



**PROVISIONAL VERSION**

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## **The inclusion of children's rights in national constitutions as an essential component of effective national child policies**

Report<sup>1</sup>

Committee on Social Affairs, Health and Sustainable Development

Rapporteur : Mr Cezar Florin PREDA, Romania, Group of the European People's party

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<sup>1</sup> Reference to Committee: Doc 13149, Reference No. 3951 of 26 April 2013.

## A. Draft resolution<sup>2</sup>

1. Children's rights are anchored in national constitutions and legislations in various manners across Europe, in accordance with diverse legal traditions and legal, political, social and cultural backgrounds. A global standard to be respected by all Council of Europe member States is the UN Convention on the Rights of the Child (CRC) providing that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention".
2. The Parliamentary Assembly is concerned that member States of the Council of Europe have not yet exploited all constitutional, legal and administrative means at their disposal to protect children and promote their development and life chances to the greatest extent possible. With ever new threats to children's safety and well-being emerging in the 21<sup>st</sup> century, such as risks linked to information and communication technologies or children's particular vulnerability in a context of austerity measures applied to public services, bolder measures are needed.
3. The incorporation of children's rights in national constitutions can be considered as an essential component of national child's rights policies. The effectiveness of constitutional provisions regarding children's rights, however, also depends on domestic legislation, policies and administrative set-ups aimed at enforcing these rights.
4. Taking into account European diversity in this field and good practices identified in many countries, the Parliamentary Assembly calls upon member States to re-examine their current constitutional and legislative coverage of children's rights, as well as their enforcement at the national level, so as to further incorporate and materialise the universal principles provided by the CRC.
5. With a view to the need to update constitutional and legislative frameworks, the Parliamentary Assembly thus calls on member States to:
  - 5.1. Analyse current constitutional provisions in the light of international standards and recent developments in a given national context;
  - 5.2. Provide constitutional guarantees for the protection and promotion of children's rights based on a modern approach addressing children as autonomous rights-holders, ensuring that the best interests of the child are a primary consideration (according to Art. 3 of the CRC) and giving children the right to be heard in all decisions affecting them (according to Art. 12 of the CRC);
  - 5.3. Implement international standards through the most comprehensive and up-to-date national legislation, also to respond to specific threats against children and their rights;
6. With a view to enforcing children's rights, be they anchored in constitutions or national laws, the Parliamentary Assembly invites member States to:
  - 6.1. Sign up to and respect international instruments and mechanisms for the enforcement of children's human rights, including the new Optional Protocol of the CRC on a communications procedure, the European Court of Human Rights' case law, the Additional Protocol providing for a system of collective complaints to the European Social Charter, as well as the Council of Europe Guidelines on child-friendly justice;
  - 6.2. Develop appropriate and accessible enforcement mechanisms for children, including access to judicial remedies and courts, specific complaint mechanisms and adequate procedural safeguards, at the national level;
  - 6.3. Provide strong procedural guarantees for the enforcement of children's rights, including by setting up an independent human rights institution for children (according to the Paris principles);
7. With a view to more general measures aimed at promoting children's rights and supporting any constitutional, legislative or political reforms, member States are invited to:

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<sup>2</sup> Draft resolution adopted unanimously by the Committee on 21 April 2015.

- 7.1. Continue to organise international exchanges in this field, so that States can learn from each other in promoting higher standards;
- 7.2. Support effective implementation of children's rights through specific national policies and an appropriate set-up of administrative services, accompanied by the allocation of the necessary budgetary resources;
- 7.3. Set-up or strengthen children's rights committees in national parliaments on a permanent basis to ensure democratic oversight over the full implementation of children's rights.

## B. Explanatory memorandum by Mr Preda, rapporteur

*"In serving the best interests of children, we serve the best interests of all humanity."*

*Carol Bellamy, former Executive Director  
of the United Nations Children's Fund  
(UNICEF, 1995 – 2005)*

### 1. Introduction

1. International efforts to promote and protect children's rights have undergone significant change since the beginning of the 20<sup>th</sup> century. The UN Convention on the Rights of the Child (UNCRC) of 1989 has provided an invaluable contribution to this shift in paradigms. Articles 3 and 4 of the UNCRC respectively provide that "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" and require parties to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized".

2. Even though legislative action alone does not ensure the translation of children's rights into national policy, the inclusion of children's rights in national constitutions may represent a strong signal and starting point for reinforcing national legislation and mechanisms in favour of child protection and development. In this respect, the CRC provides a strong basis for the inclusion of children's rights in constitutions among national measures for the protection of children, without, however, explicitly requesting this.

3. The present report aims at exploring the question of how children's rights could be inscribed in national constitutions, and how to ensure that relevant provisions, as well as children's rights more generally, are effectively implemented in the national context. The subsequent outcomes of this activity may serve as a basis for a continued exchange of best practice and give orientation to national governments.

4. By letter of 25 March 2013, the Committee on Social Affairs, Health and Sustainable Development ("Social Affairs Committee" hereafter) seized the European Commission for Democracy through Law (Venice Commission hereafter) with the following question: "How can children's rights be included in national constitutions with a view to thus promoting their effective implementation?" The Venice Commission agreed to undertake a study on this question, involving several of its members as experts, and adopted the final report at its 98<sup>th</sup> Plenary Session on 21-22 March 2014. This study was fully taken into consideration for this report, to ensure that the activities of the Parliamentary Assembly and the Venice Commission in this area are fully coordinated and that any recommendation resulting from the present report is based on substantial expert analysis.

### 2. Children's Rights as Constitutional Rights – general observations

#### 2.1. History and status of children's rights in constitutions

5. A study conducted in 1978<sup>3</sup> revealed that 82% of national constitutions drafted between 1788 and 1948, and 93% of the constitutions drafted between 1949 and 1975, provided some form of protection for human rights and fundamental freedoms. At the beginning of the 21<sup>st</sup> century, UNICEF estimated that there were just over 20 constitutions worldwide that expressly guaranteed or protected the rights of children according to the approach promoted by the CRC (as set out below).<sup>4</sup> These constitutional provisions display five main characteristics namely: universality, inalienability, accountability, participation and opportunity for redress. Provisions concerning children's rights would generally show concern for the following principles: non-discrimination, best interest of the child, the right to survival and protection, access to basic social services and protections, the primary role of family, protection from violence, abuse and neglect and respect for the views of the child. The most broadly protected rights afforded to children are generally related to education, labour or equality before the law (see further details in chapter 4 on the study undertaken by the Venice Commission).

6. UNICEF distinguished three different categories concerning constitutional status of children according to the time period in which constitutions were drafted and adopted: (1) the "invisible child" constitution, (2) the

<sup>3</sup> H. van Maarseveen & G. van der Twang: *Written Constitutions: A Computerized Comparative Study*, Oceana, 1978.

<sup>4</sup> UNICEF: *Constitutional Reforms in Favour of Children*, New York, 2008, available at: [http://www.unicef.org/policyanalysis/files/Constitutional\\_Reforms\\_in\\_Favour\\_of\\_Children.pdf](http://www.unicef.org/policyanalysis/files/Constitutional_Reforms_in_Favour_of_Children.pdf).

“special protection” constitution and (3) the “children’s rights” constitution which, in some cases, seem to be linked to the history of relevant texts.<sup>5</sup> Accordingly, children are mostly invisible in texts adopted prior to 1945, even though some of them contain a range of human rights provisions that may assure their application to children.

7. National constitutions following the protection approach, often adopted in the post-war period, generally reflect a perception of children not so much as individuals bearing rights on their own behalf as persons entitled to special care or assistance, thus assigning a special responsibility for their care and education to parents. This approach is reflected by the Universal Declaration of Human Rights of 1948, as well as the International Human Rights Covenants of 1966. According to UNICEF, the “special protection” constitutions are not incompatible with the UNCRC approach; they do however fall short of the ideal approach reflected in this later universal text. Although they show a growing concern for human rights more generally with moderate concern for children as a discrete category, the language in use belies a view of children as “objects” in need of protection rather than active rights holders.<sup>6</sup>

8. Those constitutions adopted or revised since 1989, year of adoption of the UNCRC, are the ones most likely to adopt a fully-fledged approach. The latter is often premised upon the recognition of children’s rights *per se* including a shift to a rights-based discourse on constitutional treatment of children.<sup>7</sup> However, the level of penetration by the UNCRC in the text of each provision dealing with the rights of children differs for each constitution. Whilst the increasing prevalence of such constitutional guarantees for children’s rights is to be welcomed, it must be accompanied by a critical discussion about the status and implementation of such rights. As rapporteur on this issue, I am convinced that the lack of explicit provisions in a national constitution does not mean that children’s rights are not respected, as they may also be covered by more general provisions on human rights. Nevertheless, the fact that specific provisions have not been considered necessary in the past does not prevent States concerned to re-examine the issue in the light of evolving perceptions and standards.

## 2.2. Why include children’s rights in constitutions?

9. A written constitution is the primary and superior codicil of law in a state and generally consists of a single written text that serves as a reference point for the formulation of all other national laws and regulations. Constitutional rights thus enjoy an elevated position in which all other laws are made in compliance with them. Such status and influence may be mobilised in favour of children by the inclusion of specific protection for the rights of children in national constitutions.

10. Constitutions may also express policy priorities of a state. Several common law jurisdictions constitutionally prioritise policies through “Principles of State Policy”.<sup>8</sup> These provisions are generally broad, serving as general standards against which state action may be judged. Such non-binding policy priorities, while they may serve as an encouraging step towards securing explicit guarantees of children’s rights in the constitutional text at a later date, offer little substantive guarantee, largely due to the demonstrable reluctance of courts to utilise such implicit guarantees, and thus be perceived to engage in judicial activism.

11. The Directive Principles of Social Policy included in Article 45 of the Irish Constitution, for example, are intended for general guidance but “whose application in the making of laws shall be the care of the *Oireachtas* (parliament) exclusively, and shall not be justiciable before any Court under the Constitution.” The principles include the equality of all citizens and their entitlements to welfare, the operation of free competition and the duty of the state to pay particular attention to the needs of those sections of the community who are particularly vulnerable.

12. Not all States have a written constitution or a single constitutional text, one example being the United

<sup>5</sup> UNICEF Innocenti Research Centre: *Laying the Foundations for Children’s Rights, An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (Alston, Tobin), Florence 2005, [http://www.unicef-irc.org/publications/pdf/ii\\_layingthefoundations.pdf](http://www.unicef-irc.org/publications/pdf/ii_layingthefoundations.pdf).

<sup>6</sup> T. McDorman & M. Young: *Constitutional Structures and Human Rights in South-East Asia*, *New Brunswick Law Journal* 1998. See also, R. Ludwikowski: *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, *Cardozo Journal of International and Comparative Law*, 1995.

<sup>7</sup> T. Burgenthal: *Modern Constitutions and Human Rights Treaties*, 36 *Columbia Journal of Transnational Law*, pages 211, 215-220, Columbia 1997.

<sup>8</sup> The underlying idea behind the Directive Principles is that whichever party may possess the rein of administration should implement these constitutional ideals. The Irish Constitution, for example, lists the Directive Principles of Social Policy in its Article 45: “The state shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all institutions of national life”.

Kingdom. This does not prevent them from seeking to comply with the Convention provisions by other means. Furthermore, the inclusion of children's rights in national constitutions does not in itself guarantee their actual implementation: additional legislative and political measures will always be necessary. Lastly, constitutional texts differ in nature from one country to another, and this may also influence the implementation of the rights contained therein. It is important, therefore, to take account of specific national circumstances when exploring the usefulness of including children's rights in constitutions, before making any recommendations to this effect.

### 2.3. *How to include children's rights in constitutions?*

13. The predominant method of "constitutionalisation" of children's rights currently takes the form of incorporation by reference to other texts, such as the CRC. However, certain legal experts claim that such guarantees offer a false security and lend a rhetorical strength to the vindication of children's rights that is not always sufficient to ensure actual or adequate protection.<sup>9</sup> When using this form of "constitutionalisation" of children's rights, the stringent implementation through specific legislation and political mechanisms will therefore be of utmost importance. Children's rights may also be incorporated directly in the constitutional text. This is the case in a number of European countries including my own, Romania (under Article 49, the Romanian constitution provides special protection to children and young people in the pursuit of their rights by prohibiting their employment in any harmful activity).

14. Some experts, such as the current Mediator (Ombudsman) of Luxembourg, regularly promote the idea not to inscribe children's rights as such in constitutions given that constitutional majorities are difficult to obtain. Instead, it is recommended to anchor the national human rights institution dedicated to children in constitutional texts, thus obliging these institutions to follow minimum standards in any action in favour of children, based on the original "3 Ps" - *prevention, protection, prosecution* - later completed by a 4<sup>th</sup> "P" designating public *policies*.<sup>10</sup> Making use of national human rights institutions for children as a means of enforcing children's rights, is also one of the key recommendations put forward by the Venice Commission (see chapter 4 developing more specific proposals in this respect).

## 3. **Arguments surrounding the constitutional status of children's rights**

15. Constitutions can concretely induce change if they provide binding standards for legislative, policy and regulatory measures. More generally speaking, constitutionalisation promotes awareness of children's rights and provides such rights with a legitimacy and foundation they may otherwise lack. It also creates a political incentive for increased spending allocations for children in budgets and can strengthen children's standing before the courts. However, studies of the implementation of the CRC indicate that one of the main problems in this regard is still a lack of recognition and promotion at national level. As regards the budget allocations needed to enforce children's rights, some only require limited resources (for example, the right to have one's own name or citizenship), while others are more costly and the degree to which they are implemented depends on the will of each state (for example, the right to education and cost of schooling).

### 3.1. *Why constitutionalisation over other means?*

16. UNICEF qualifies the constitutional recognition of children's rights as a "springboard" from which to launch a concerted effort to change legal and policy frameworks and to challenge parent-centred child welfare laws that are not always in the best interest of the child.<sup>11</sup> The introduction of a children's code has been put forward by the organisation as an alternative to constitutionalisation.<sup>12</sup> The benefit of such a mechanism lies largely in its immediate effect as it creates a comprehensive body of law dealing with children's issues. However, such breadth may in itself create difficulties, as the implications of a volume of new law may be hard to assess. In common law countries, codes will not be easily enforced due to unfamiliarity of legal and other professionals with codified systems as well as the incompatibility of codes with elaborate case-law and constitutional structures.

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<sup>9</sup> Such an effect can be seen in the French example regarding a Court decision of 1993: *Cour de Cassation 1ère Chambre civile*, 10 March 1993, 91-11.310, available at: <http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007030074&fastReqId=1148532603&fastPos=1>.

<sup>10</sup> As presented by the Mediator of Luxembourg, Ms Lydie Err, to the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly and the network of contact parliamentarians to stop sexual violence against children of the ONE in FIVE campaign on 14 March 2013 at their meeting in Berlin.

<sup>11</sup> UNICEF: Handbook on legislative reform: realising children's rights, Vol. 1, New York, 2008, available at: [http://www.unicef.org/crc/files/Handbook\\_on\\_Legislative\\_Reform.pdf](http://www.unicef.org/crc/files/Handbook_on_Legislative_Reform.pdf).

<sup>12</sup> UNICEF Innocenti Research Centre, see footnote no. 3.

17. However, the alternative, of relying on change through precedent, is equally untenable. The system of “stare decisis” (i.e. the doctrine of judicial precedent) in operation at common law favours a retrenchment of the status quo, thus change is gradual and occurs over extended periods of time. More worryingly, it takes only a single judgment in a higher court to undo the progress made in a particular area and revert to a previous position. Where change is to occur there must also be a concrete source of law on which a judge may rely lest the bench be accused of engaging in judicial activism and overstepping its role. In the presence of such uncertainty and piecemeal remedying of the problem, constitutionalisation offers a uniform means of protection in all jurisdictions operating under a constitutional system.<sup>13</sup>

### 3.2. *Express versus implied inclusion*

18. In the context of arguments that seek to question the inclusion of children's rights in national constitutions the primary contention is that additional, explicit guarantees are unnecessary as children are already guaranteed rights as citizens of that jurisdiction. More simply put, the rights afforded to citizens are also implicitly afforded to children of the state in their role as citizens. Thus, the only situation in which the inclusion of additional guarantees of children's rights in the constitution could be required would be if one believed that children were not citizens, or for children who are evidently not citizens, thus nationals of a given country. Additionally it might be contended that by guaranteeing specific rights for children in state constitutions, there is an implicit exclusion of children from the broader and more established guarantees afforded to adult citizens.

19. The corollary argument is that specific groups of the population, including children, may be vulnerable to victimisation and could face increased obstacles in representing and vindicating their legal rights, and thus may need protection in addition to that afforded to the majority of citizens. Among the most vulnerable groups of children, I would like to mention refugee or migrant children, as well as children with disabilities, who often require special protection and support.

### 3.3. *The separation of powers*

20. There are concerns that the constitutional incorporation of the specific socio-economic rights listed in the CRC would lead to unacceptable conflicts in the separation of powers as it would not only permit but require Courts to make orders directing the state to implement particular policies or services thus encroaching on the roles of the legislature and executive.

21. Experts have, for example, noted that the South African model (of enshrining extensive lists of socio-economic rights into their constitution through incorporation of the CRC by reference) has led to a situation in which interpretation and application of children's rights are unpredictable, inconsistent and frequently create tensions between the rights of children and society more generally. Such unpredictability of enforcement is largely linked to the socio-economic nature of the rights that the judgments seek to enforce: there may be insufficient resources to allow for enforcement, or one court may be less willing than others to engage in policy formulation or resource allocation involved in its enforcement.<sup>14</sup> As regards the enforcement of international treaties, it may also be observed that courts are reluctant to enforce provisions having the status of principles without including more objective implementation criteria.

### 3.4. *The state's ability to supplement or supply the role of parents*

22. The potential of constitutionalisation to expand the state's power to interfere in family life, thus usurping the place and authority of the family unit, is of concern for some. The risk of parents' rights being reduced is, by the way, one of the major reservations expressed by the United States with regard to ratification of the CRC, fearing, for example, that parents might be prevented from raising a child in accordance with their religious faith or from using minor corporal punishments. Generally there is thus a need to establish clear rules and procedures for intervention by state authorities and public services.

23. Recommendations for interventions by social services, notably when it comes to the removal of children from their families if their well-being is under threat, are currently in preparation by the Parliamentary Assembly in a report entitled “Social services in Europe: legislation and practice of the removal of children

<sup>13</sup> Motta Feraz, Octoavio Luiz: *Harming the Poor through Social Rights Litigation*, Texas Law Review 2011, cf. <http://www.texasrev.com/wp-content/uploads/Ferraz-89-TLR-1643.pdf>.

<sup>14</sup> K. Klare: *Legal Culture and Transformative Constitutionalism*, 14 South African Journal on Human Rights 147 (1998); Mbazira C.: *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009), at [http://www.pulp.up.ac.za/pdf/2009\\_07/2009\\_07.pdf](http://www.pulp.up.ac.za/pdf/2009_07/2009_07.pdf) (accessed 15/07/13). This was illustrated in the case of Republic of South Africa v Irene Grootboom et al 2000 (11) BCLR 1169 (CC) 2000 SACLR LEXIS 126.

from their families in Council of Europe member States” (to be debated at the PACE April 2015 part-session). A topical example from France shows that increasingly, States are expected to set clear rules for the education of children in the private context (including families and schools): On 3 November 2014, and following complaint no. 92/2013 put forward by the Association for the Protection of all Children (APPROACH) versus France, the European Committee of Social Rights notified a violation of Article 17§1 of the European Social Charter, due to the lack of “sufficiently clear, binding and precise prohibition of corporal punishment set out in French law”.<sup>15</sup>

#### 4. Constitutional protection of children’s rights: findings by the Venice Commission

24. In 2013/2014 and at the initiative of the Social Affairs Committee, the European Commission for Democracy through Law (Venice Commission hereafter) conducted a study on “how children’s rights can be included in national constitutions with a view to thus promoting their effective implementation” (see introduction), also perceived as a contribution to the Council of Europe Strategy for the Rights of the Child (2012-2015).<sup>16</sup>

##### 4.1. General status of children’s rights

25. The Venice Commission firstly notes that the United Nations Convention on the Rights of the Child (CRC) constitutes the baseline of the protection of children’s rights through international law and the recognition of children as autonomous rights-holders. It also emphasises that the impact of state legislation for the protection of children’s rights and needs cannot be underestimated, not least due to the fact that children often require representation, assistance and support to exercise their rights.

26. Nevertheless – and here a shift in paradigms is still underway - children should not primarily be seen as “victims” but as bearers of individual and autonomous rights who may also contribute to the realisation of their substantial protection rights through additional participation rights. As with all human rights, the State is seen as the primary duty-bearer under the CRC whilst parents as care takers may take a role in the vindication of children’s rights either directly or in their role as advocates.

27. According to the UN Committee on the Rights of the Child in particular four general principles should be given legal standing and effect in national legal systems: non-discrimination (Art. 2), the best interests of a child as a primary consideration in all action (Art. 3), the right to life, survival and development (Art. 6) and the right to be heard in all decisions affecting children (Art. 12).

28. However, the UN Committee also notes that constitutionalising children’s rights does not automatically ensure respect for the rights of children. Against this background, as well as recent evolutions of European societies (new threats to well-being, austerity measures disproportionately affecting children in times of economic crisis and leading to increasing child poverty<sup>17</sup>), the analysis of the constitutional protection of children’s rights in Council of Europe member States as well as their enforcement, was judged most useful by the Venice Commission at the outset of their study.

##### 4.2. Different forms of child protection

###### *Incorporation of international law into the domestic law order*

29. One of the ways of protecting children’s rights is the indirect constitutional protection through international law, i.e. the incorporation of the CRC and children’s rights provisions under Art. 24 of the European Union Fundamental Rights Charter (EU FRC) into the domestic law order. In this case, a constitutional type of protection may only be achieved if CRC and Art. 24 of EU CFR are awarded constitutional status and effect.

30. However, the status and effect of international law in national legal systems vary from one country to another. In purely formal terms, their normative effect would therefore be less powerful than that of a constitutional clause on children’s rights, even though conventions may also deploy direct effects (according

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<sup>15</sup> See “Decision on the Merits” by the European Committee of Social Rights, published on 4 March 2015: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC92Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC92Merits_en.pdf).

<sup>16</sup> If not specified otherwise, all information in this chapter comes from the following source: European Commission for Democracy through Law (here-after “Venice Commission”): Report on the protection of children’s rights: international standards and domestic constitution, Opinion no. 713/2013, Strasbourg 24 March 2014; [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)005-e).

<sup>17</sup> Also see Assembly Resolution 1995 (2014) on Ending Child Poverty in Europe.

to relevant decisions taken by national law-applying authorities). For example, the direct effect of the best-interest of the child provision in Art. 3 has been answered quite differently by various domestic courts, some opting in favour (France, Bulgaria), others against direct effects (Belgium).

31. Whilst, up until now, the CRC has often been weakened by reservations expressed by member States (often with regard to provisions of Art. 14 (freedom of religion) and 21 (adoption)), the trend goes to an increasing number of States withdrawing reservations. Nevertheless, implementation of children's rights anchored in the CRC is not facilitated by the fact that the Convention provides a fairly weak monitoring mechanism, limited to periodic States reports. However, much hope is currently set in the new Optional Protocol of the CRC on a communications procedure (providing children with an individual complaints mechanism, and foreseeing inter-state communications and systematic inquiry procedures).

32. Further children's rights provisions are contained by the EU CFR (Art. 24), but their priority over domestic law, whilst fully recognised by the European Court of Justice (ECJ), is refused even by certain EU member States who would not accept that EU law infringes their "constitutional identity". The European Convention on Human Rights, for its part, does not mention children's rights explicitly but guarantees their rights through its case-law. The latter presents the advantages of being open to individual applications, leading to legally-binding decisions and of evolving with changes of social and family structures; it can therefore be considered as a dynamic instrument.

*Provisions on children or their rights in national constitution: scope and forms of protection*

33. Only three Council of Europe member States, France, Norway and the United Kingdom, currently have no constitutional provision regarding children rights, for various reasons: In France, international treaties, including the CRC, have a superior authority to that of national legislation; the United Kingdom does not have a written constitution, however, through the 1998 Human Rights Act and national jurisdiction, finds other ways of giving effect to children's rights; Norway's constitution for its part remains silent on children's rights until now but possible reforms are currently being discussed.<sup>18</sup>

34. All other member States' constitutions do contain some sort of provisions relating to children or their rights. The most widespread is the right to education that can be found in 43 constitutions. The presence of a constitutional right to education has significant potential to advance the indivisible rights of children, and particularly their right to development as education is a pre-requisite to the enjoyment of other rights. The second most common provision 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. Another frequently found provision at constitutional level is the right to protection from harm. The requirement that children should have equal status before the law, irrespective of the marital status of their parents, is present in 16 States.

35. Some of the Council of Europe member States have already given constitutional expression to the general principles of the CRC, including the principle of non-discrimination (Art. 2; most commonly represented), the child's right to survival and development (Art. 6), the right to be heard (Art. 12) and the best interests of the child as a primary consideration (Art. 3). However, in its study, the Venice Commission expresses great surprise at the fact that especially the latter "best interest principle" was set out in very few national constitutions.<sup>19</sup>

36. The Venice Commission takes stock of three possible approaches of protection of children's rights in national constitutions: (1) Children as objects of special protection provisions; (2) Children as rights-holders and (3) Children's rights being explicitly referred to the legislator. Of course, referring back to the CRC as the main standard, it recommends that all member States should follow the "modern" approach of acknowledging the status of children as autonomous rights-holders.

<sup>18</sup> The report noted that in France, international treaties have a superior authority to that of legislation, which applies to the CRC (as concerns its self-implementing provisions) and the *Cour de Cassation* has held that at least some provisions of the CRC can be applied directly. Also, as a part of a possible inclusion of a more general human rights catalogue in the Norwegian Constitution there are on-going discussions of including children's rights provision. Even though the United Kingdom does not have a written constitution, the Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law and there are many examples of national courts giving effect to children's rights by interpreting national law in light of Article 8 ECHR or declaring it incompatible with Article 8.

<sup>19</sup> Some constitutions demand that children have a right to the fullest possible development of their personality and potential (Austria, Hungary, Portugal and Switzerland); others refer to development by imposing duties on the state to protect children from specific dangers to their development, such as economic exploitation (Albania, Austria, Hungary, Moldova and Romania). Other jurisdictions emphasise the importance of education to the development of children (Andorra, Croatia, Portugal and Spain).

37. For the experts of the Venice Commission, the highest form of compliance with international standards would be “constitutions that express children’s rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC, recognising the status of children as rights-holders with an entitlement to have those rights vindicated against the state”, whilst the lowest level of protection would be “constitutions that enshrine general human rights protection, use merely a protection, rather than a rights-based expression of children’s needs, and commit to weak justiciability”. However, given that States rarely choose a single approach, but often combine approaches, good practice in constitutionalising children’s rights may be found in many member States.<sup>20</sup>

*Children as objects of special protection*

38. Constitutions following this approach present children as objects of concern and give little, if any, recognition to their agency or autonomy, but often group them with other vulnerable groups like mothers or families. Different national approaches may be regrouped along the following lines some of which may appear as quite “abstract”:

- “Mothers and children” are entitled to special protection under the constitutions of Montenegro, “the former Yugoslav Republic of Macedonia” and Serbia (“mothers, children and families” in Ukraine);
- Some countries tend to protect “childhood” rather than children, e.g. Azerbaijan, Italy, Lithuania, and the Russian Federation;
- “parenthood” or “the family” are protected in Portugal and Bulgaria or Moldova respectively;
- Croatia and Montenegro foresee the parental duty to protect children, while the Czech Republic and Hungary assign to parents a right to the upbringing of children, whereas many would join parents’ rights *and* duties (Croatia, Estonia, Italy, Lithuania, Montenegro, and Romania).

39. Such approaches assigning a strong role to parents are not always consistent with the CRC which provides the State with the responsibility of being the ultimate duty bearer. Constitutions providing that the State also has a responsibility to support parents and the family are therefore judged as a positive approach in this area. Also perceived as consistent with the CRC are those constitutions which consider that parents’ rights with regard to children are not absolute and may be revoked from parents if it is in the best interests of the child (as for example in Ireland, Italy and Portugal).

*Children as autonomous rights-holders*

40. For this approach, the Venice Commission identified different examples of rights-based language to express children’s entitlements and needs in consistency with the CRC, however constitutions referring explicitly to children’s rights do not seem to be numerous across Europe. A positive example is the rights-based language of the Hungarian Constitution which stipulates that every child “shall have the right to the protection and care necessary for his/her development”.<sup>21</sup> Equally strong formulations seem to be contained in the constitutions of Austria, Montenegro, Slovenia and Poland. A slightly different formulation is used by the constitution of my own country, Romania, providing that “children, the young [...] have the right to special protection by the State”. However, all these formulations reflect the status of children as rights-holders, while making clear that there is an onus on the State to vindicate those rights.

41. Whilst noting these examples of a strong rights-based discourse, the Venice Commission also notes that only few States take such an approach in an exclusive manner, whilst most States would follow a mixed approach combining protection-need and rights-based expressions (to be seen clearly in the constitutions of Ireland, Portugal and in particular Serbia, for example).

42. The third approach to enshrining children’s rights in constitutions, would be their referral to the legislator by undertaking, requiring or mandating legislative or other action to protect children’s rights, for example by requiring that the law shall guarantee care and protection to children (Iceland), by providing that children are protected by law (Lithuania), by providing that any violence against a child shall be prosecuted by law (Ukraine) or by prescribing the supervision of the implementation of rights of a child by the State (Azerbaijan). Whilst such approaches stop short of giving full constitutional status to children’s rights, their value resides in the fact that they provide a vehicle for bringing children’s rights closer to the level at which they may be implemented.

43. In addition to the Venice Commission’s most interesting study, a survey undertaken by the Social

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<sup>20</sup> Venice Commission – see footnote 14.

<sup>21</sup> See Art XV(1) of the Hungarian Constitution.

Affairs Committee via the European Centre for Parliamentary Research and Documentation (ECPRD) in 2013 on specific child-protection mechanisms at national level found that the Austrian, Slovenian and Turkish constitutions contained quite innovative provisions to children's rights (see respectively Art. 1-6 of the Austrian, Art. 54-57 of the Slovenian and Art. 10, 41 and 61 of the Turkish constitutions).<sup>22</sup>

## 5. Ensuring that practice follows legislation

### 5.1. Various issues related to the enforcement of children's rights

44. In its comprehensive study, the Venice Commission rightly notes that the inclusion of children's-rights provisions in a constitutional document only "tells part of the story" and that a key indicator in assessing the level of constitutional protection of children's rights, thus their effectiveness, is the extent to which those rights are justiciable, through courts or other mechanisms, or enforced through other institutions ranking from specific ministries to specialised bodies at the local level.

45. Litigation in the courts is the most obvious way of enforcement. However, children are unlikely to know about their constitutional rights and how to enforce them. The institution of an Ombudsperson for Children is one possible way around this difficulty; other options include the possibility of standing being afforded to special interest groups. Finally, the role of parents and guardians should not be disregarded or undermined, as long as their interests run parallel with those of the children.

46. With regard to the practical implementation of children's rights through political and administrative action, we have to keep in mind, however, that enforcing the principles of participation and inclusion promoted by the CRC or similar standards (the Council of Europe guidelines on child-friendly justice, for example), will have possible cost implications for States as they may require the appointment of a counsel or a guardian *ad litem* to present the views of the child in proceedings. Where this is not the case, the best interests are simply to be ascertained and held in due regard by the judge.

47. However, as highlighted by legal experts<sup>23</sup> the best-interest test raises additional issues: though it has a strong intuitive appeal, the best interest principle in reality may sometimes be seen as inviting a court or individual involved in imposing their values or views on the child. The benefits of this standard and its desirability as a constitutional value are therefore questionable for some. In order to make it better known and promote it, the principle is therefore regularly looked at in international exchanges, such as most recently at a Council of Europe conference (co-organised with the Belgian Chairmanship) which certainly represents a major step forward in this matter.<sup>24</sup>

48. The principles of equality and non-discrimination may also involve some changes in resource allocation where disparities in treatment exist but are likely to receive significant popular and political support initially and thus prove easier to implement following initial analysis of existing provisions and remedying of inequalities.

49. More generally speaking, additions to, or amendments of, constitutions in some countries require referenda. Thus, the provisions finally constitutionalised may not reflect the precise guarantees desired under the CRC but more politically popular protections that are likely to pass. Even in situations in which the guarantees are uncompromised, amendments may still fail to pass at the ballot box. No politician or party wishes to guarantee rights that it cannot be sure of being able to enforce, exposing them to unnecessary popular and legal challenges. Post-constitutional reforms including dissemination of information through appropriate means regarding the new rights and how they might be vindicated as well as monitoring of implementation of the new provisions must also be considered. Though criminal sanctions for breach of attendant legislation would be required, constitutional rights themselves are largely self-executing, thus the main challenge is to ensure that the public is aware of these rights.<sup>25</sup>

50. As regards implementation of the CRC, both the state and civil society play an important role, and effective co-ordination of the different players is essential. The government departments responsible for children's rights often form part of the ministries responsible for women's rights, the rights of the family or social protection. There are some States, however, which already have a ministry dedicated exclusively to children's rights. In my view, this is a good practice, which other countries should adopt.

<sup>22</sup> Information gathered through a survey on specific child-protection mechanisms at national level by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, 25 June 2013 (restricted).

<sup>23</sup> Mnookin, Robert H.: Foster Care - In Whose Best Interest? Harvard Educational Review 2012.

<sup>24</sup> See: [www.bestinterestofthchild.be](http://www.bestinterestofthchild.be).

<sup>25</sup> Venice Commission - see footnote 14.

51. As rapporteur and parliamentarian, I would also like to recall the significance of parliamentary committees or sub-committees relating to children's rights within national parliaments which, according to the ECPRD survey on specific child protection mechanisms (quoted in the previous paragraph) only exist in very few Council of Europe member States, especially in the format of standing committees.<sup>26</sup>

*5.2. Enforcing children's constitutional rights through independent human rights institutions for children*

52. Alongside with other experts (see chapter 2.3. above), the Venice Commission identifies the institution of Ombudsmen for Children's Rights as an effective tool for enforcing children's constitutional rights, and recommends that it should be set up by all member States. Such institutions, also denominated "independent human rights institutions for children" have been examined and promoted by Unicef for a number of years; the most recent Unicef findings in this respect can be found in the 2012 study "Championing Children's Rights".<sup>27</sup>

53. In its study, Unicef notes that independent human rights institutions for children, such as child commissioners, ombudspersons and child advocates, have emerged globally as influential bodies promoting and protecting children rights. By monitoring actions by governments and other entities, receiving complaints, providing remedies for violation of rights and creating a space for dialogue, they act as "champions for children" and contribute to progress in the implementation of children rights.

54. Unicef recommends that governments and parliaments should ensure that institutions are founded on adequate legislation. They should also be independent, represent the best interest of the child and be given adequate investigatory powers needed to perform their monitoring role. Evidently, they should be accessible to all children and promote child participation both in their own work and in society as such. Additionally, governments should instruct relevant administrative departments and public bodies at all levels to fully cooperate with them, and should hold them accountable if this does not happen. Similarly, parliaments should engage actively with these institutions, for example by consulting with them when developing and adopting legislation affecting children.

55. Moreover, UNICEF recommends that these institutions, especially those that are a part of a broad-based human rights institution, should review their effectiveness relating to encouraging child participation, in particular regarding younger and marginalised children. For the agency, meaningful child participation must be based on the evolving capacities of the child, i.e. different methods need to be used and participation may have differing scope and objectives depending on the age and situation of the child. The institutions should also be proactive in finding methods to increase awareness of their role among children and adults with responsibilities towards children and be in a position to draw attention to child-accessible complaint mechanisms.

56. Finally, Unicef puts forward that civil society should support these independent institutions by cooperating with them, sharing information, supporting children and other actors in making complaints, supporting the follow-up of recommendations and sharing technical expertise. In particular NGOs should be "critical friends". Likewise, donors and intergovernmental organisations should provide technical assistance in establishing and strengthening the institutions, raise awareness of their role, advise on their legislative mandate and build supportive capacities around the country.

57. Next to the work by Unicef in this field, other interesting references exist for member States wishing to set up or to reinforce such institutions. A more general reference in this field is the Handbook on the establishment of National Human Rights Institutions in the European Union which defines the concept and specifies the so-called "Paris principles" also recommended by the Venice Commission.<sup>28</sup> Here-in, a national human rights institution is defined as an independent body established by domestic law with a mandate to protect and promote human rights in a State. As stated by the UN Secretary General in 2009, "when properly established and well-functioning, these institutions are key elements of a strong effective national human rights protection system".

58. The so-called Paris principles mainly put forward the following criteria, amongst others, that could

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<sup>26</sup> Out of 33 respondents amongst Council of Europe member and observer States in 2013, only 10 States replied that their parliament had set up such a committee or sub-committee on a permanent basis.

<sup>27</sup> Unicef / Office of Research: Championing Children's Rights. A global study of independent human rights institutions for children – summary report, Florence/Italy, October 2012; <http://www.unicef-irc.org/publications/669>.

<sup>28</sup> European Agency for Fundamental Rights (FRA): Handbook on the establishment of National Human Rights Institutions in the European Union, Vienna 2012; [http://fra.europa.eu/sites/default/files/fra-2012\\_nhri-handbook\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf).

apply to such institutions dedicated to children:

- Independence from governments;
- Independence guaranteed by constitution or legislation;
- Adequate powers of investigation;
- Pluralism including through membership and/or effective co-operation;
- Adequate human and financial resources.<sup>29</sup>

## 6. Conclusions and recommendations

59. In the light of the above in-depth exploration of the constitutionalisation of children's rights, including thanks to the most valuable study undertaken by the Venice Commission upon my Committee's request, I would like to conclude that the incorporation of children's rights in national constitutions is indeed an essential component of national child policies. However, the question whether these policies are effective or not, do not only depend on the constitutional or legal coverage of children's rights but mainly on how constitutions and domestic laws protecting and promoting children's rights are enforced.

60. As a main recommendation to member States, I would therefore like to propose that all governments and parliaments should examine the current state of their own constitutions and domestic laws with regard to children's rights, notably to see if all possibilities for protecting children and supporting them in their development through equal life chances have been exploited and if current legal provisions still correspond to the reality children are facing in their specific national context of today. Wherever a need for constitutional or legal reform processes may emerge, these should be initiated as soon as possible, ideally based on a broad approach carried by all stakeholders concerned: public authorities, civil society and, last but not least, children themselves in order to guarantee their right to participation.

61. However, given that the usefulness and effectiveness of constitutionalising children's rights also very much depends on the national societal context, as well as legal traditions and frameworks, I would not be in favour of prescribing the constitutional anchorage of children's rights to all member States, but rather incite them to consider this as one option. I would nevertheless urge member States to re-examine the current enforcement of children's rights in their domestic context and take legislative and political action wherever appropriate and notably where loopholes or new challenges require such action.

62. Whilst the CRC, the European Convention of Human Rights and, since 2000, also the EU Charter of Fundamental Rights remain the main international references, both for constitutionalisation and the enforcement of children's rights, some inspiration may be drawn from the most interesting studies carried out by the Council of Europe Venice Commission and by Unicef quoted here above.

63. Based on the recommendations of these two bodies, the following action by member States therefore seems essential:

- Analyse current constitutional provisions in the light of international standards and recent developments in a given national context;
- Implement international standards through the most comprehensive and up-to-date national legislation;
- Develop appropriate and accessible enforcement mechanisms, including access to judicial remedies and courts and specific complaint mechanisms;
- Provide constitutional guarantees for the protection and recognition of children's rights by:
  - addressing children as autonomous rights-holders,
  - ensuring that the best interests of the child are a primary consideration (according to Art. 3 of the CRC);
  - giving children the right to be heard in all decisions affecting them (according to Art. 12 of the CRC);
- Provide strong guarantees for the enforcement of children's rights, including by setting up an independent human rights institution for children (set up according to the Paris principles);
- Ensure that efficient mechanisms – judicial and non-judicial – are in place to remedy possible violations of children's rights, coupled with adequate procedural safeguards
- In the light of the numerous examples of good practice identified in many countries, continue to organise international exchanges in this field, so that States can learn from each other in promoting

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<sup>29</sup> The "Paris principles" were formulated at a 1991 conference devoted to the subject of NHRIs convened by the UN Commission on Human Rights (precursor to the UN Human Rights Council), and endorsed by the UN General Assembly in 1993.

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- higher standards;
- Ensure effective implementation of children's rights through specific national policies and appropriate set-up of administrative services.

64. From a Council of Europe perspective I would wish to complete this list by the need to further promote existing international instruments and mechanisms in this field, such as the new Optional Protocol of the CRC on a communications procedure, the European Court of Human Rights' case law, the Additional Protocol providing for a system of collective complaints to the European Social Charter, as well as amongst the non-binding instruments, the Council of Europe Guidelines on child-friendly justice.

65. However, in terms of conclusion, I would like to emphasise that acting in the best interest of children must not be limited to positive legal provisions and a public discourse on child protection and development; it must be followed by concrete, real-life action showing positive and measurable effects for our children's well-being and their development into fulfilled adults, based on equal opportunities in all areas from an early age onwards, and, of course, based on sufficient budgetary allocations to policies aimed at protecting and promoting the rights of children.