vol. 17, pp. 161-162. See also Germany’s 3rd and 4th Periodic Reports to the Committee on the Rights of the Child, CRC/C/DEU/3-4, para.91, and Third and Fourth Periodic Reports submitted by Spain to the Committee on the Rights of the Child, CRC/C/ESP/3-4, paras.308 and 451.

128. Article 50(5).

129. Article 49(5).

130. Article 4 Constitutional Act on the Rights of Children.

131. Section 6(3).

132. Article 42A.4.

133. Article 74.

134. Article 56(1).

135. Article 64.

136. Article 11(2).

137. Article 42A.

138. Article 65.

139. See, e.g., Askola, “Cut-Off Point? Regulating Male Circumcision in Finland” *International Journal of Law, Policy and the Family*, vol. 25(1), 2011, p. 107 and Third and Fourth Periodic Reports submitted by Spain to the Committee on the Rights of the Child, CRC/C/ESP/3-4, paras.274-276. It also features in legislation in many states.

## Children as the object of special protection

■ Constitutions following this approach present children as objects of concern and give little, if any recognition to children's agency or autonomy. They rarely use rights language and often group children together with other perceived vulnerable groups, like mothers or families. For instance, 'mothers and children' are entitled to special protection under the Montenegrin Constitution<sup>140</sup>, the Constitution of "the former Yugoslav Republic of Macedonia"<sup>141</sup> and the Serbian Constitution<sup>142</sup> while the Ukraine Constitution<sup>143</sup> groups children together with families and mothers. Children and young people/adolescents are protected in the Constitutions of Croatia<sup>144</sup>, the Czech Republic<sup>145</sup> and Greece<sup>146</sup>.

■ In some countries, "childhood" rather than children is deemed worthy of protection, with an even greater abstraction (Azerbaijan<sup>147</sup>, Italy<sup>148</sup> and Lithuania<sup>149</sup> and to some extent the Russian Federation<sup>150</sup>). Certain constitutions expressly acknowledge that the family is the fundamental unit of society<sup>151</sup>, while the Portuguese Constitution also provides for the protection of parenthood (while also referencing the rights of children – see below). Along similar lines, the Bulgarian Constitution<sup>152</sup> provides that 'the family ... and children shall enjoy the protection of the State and society'. The Moldovan Constitution<sup>153</sup> contains strong protections for the family (as well as for children).<sup>154</sup>

■ A further common theme is the imposition on parents and families of a duty to protect their children. For example, the Croatian Constitution<sup>155</sup> provides that parents shall have the duty to 'bring up, support and educate their children' whereas the Montenegrin Constitution<sup>156</sup> requires parents to 'take care of their children, to bring them up and educate them'.<sup>157</sup> Rare is the Constitution that recognises the raising of children purely as the right of parents. For example, the Constitution of the Czech Republic<sup>158</sup> provides that 'the care and upbringing of children ... is the right of their parents'. Similarly, the Hungarian Constitution<sup>159</sup> provides that parents shall have the right to choose the upbringing to be given to their children and shall provide for their minor children, including their education.

■ It is much more common, however, for constitutions to refer to parents' rights and duties to raise, educate and support their children. For example, the constitutions of Montenegro<sup>160</sup>, Romania<sup>161</sup>, Croatia<sup>162</sup>,

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140. Article 73

141. Article 42

142. Article 66

143. Article 51

144. Article 62

145. Article 32(1)

146. Article 21(3) This provides that the state shall adopt special measures for the protection of youth

147. Article 34

148. Article 31

149. Article 38

150. The Constitution of the Russian Federation provides, in Article 7, that state support shall be ensured to the family and childhood. Article 38 provides that childhood shall be under state protection and that the care for children and their upbringing shall be the equal right and duty of the parents.

151. Article 67 of the Portuguese Constitution and Article 41 of the Irish Constitution.

152. Article 14

153. Article 48

154. Article 49 provides that the state undertakes to protect children and the young and to develop the institutions required to put that into effect. It provides that all children, including those born out of wedlock shall enjoy the benefits of the same social assistance. It also provides that children and young people enjoy a special form of assistance in the enforcement of their rights and that exploitation of minors is forbidden.

155. Article 63(1)

156. Article 72

157. See also Article 48 of the Moldova Constitution.

158. Article 32(4)

159. Article XV

160. Article 72

161. Article 48

162. Article 63(1) of the Croatian Constitution, parents shall have the duty to 'bring up, support and educate their children'. Article 63(2) states that 'parents shall be responsible for ensuring the right of their children to a full and harmonious development of their personalities'. Interestingly, the Croatian Constitution also recognises the rights of the child – Article 63 (4) provides that the State is bound to take 'special care of parentless minors and or parentally neglected children' whereas under Article 63(3), 'physically and mentally disabled and socially neglected children shall have the right to special care, education and welfare'. Further evidence of the mixed approach in the Croatian Constitution is found in Article 64 that 'everyone shall have the duty to protect children'.

Estonia<sup>163</sup>, Italy<sup>164</sup>, and Lithuania<sup>165</sup> all refer – in reasonably similar wording – to the right and duty of parents to raise their children. Rather uniquely, under the Spanish Constitution<sup>166</sup>, (1) the public authorities must ensure the social, economic and legal protection of the family, (2) the public authorities must ensure the full protection of children and (3) parents must provide their children with assistance of every kind while they are still under age.

■ It should be stressed in this context that the CRC recognises the very important role played by parents and family in the realisation and exercise of children’s rights<sup>167</sup>; however, viewing responsibility for children as an issue solely for parents is not consistent with the CRC, which makes it clear that the state is the ultimate duty bearer. More consistent with this approach are the (rare) instances in European constitutions where expression of the right or responsibility of parents to protect or raise children is combined with recognition of state responsibility in this regard. For example, the Azerbaijan Constitution<sup>168</sup> provides that parents must take care of their children and their education, but also points out that the state implements this responsibility. Similarly, the Bulgarian Constitution<sup>169</sup> recognises that the raising of children is a right and obligation of parents, assisted by the state<sup>170</sup>.

■ Although most states consider the raising of children as a parental right and duty, some constitutional provisions clearly stipulate that it is also the state’s responsibility to support parents and the family in this area. For example, the Finnish Constitution<sup>171</sup> provides that the public authorities shall support families and others responsible for caring for children so that they have the ability to ensure the children’s wellbeing and personal development.

■ The German Constitution provides, in several different provisions, for the protection of the child and the family. For instance, Article 6(2) provides that the care and upbringing of the child is the natural right and duty of parents and that the state shall supervise performance of this duty. This balancing of parental responsibility with state responsibility is found in other constitutions too. The Greek Constitution<sup>172</sup> provides that childhood shall be under the protection of the state and also provides<sup>173</sup> that families with many children are entitled to the special care of the state. Similarly, the Italian Constitution states that it is the duty of the state to support families, notably those with many children<sup>174</sup>.

■ In keeping with the CRC<sup>175</sup>, several constitutions consider that parents’ rights with regard to their children are not absolute. For example, the Serbian Constitution<sup>176</sup>, while recognising the right and duty of parents to support, raise and educate their children, notes that these rights may be withdrawn from parents if this is in the best interests of the child.<sup>177</sup> The Irish<sup>178</sup>, Italian and Portuguese<sup>179</sup> Constitutions recognise the duty of the state to provide for the child where parents fail in their responsibilities to the child or are incapable of caring for them, whereas the Polish Constitution provides that the restriction or deprivation of parental rights may be affected only as provided by law<sup>180</sup>. Drawing on Articles 20 and 21 of the CRC, which provide for the rights of children without parental care, both the Constitution of “the former Yugoslav Republic of Macedonia” and the Latvian Constitution recognise that the state must provide for children without parental care.

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163. Section 27

164. Article 30

165. Article 38(6)

166. Section 39

167. See Articles 5 and 18 for example

168. Article 17.II

169. Article 47(1)

170. Article 47(4) of the Bulgarian Constitution also provides that abandoned children shall enjoy protection of the State and society.

171. Section 19(3)

172. Article 21(1)

173. Article 21 (2)

174. Article 31.

175. Notably Article 19 which recognises that children can be harmed by their care givers

176. Article 65

177. See the case-law of the European Court of Human Rights under Article 8 of the European Convention on Human Rights in U. Kilkelly, ‘Child Protection and the European Convention on Human Rights’. *Irish Journal of Family Law*, 2 (2000):12-20.

178. Article 42A

179. Article 36(6)

180. Article 48.

## Children as holders of rights

There are different types of examples of rights-based language that can be used to express children's entitlements and needs in a way that is consistent with the CRC. These include explicit references to the 'rights' of children, clauses that stipulate that 'children have the right to' have their needs met, and phrases that place duties on the state, and others, to implement those rights. These practices are not widespread in the constitutions of Council of Europe member states. The Hungarian Constitution<sup>181</sup> contains a very good example of rights language by providing that every child shall have the right to the protection and care necessary for his/her development. In Austria, a special Constitutional Act on the Rights of Children was enacted in 2011; it contains a number of specific rights of children. Under the Irish constitution<sup>182</sup> the state recognises the rights of the child and undertakes to uphold those rights. Similarly, Montenegro<sup>183</sup>, Slovenia<sup>184</sup> and Poland<sup>185</sup> all recognise that children shall enjoy rights and freedoms appropriate to their age and maturity and be guaranteed special protection from exploitation or abuse. Different wording is used in the Romanian Constitution<sup>186</sup>, which provides that children and young people shall enjoy protection and assistance in the pursuit of their rights and the Albanian Constitution, similarly, provides that 'children, the young ... have the right to special protection by the state'<sup>187</sup>. Crucially, both forms reflect the status of children as rights holders, while making it clear that there is an onus on the state to uphold those rights. More indirectly, the Latvian Constitution provides that the state shall support the right of parents and the rights of the child. This recognition of the rights of the child<sup>188</sup> falls short, perhaps, of the more explicit rights-based approach by requiring that the state support the rights of the child.

There are therefore varying practices in the approaches that states take to protecting children's rights in their constitutions. In reality, very few states take a purely rights-based approach to the issue, and most of them combine children's "need for protection" with a "rights-based" approach. In Ireland's new Article 42A, for example, the first section contains an explicit recognition of children as the bearer of rights, but its subsequent provisions focus on protection over rights. Similarly, the Portuguese Constitution<sup>189</sup> provides that children 'have the right to' the protection of society but then goes on to provide that children are 'entitled to special protection' (not the right to protection) from the abuses of authority in the family. A rare exception is the Serbian Constitution, whose provision headed 'the Rights of the Child' contains several uses of rights language, especially in relation to the child's right to name and identity and to protection from exploitation and abuse.

## Delegation to the legislature

A final approach to children's rights in constitutional instruments can be found in those states whose constitutions make reference to children's rights but stop short of giving constitutional expression to them. A significant number of constitutions undertake, require or mandate legislative or other action to protect children's rights. While these could be regarded as coming within either the "need for protection" or "rights-based" category, in reality they are neither because they stop short of enshrining rights in the constitution per se. Although these could be considered to fall short of CRC requirements for this reason, at the same time, the recognition of a duty to take legislative action reflects the duty to implement the CRC, as Article 4<sup>190</sup> requires. This section highlights this apparently common trend in European constitutions.

There are many examples of this kind of approach (which may say more about the constitutional tradition in those countries than the approach to children's rights) and they are framed in different ways.

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181. Article XV(1)

182. Article 42A, yet to be enacted.

183. Article 74

184. Article 56

185. Article 74

186. Article 49

187. Article 54(1)

188. Article 110

189. Article 69

190. Article 4 CRC reads: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

■ The first approach is where the constitution requires that the law guarantee care and protection to children. For example, the Icelandic Constitution<sup>191</sup> provides that the law shall guarantee the protection and care which is necessary for children's well-being. In a similar approach, some constitutions stipulate that children and/or their rights are protected by law. This is the approach adopted in the Lithuanian Constitution<sup>192</sup>, the Constitution of Georgia<sup>193</sup> and the Ukrainian Constitution<sup>194</sup>, which provides that any violence against a child shall be prosecuted by law. Other approaches include the duty to make legislative provision for children's rights<sup>195</sup> and the requirement that children's rights and their protection be regulated<sup>196</sup>. The Azerbaijani Constitution<sup>197</sup> provides that the state "supervises the implementation of rights of a child".

■ Although this approach stops short of giving full constitutional status to children's rights, it is an important way of promoting the use of the law to express and protect children's rights. For example, the Swedish Constitution<sup>198</sup> stipulates that the public institutions shall promote the opportunity for the rights of the child to be safeguarded. Although this provision is rarely referred to, the merit of such an approach is that it provides a constitution-based means of bringing children's rights closer to the level at which they are implemented<sup>199</sup>.

■ In short, there is clearly no single way to express children's rights in national constitutions and every country has a range of factors that must be taken into account in deciding what rights to enshrine at a constitutional level, how to express those rights and the state's corresponding duties and how to ensure that those rights are enforced. In general, constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC and recognising the status of children as rights holders with an entitlement to have those rights upheld against the state, are those which attain the highest degree of compliance with international norms. At the other end of the spectrum, constitutions that enshrine general human rights protection but refer to children's interests merely in a language of protection and needs rather than in a rights-based language, and which allow only for limited justiciability of those constitutional provisions cannot be considered as models of good practice in terms of children's rights.

■ What is revealing is that constitutions, taken as a whole, often occupy several points on this spectrum at once. States rarely choose a single approach from one end of the scale and their variety of approaches means that good practice with regard to how to best enshrine children's rights in the constitution can be found virtually everywhere in the constitutions of individual Council of Europe states.

## THE ENFORCEMENT OF CHILDREN'S RIGHTS PROVISIONS

■ The inclusion of a children's rights provision in a constitutional document only tells part of the story: its mere inclusion does not secure a means of redress in the event of failure to uphold that right. A key indicator in assessing the level of constitutional protection of children's rights therefore is the extent to which those rights are justiciable, through the courts or another mechanism such as a children's ombudsman. However justiciability is not the sole indicator. As revealed by a survey to which the Venice Commission's network of liaison officers answered<sup>200</sup>, the enforcement of children's rights provisions also goes through a wide range of public authorities ranking from specific ministries to specialised local bodies.

■ A comprehensive assessment of the justiciability of children's constitutional rights across all 47 member states is outside the scope of this study, since it would require an assessment of case law, legislation, policy, practice and attitudes, all of which combine to determine the extent to which a right can be enforced. Moreover, any attempt to draw firm conclusions on justiciability is further complicated by the fact that some

191. Article 76.

192. Article 39. This provides that children who are under age shall be protected by law.

193. Article 36.

194. Article 52.

195. See Ireland, Article 42A, yet to be enacted.

196. See Serbia, Article 64 and Slovakia, Article 41.

197. Article 17. VI.

198. Chapter I, Article 2.

199. L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, 'The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries' (London: UNICEF UK, 2012), at p. 60.

200. The question put to the Confidential Forum of Liaison Officers read: "What institutions are competent to enforce children's rights that are enshrined in the Constitution of your country".

rights might be more justiciable than others (perhaps even within a single constitution): for example, civil and political rights tend to be more justiciable than economic and social rights. In light of these challenges, the analysis will be restricted to giving examples of varying approaches to justiciability, which can range from complete non-justiciability, to non-judicial enforcement through administrative remedies such as a children's ombudsman, to full justiciability before the courts using weak or strong judicial remedies (such as declaring laws, actions or inactions to be in breach of rights and possibly invalidating them in the process; awarding damages, or granting injunctions ordering actions to be taken or ceased).

### ► Non-justiciability

■ In some cases, the constitutions of Council of Europe states contain provisions regarding children's rights that are entirely non justiciable because they are merely guidance for the legislator and are not cognisable by any court. For example, the Irish Constitution contains a provision entitled "Directive Principles of Social Policy", which includes provisions in which the State pledges to safeguard the economic interests of the weaker sections of the community (including, in particular, orphans), and to endeavour to ensure that the tender age of children shall not be abused and that they shall not be forced by economic necessity to engage in labour unsuited to their age or strength. However, these Directive Principles of Social Policy are made expressly non-justiciable: a paragraph in the preamble stipulates that they are for the general guidance of the Oireachtas (Parliament) only and shall not be cognisable by any court under any provision of the Constitution. No remedy is therefore available in the event of failure to uphold the rights envisaged by these constitutional provisions.

### ► Administrative remedies

■ An increasingly common and relatively accessible means of redress for breaches of children's constitutional rights is through an administrative body such as a children's ombudsperson, or more broadly speaking an independent national human rights institution, which exists in a significant number of member states.

■ This was advocated by the Committee on the Rights of the Child in its General Comment No. 2 (2002) for the promotion and monitoring of implementation of the Convention. While such an institution should be established in compliance with the "Paris Principles", the Committee underlines the fact that "additional justifications exist for ensuring that children's human rights are given special attention". In addition to key features that can be drawn from the Paris Principles, the Committee has identified key features, specially tailored for the protection of children's rights, ranging from accessibility and participation to power to receive and investigate complaints regarding breaches of children's rights. However, the powers available to deal with such breaches vary from state to state. The baseline power of children's ombudsmen across Europe is the power to make findings of failure by administrative agencies to adequately observe children's rights, to make recommendations on how this could be avoided in the future, and to prepare an annual report that is generally submitted to the legislature or the executive. In some states the children's ombudsperson has extensive powers beyond this baseline and plays a significant role in the enforcement of children's rights. For example, in Serbia the Ombudsperson may have authority to initiate proceedings before the Constitutional Court to assess the legality and constitutionality of laws, other regulations and general by-laws which govern issues relating to the liberties and rights of citizens. This is an extremely important mechanism that could be usefully replicated in other states, given the barriers that children often face in initiating legal proceedings in their own right. In Montenegro the Ombudsperson may also have authority to submit to the Government or to the National Assembly an initiative to amend laws and other regulations. They are then obliged to consider the initiatives submitted by the Ombudsman. Again, this is a significant mechanism that has the potential to overcome the tendency for children's rights issues to be overlooked by elected officials who are not directly accountable to children at the ballot box.

■ According to the results of a survey<sup>201</sup> conducted within the European Ombudspersons for Children (ENOC) network, the vast majority of the twenty ombudspersons who replied expressed the view that if children's rights are included in the Constitution, they are made more visible and become more operational in the

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201. The Norwegian Ombudsman for Children, Dr Anne Lindboe, conducted the survey. The main aim of the survey was to explore the practical role of constitutional protection of rights of children, seen from the perspective of the ombudspersons. Three questions were asked:

- if children's rights as such are protected in the Constitution, which elements are specified and included?
- to what extent does the ombudsperson see that the constitutional protection of the rights of children have practical impact?
- if the rights of children are not protected in the Constitution, does the ombudsperson see it would be advantageous to include rights of children in the Constitution?

legal and political system. In addition, a majority regretted that constitutional protection does not reflect the rights protected by the CRC, while some would argue that if the CRC was given the status of constitutional law, it would not be necessary to enumerate children's rights. Some of the ombudspersons accept that even if the CRC is not incorporated at constitutional level but at statutory level, the rights of the children will be effectively protected. A tiny minority of the ombudspersons argue that children are effectively protected by the Constitution even though their rights are not specifically spelled out, as Constitutions protect "everyone".

■ However, a children's ombudsperson is not the only way in which administrative remedies can be provided for breaches of children's constitutional rights. A wide range of administrative bodies – some of which are dedicated child-focused bodies and some of which are not – are given specific responsibilities to assist the courts with the task of vindicating the constitutional rights of children in Europe.

### ► Judicial remedies

■ Generally, the most obvious way in which constitutional rights can be enforced is through litigation in the courts. This has been widely confirmed by the Venice Commission's network of liaison officers.

■ However, recourse to the courts is less straightforward in the context of enforcing the constitutional rights of children, since children may often face barriers to accessing court proceedings. As John Tobin has observed, "[m]ost constitutions only grant standing to victims but in practice children are unlikely to know about their constitutional rights let alone how they can enforce them." The Children's Ombudsperson is one possible way around this difficulty; other options include the possibility of standing being afforded to special interest groups. In Ireland, the "next friend" procedure allows another party (usually a parent or guardian) to bring a constitutional action in the name of the child whose rights are at issue – but there is no possibility for a child to bring a constitutional action independently, and adults are therefore cast in the role of gatekeepers to access to justice.

■ While one can argue that failure to create a suitable mechanism allowing children's rights claims to reach the courts risks reducing the good sentiments expressed in the text of a constitution to empty rhetoric rather than translating them into substantive change, the role of parents and carers in children's access to justice, as long as their interests run parallel, is not to be disregarded or undermined.

■ Here again, variety is one of the main features of the effects of the enforcement of constitutional children's rights. Some rights can be upheld relatively easily by court order – particularly when significant public resources are not required for that purpose. For example, where legislation infringes on a child's constitutional rights, that legislation could be declared unconstitutional and invalid; in some cases, the removal of the offending law will immediately uphold the rights of that child (and indeed every child in that country). For example, in Liechtenstein, the Constitutional Court found that a law imposing an age limit of 16 for family reunification in the case of the children of the nationals of third States was unconstitutional. The effect of this decision was to allow all children of citizens of third countries to be granted reunification with their families up to the age of 18<sup>202</sup>.

■ Seeking a remedy for failure to uphold social and economic rights potentially involves asking the courts to make decisions concerning the allocation of public resources, which ordinarily is a matter only for the elected organs of state. It is often said that courts lack the necessary expertise and information, as well as the democratic mandate, to override budgetary decisions made by the executive or legislative branch. For this reason, the majority of the constitutions of the Council of Europe's member states include limited, if any, provisions expressly granting socio-economic rights to children. The right to education is a significant exception to this trend and is to be found in forty-four out of forty-seven constitutions; however, even such a widely accepted socio-economic right of children gives rise to challenges in its enforcement.

■ This brief overview reveals that a full set of efficient mechanisms – judicial or non-judicial – are available to remedy possible violations of children's rights. This range of mechanisms must, however, be coupled with adequate procedural safeguards to ensure that there is an effective and appropriate response to the specificities of the needs and rights of the child.

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202. Second Report of Liechtenstein to the Committee on the Rights of the Child, CRC/C/136/Add.2, July 14 2005, para. 84.

# Conclusions

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■ Twenty five years after the adoption of the Convention on the Rights of the Child, the analysis of the protection of children's rights at the constitutional level offers an interesting picture not only of great and complex variety but also of recent and continuing evolution.

■ At international level, the CRC still constitutes the baseline of the status of children as autonomous rights holders and of the protection of children's rights. It has been echoed, at European level, by the sixty year old European Convention on Human Rights and its case-law, which has developed a "children's rights content" without much specific textual basis focused on children and, more recently, by the inclusion of specific children's rights issues at the level of the EU Fundamental Rights Charter.

■ The standard setting activity that has been undertaken more recently by the Council of Europe has inevitably increased awareness among member States of the importance of the constitutional expression of children's rights.

■ States have a positive obligation under international law to respect, protect and fulfil children's rights. However, the limits of the effects of this international protection underline the importance for member states to adopt domestic law provisions on children's rights.

■ The CRC was meant as a useful tool for advocacy and greater awareness of a new understanding of children as independent right holders. This is without prejudice to children who need protection within the family, which remains, as stated in the Universal Declaration of Human Rights, "the basic unit of society"<sup>203</sup>. While the importance of a loving family for the best development of a child remains indisputable, the impact of state legislation for the protection of children of their rights and needs, cannot be underestimated

■ The analysis of constitutional provisions reveals that there is clearly no single way to express children's rights in national constitutions and every country will have a range of factors to take into account in deciding what rights to enshrine at a constitutional level, how to express those rights and the state's corresponding duties, and how to ensure that those rights are enforced.

■ In general, constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC, and recognising the status of children as rights holders with an entitlement to have those rights upheld against the state, express the highest forms of compliance with international norms.

■ At the other end of the spectrum, constitutions that enshrine general human rights protection, using only a protection- rather than a rights-based expression of children's needs, commit to weak justiciability and exemplify a low level of protection for children's rights.

■ What is revealing is that constitutions, taken as a whole, often occupy several points on these spectrums at the same time. States rarely choose a single approach from one end of the scale and their variety of approaches means that good practice with regard to how to best enshrine children's rights in the constitution can be found virtually everywhere in the constitutions of individual Council of Europe states.

■ Given the specificities of children's protection and rights, a meaningful protection implies access to appropriate and accessible enforcement mechanisms including access to judicial remedies and courts. In addition, provisions on specific rights of complaint, of formal authority/legal standing for an ombudsman or other institutions (preferably set up in line with the Paris principles) are essential.

■ This study has identified considerable good practices in the constitutional protection of children's rights and their enforcement. The merit of identifying such good practices is that States can learn from each other in promoting higher standards.

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203. See UN Resolution 217 A (III), article 16 (3). [http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf)

■ Against this background, the Venice Commission has identified a set of key measures that would best answer the question “How can children’s rights be included in national constitutions with a view to thus promoting their effective implementation?”.

■ The Venice Commission recommends that member states of the Council of Europe provide, according to their constitutional system, constitutional guarantees for the recognition and protection of children’s rights, along the following lines:

- ▶ notwithstanding the status and rights granted to the family, children shall be addressed as rights-holders and not merely as persons in need of protection;
- ▶ in all actions concerning children, the best interests of the child shall be a primary consideration (in line with Article 3 of the Convention on the Rights of the Child);
- ▶ children shall have the right to be heard in all decisions that affect them (in line with Article 12 of the Convention on the Rights of the Child).

■ The Venice Commission further recommends member states to:

- ▶ provide strong guarantees for the enforcement of children’s rights, including by setting up an independent institution with responsibility to promote and protect children’s rights (preferably set up in line with the Paris principles)<sup>204</sup>;
- ▶ make sure that efficient mechanisms - judicial and non-judicial – are in place to remedy possible violations of children’s rights, coupled with adequate procedural safeguards<sup>205</sup>.

■ Moreover, member states and their institutions have a positive obligation to ensure the effective implementation of children’s rights.

■ The Venice Commission recalls that positive obligations to ensure effective human rights protection, consistent with the case law of the ECtHR, are of particular importance for children.

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204. In line with General Comment N° 2 CRC.

205. The Venice Commission recalls in this regard the Council of Europe’s Recommendation Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice.





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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

