

Title	Constitutional protection of children's rights: Visibility, agency and enforceability
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Publication date	2019-10-11
Original Citation	O'Mahony, C. (2019) 'Constitutional protection of children's rights: Visibility, agency and enforceability', Human Rights Law Review, 19(3), pp. 401-434. doi: 10.1093/hrlr/ngz017
Type of publication	Article (peer-reviewed)
Link to publisher's version	10.1093/hrlr/ngz017
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Download date	2025-07-31 06:03:19
Item downloaded from	<a href="https://hdl.handle.net/10468/9666">https://hdl.handle.net/10468/9666</a>

# Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability

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## ABSTRACT

While almost every state in the world has ratified the UN Convention on the Rights of the Child (CRC), there is less consensus around the manner in which the rights protected by the CRC should be protected in national constitutions. To say that a constitution makes provision for children's rights is just a starting point: the extent to which a national constitution takes a genuine child rights approach will depend on the quality of the constitutional provisions in question. This paper aims to provide a typology which can be used to assess whether the approach taken by any given constitution to the protection of children's rights is in line with the child rights approach envisaged by CRC by analysing individual constitutions along three separate spectrums. The *Visibility* spectrum measures how visible children are in a constitutional scheme; the *Agency* spectrum measures the extent to which children are considered to be independent, autonomous rights holders, while the *Enforceability* spectrum measures the extent to which children's constitutional rights can be enforced.

**KEYWORDS:** Constitutional law; children's rights; Convention on the Rights of the Child.

## 1. INTRODUCTION

While almost every state in the world has ratified the UN Convention on the Rights of the Child (CRC),<sup>1</sup> there is wide divergence evident in the extent and manner of protection in national constitutions for the rights provided for in the CRC. As the fundamental source of law in a legal system, the presence of children's rights provisions in a national constitution has the potential to be highly significant. In Europe, there is broad consensus that constitutions should make at least some reference to children in their provisions on fundamental rights. 46 of the 47 member states of the Council of Europe have codified written constitutions; of these, 45 include provisions that make express reference to children. However, to say that a constitution makes reference to children is just a starting point; not all such provisions create rights for children, and even among those that do, there are many different approaches taken to their drafting and enforceability. The extent to which a national constitution takes a genuine child rights approach will depend on the quality of the constitutional provisions in question, and any attempt to benchmark a particular constitutional scheme against the CRC requires detailed analysis.

This paper aims to provide a typology which can be used to assess whether the approach taken by any given constitution to the protection of children's rights is in line with the child rights approach envisaged by the CRC. It does not aim to assess the actual level of protection provided on the ground in the states analysed for specific rights itemised in the CRC, which would be far outside the scope of a single article. Instead, it allows for existing constitutional schemes or draft constitutional amendments to be analysed with a view to assessing whether they take a genuine

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<sup>1</sup> United Nations Convention on the Rights of the Child 1989, 1577 UNTS 3.

child rights approach. It also provides more in-depth analysis than previous literature<sup>2</sup> in this area by focusing on a regional subset of states (namely, member states of the Council of Europe) rather than conducting a global survey, and provides more nuance by analysing individual constitutions along three separate spectrums rather than assigning constitutions as a whole (or aspects of children's rights protection within constitutions) to rigid categories. The *Visibility* spectrum measures how visible children are in a constitutional scheme and the range of children's rights that are expressly protected. The *Agency* spectrum measures the extent to which children are considered to be independent, autonomous rights holders rather than objects of concern who are in need of protection. Finally, the *Enforceability* spectrum measures the extent to which children's constitutional rights can be enforced through a variety of possible remedial avenues. It will be seen that a constitution can score highly on one spectrum but poorly on another; this paper argues that all three spectrums are at the core of the child rights approach evident in the text of the CRC and the jurisprudence of the Committee on the Rights of the Child ('the CRC Committee'), and a constitution that scores highly on all three will achieve the greatest level of harmony with this approach.

## 2. CONSTITUTIONAL PROTECTION OF CHILDREN'S RIGHTS: A SPECTRUM APPROACH

As is well known, the CRC is the key international instrument on children's rights and represents an extraordinary level of international consensus on the legal rights that children should have. The Convention imposes obligations on 195 states parties to provide legal protection for a wide range of rights that inhere in children by virtue of their human dignity.<sup>3</sup> Many of these rights inhere in all human beings, and were therefore already protected by pre-existing instruments of international law such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CRC aims to emphasise that these rights apply equally to children, regardless of their age, and to provide explicit measures to ensure that children can enjoy these rights on an equal basis with other human beings.<sup>4</sup> The Convention grants rights to children across categories often referred to as the three Ps: Protection (from harm, violence or exploitation); Provision (with the resources or services necessary for a decent life); and Participation (in society and in decisions affecting the child).<sup>5</sup>

In addition, the Convention makes specific provision for some rights that are particular to children due to their stage of development and their comparatively disempowered position in society. It seems clear that some of the rights protected in the CRC are either not relevant, or less relevant, to adults with full legal capacity, and thus do not tend to feature in the general human rights conventions. These include the best interests principle in Article 3; the right to special

<sup>2</sup> There have been two main studies previously published in this area: Tobin, 'Increasingly seen and heard: the constitutional recognition of children's rights', (2005) 21 *South African Journal on Human Rights* 86 and Habashi et al., 'Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation', (2010) 18 *International Journal of Children's Rights* 267.

<sup>3</sup> Verhellen, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective', in Vanderhole (ed), *Routledge International Handbook of Children's Rights Studies* (2015) at 43.

<sup>4</sup> Ibid. at 48. See also Lopatka, 'Introduction' in *Legislative History of the Convention on the Rights of the Child* (2007) at xxxvii, available at: <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>. For a sceptical view of the strategy of providing children with 'special rights' rather than relying on general rights guarantees, see Dwyer, 'Inter-Country Adoption and the Special Rights Fallacy', (2013) *University of Pennsylvania Journal of International Law* 189 at 198-208.

<sup>5</sup> For a discussion of the three Ps and how they interact with the four general principles of the CRC, see Verhellen, *supra* n 3 at 49-50.

protection and assistance for children deprived of their family environment in Article 20; the right to development under Article 6; and a range of rights in Articles 7-12, including the right to name and nationality, preservation of identity, the right to maintain contact with parents, and the right to express views in all matters affecting the child. In this way, the CRC does not just re-state that children enjoy the same rights as adults, but supplements the rights afforded to adults with important child-specific rights. Cutting across the CRC as a whole are four general principles that have been identified by the CRC Committee: the right to life, survival and development (Article 6); non-discrimination (Article 2); that the best interests of children should be a primary consideration in all matters affecting them (Article 3); and the right of children to participate in decision affecting them (Article 12).<sup>6</sup>

This article does not propose to benchmark national constitutions against all the individual rights contained in the CRC (clearly, an impossible task in a work of this length); instead, its focus is on the overall approach taken by national constitutions to the protection of children's rights, and the extent to which that approach is in harmony with what Verhellen has termed the 'holistic childhood image in the CRC'.<sup>7</sup> This is encapsulated both in the text of the CRC itself and in the jurisprudence of the CRC Committee (which highlighted in General Comment No. 5 the importance of taking a holistic approach to assessing compliance).<sup>8</sup> Crucially for these purposes, the CRC Committee has set out what it describes as a child rights approach, defined in General Comment No. 13 as:

A child rights approach is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children's evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.<sup>9</sup>

Moreover, the Committee has stressed in General Comment No. 5 that it is not enough for the law to say that children have rights along the lines set out above: it must give meaning to those rights by providing a means for their enforcement:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.<sup>10</sup>

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<sup>6</sup> Committee on the Rights of the Child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003 at para 12.

<sup>7</sup> Verhellen, *supra* n 3 at 50.

<sup>8</sup> Committee on the Rights of the Child, *supra* n 6 at para 18.

<sup>9</sup> Committee on the Rights of the Child, General Comment No. 13: Article 19: the right of the child to freedom from all forms of violence, 18 April 2011 at para 59.

<sup>10</sup> Committee on the Rights of the Child, *supra* n 6 at para 24.

Rather than taking an atomised approach of focusing on individual provisions, the analysis will hold the stance taken by national constitutions towards children and children's rights up against the child rights approach envisaged by the text of the CRC and the jurisprudence of the CRC Committee. This holistic approach provides a more effective overall assessment of the relationship between a national constitution and children's rights than an analysis focused on the level of protection provided by specific rights in a national constitution. A national constitution that takes a stance that conflicts with the CRC child rights approach (by treating children as invisible, or as mere objects in need of protection, or as having rights that are unenforceable) risks setting a tone for a legal system as a whole that undermines laws protecting children's rights and hinders the effective implementation of the CRC in that state. Conversely, a national constitution that portrays children's rights in a manner that coheres with the CRC and the jurisprudence of the CRC Committee has the potential to act as an important aid to compliance with the Convention.

From an implementation perspective, the Convention is focused broadly on law and policy, and constitutional law is not singled out for special attention. Article 4 of the CRC requires that states parties 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.' While full implementation of Convention rights is a legally binding obligation, states parties are left a degree of discretion as to how they go about achieving this.<sup>11</sup> The Committee has stressed that '[e]nsuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental.'<sup>12</sup> However, the Convention does not require states parties to elevate children's rights to constitutional status; if domestic law as a whole is compatible with a state's obligations under the CRC, the absence of constitutional protection for children's rights would not cause that state to fall short of its obligations.

Notwithstanding this fact, the CRC Committee has stated that it welcomes constitutional protection on the basis that it 'helps to underline the key message of the Convention – that children alongside adults are holders of human rights.'<sup>13</sup> The point is that adults have constitutional rights; and if children are to be viewed as autonomous rights holders in the manner intended by the CRC, then it makes sense that constitutions that make provision for the rights of adults should also make provision for the rights of children. It will be seen below that some level of specific protection for children's rights is almost invariably included in national constitutions of Council of Europe states, although the form that this protection takes varies widely.

Assessing the extent to which national constitutional law takes a child rights approach that is in harmony with the CRC requires detailed analysis, and comparisons between states are rendered difficult by the wide variation of approaches. Two previous studies have approached this task. John Tobin<sup>14</sup> has tracked the transformative effect of international human rights law on national constitutions, and identified three main periods in the development of children's rights. The pre-World War II period was characterised by an absence of focus on children in international human

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<sup>11</sup> Ibid. at para 26: 'The Committee cannot prescribe in detail the measures which each or every State party will find appropriate to ensure effective implementation of the Convention.'

<sup>12</sup> Ibid. at para 1.

<sup>13</sup> Committee on the Rights of the Child, *supra* n 6 at para 21.

<sup>14</sup> Tobin, *supra* n 2.

rights law (and other sources of international law),<sup>15</sup> and by ‘invisible child’ constitutions which made no specific provision for the rights of children. The post-World War II period saw international human rights law begin to adopt ‘special protection’ provisions characterising children as objects in need of the special protection of the law, and Tobin argued that this was reflected in national constitutions of that era. Finally, the period following the enactment of the CRC in 1989 saw an increasing focus on children as autonomous rights holders and the advent of what Tobin called the ‘children’s rights constitution’. Since most constitutions in the Council of Europe are post-war constitutions, it will be seen that constitutions that make no specific provision for the rights of children do not really feature in this region. The influence of the CRC is evident in the detailed provisions included in various post-1989 constitutions, as well as in recent amendments to several older constitutions.

Tobin highlighted the fact that even where constitutions do provide specific protection for children’s rights, the form that this protection takes varies widely. Thus, the extent to which a particular constitutional scheme will be in line with the requirements of the CRC requires considerable analysis to determine. However, while Tobin’s study is invaluable in framing the discussion and providing multiple examples of approaches to constitutionalisation, his typology is not well suited to acting as a lens through which to determine the extent to which a particular constitutional scheme is in harmony with the child rights approach envisaged by the CRC and the jurisprudence of the CRC Committee. First, it does not account for constitutions that do not fit neatly into one of the three categories outlined above. (Tobin acknowledged that this may be the case, particularly at the boundary between the ‘special protection constitution’ and the ‘children’s rights constitution’.<sup>16</sup>) It will be seen below that relatively few constitutions can be neatly pigeon-holed as one or the other. Second, the enforceability of children’s constitutional rights formed quite a brief part of the overall analysis, and there was no consideration of the variety of enforcement mechanisms available and of their comparative effectiveness.<sup>17</sup>

An alternative typology features in a study by Janette Habashi et al.,<sup>18</sup> who employed a complicated empirical approach whereby a linguistic content analysis was conducted of relevant constitutional provisions across the globe, which were then benchmarked against Human Development Index development indicators under the rubric of the three Ps mentioned earlier (i.e. Protection, Provision and Participation). This was a hugely ambitious undertaking which generated interesting findings about the correlation between the protection enjoyed by children’s rights in a country’s constitution and the state of development of that country. It probably took on more than could be examined in detail in an article-length analysis, and – unlike Tobin – included relatively little engagement with the actual text of constitutions. Where it improved upon Tobin’s approach was in the use of multiple indicators to examine each country’s constitution instead of employing a typology that only allowed any given constitution to belong to a single category. Like Tobin, however, the key issue of enforcement of rights was not examined in any detail. The significance of this omission will be highlighted below.

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<sup>15</sup> International Humanitarian Law also made provision for the special protection of children during this period; see, e.g., Articles 14, 24, 38.5, 50, 51, 82, 89, 94 and 132 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

<sup>16</sup> Tobin, *supra* n 2 at 111, where he acknowledges that the ‘extent to which states make the transition from a special protection or welfare based approach to a rights based approach varies’, and gives the example of the Article 54 of the Albanian Constitution, which he says ‘tends to straddle both classifications’.

<sup>17</sup> *Ibid.* at 118-120.

<sup>18</sup> Habashi et al., *supra* n 2.

This paper proposes a new typology that draws on the best elements of these previous studies, while also doing some things differently. While Habashi et al.'s approach of examining each constitution under multiple headings avoided some of the rigidity of Tobin's tendency to pigeon-hole entire constitutions into single categories, their use of the three Ps suffered from the limitation that it only considered which categories of rights a constitution contains; it did not tell us anything about the quality of the provisions or the enforceability of them. Constitutions were simply identified as containing rights associated with protection, provision or participation, with no comment made about which rights are included under each heading or how strongly protected they are. Tobin's typology lends itself more effectively to making a qualitative judgment, with the 'invisible child constitution' scoring lowest and the 'children's rights constitution' scoring highest.

With a view to furthering this analysis, this paper employs a three-part typology of *Visibility, Agency and Enforceability*, and adopts a spectrum approach to analysis under these headings. Assessing constitutions against three headings allows individual constitutions to be assessed by reference to a variety of key measures at once, thus capturing multiple aspects of the quality of protection; while the spectrum approach accounts for both subtle differences in the quality of protection under each spectrum as well as stark ones. The spectrums chosen aim to build on the work conducted by Tobin and Habashi et al., drawing on the strengths of their work identified above, while addressing the limitations associated with the rigidity of their categorisations and the absence of any assessment of the enforceability of constitutional provisions. The first spectrum, discussed in Part 3 below, is *Visibility*: how visible are children in a national constitution? This may range from completely invisible to highly visible. In between these two extremes are a number of constitutions which protect only a single right of children (the right to education), while others protect a right to education plus a discrete number of other commonly-protected children's rights.

The visibility of children in constitutional law matters, and making children visible requires child-specific provisions rather than leaving children to rely on general rights guarantees. Tobin correctly identifies the historical progression from the 'invisible child constitution', to the 'special protection constitution', to the 'children's rights constitution' as key points of progress in the advancement of children's rights. It was noted above that Tobin argues that constitutional protection helps to legitimate political discourse about children's rights,<sup>19</sup> while Habashi et al. go further by arguing that providing constitutional protection for children's rights makes them part of the 'national soul'.<sup>20</sup> Indeed, there is a substantial body of literature on the expressive dimension of written constitutions and their 'unique symbolic power (among laws at least) to express a polity's core commitments'.<sup>21</sup> This focuses attention on children's rights and can serve as a nexus for advocacy and political activism,<sup>22</sup> generating significant potential to contribute to the development of what the CRC Committee describes as a 'children's rights perspective throughout Government,

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<sup>19</sup> Tobin, *supra* n 2 at 126.

<sup>20</sup> Habashi et al., *supra* n 2 at 279-283 (citing Heine, 'Institutional Engineering in New Democracies', in Van Beek (ed), *Democracy Under Construction: Patterns from Four Continents* (2005) at 65-94).

<sup>21</sup> Lino, 'Written Constitutions and the Politics of Recognition: Symbolism and Substance' at 4, 22 July 2014, available at: <https://ssrn.com/abstract=2470177> [last accessed 8 April 2019]. See further, e.g., Sunstein, 'On the Expressive Function of Law', (1996) 144 *University of Pennsylvania Law Review* 2021 at 2027-8 ('A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown') and King, 'Constitutions as Mission Statements', in Galligan and Versteeg (eds), *Social and Political Foundations of Constitutions* (2013) at 73.

<sup>22</sup> Freeman, 'Why it remains important to take children's rights seriously', (2007) 15 *International Journal of Children's Rights* 5 at 8.

parliament and the judiciary [which] is required for effective implementation of the whole Convention.<sup>23</sup>

However, the extent to which this will hold true depends at least in part on just *how* visible those rights are. Even a passing reference to children would be sufficient to move a constitution out of Tobin's 'invisible child constitution' category, even though such a constitution is much closer to the 'invisible child constitution' than it is to the 'children's rights constitution'. In simple terms, the more visible children's rights are in a constitution, the wider the range of children's rights that will enjoy the benefits of constitutional status, including entrenchment,<sup>24</sup> supremacy<sup>25</sup> and acting as a counterbalance to constitutionally-protected rights of parents and families, which otherwise run the risk of being asserted in ways that are detrimental to children.<sup>26</sup> Thus, rather than a black-and-white statement of whether children either are or are not visible in a constitution, analysing constitutions along a spectrum of visibility allows for a more nuanced assessment of the potential of a particular constitutional scheme to place children's rights at the heart of law and policy, in line with the child rights approach envisaged by the CRC.

The second spectrum, discussed in Part 4 below, is *Agency*, and assesses whether a constitution is closer to what Tobin calls the 'special protection constitution' at one end of the spectrum or the 'children's rights constitution' at the other. This spectrum measures the extent to which a constitution has made what the CRC Committee describes as the 'paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders'<sup>27</sup> by placing constitutions on a spectrum ranging from those displaying a paternalistic attitude at one end, to those displaying a child-centred attitude at the other. Agency is a crucial indicator of the quality of children's rights provisions. When adopted in 1989, the CRC aimed to establish children as independent, autonomous rights-holders, and 'can be seen as the historic culmination point of a long struggle for recognition of children as fully-fledged human beings – as subjects of rights'.<sup>28</sup> Eugeen Verhellen argues that '[t]he main aim of ... the 'Children's Rights Movement', was to have children considered as fully-fledged citizens ... with their

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<sup>23</sup> Committee on the Rights of the Child, *supra* n 6 at para 12.

<sup>24</sup> Habashi et al., *supra* n 2 at 279: 'One could argue that nation-states have laws and policies to ensure protection and provision for children without including such in the constitution. This argument is not sufficient because economic crisis, war and upheaval might break down or limit entirely the imperative services that only the constitution and associated amendments could safeguard ...'

<sup>25</sup> For discussion of the advantages of elevating children's rights to the highest level in a legal system, see, e.g., O'Mahony, 'Constitutionalism and Legislation in Special Educational Needs Law: An Anglo-Irish Comparison', (2008) *Public Law* 125 and Sloth-Nielsen and Kruuse, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012', (2013) 21 *International Journal of Children's Rights* 646 at 677, where they state: 'It can be concluded that in a certain sense, children's rights have come up trumps: this is not to say that right need not be 'balanced' when there is conflict, nor that rights are not subject to limitation. However, the rights of children cannot be overlooked, rendered perfunctory or written out of the script – no matter what the context ... In addition, officials, drawn from a wide pool, are duty bound to consider children's interests before acting ... the impact of constitutionalisation of children's rights has grown exponentially to infuse a dynamic and expanding field of judicial activity.' More generally, Lino, *supra* n 21 at 3 argues that '[t]hese two special features of written constitutions – their entrenchment and supremacy – mean that written constitutions can channel and limit state power in a way that is relatively enduring, definitive and legally potent.'

<sup>26</sup> See, e.g., Kilkelly and O'Mahony, 'The Proposed Children's Rights Amendment: Running to Stand Still?', (2007) 10(2) *Irish Journal of Family Law* 19.

<sup>27</sup> Committee on the Rights of the Child, *supra* n 9 at para 59.

<sup>28</sup> Reynaert, Desmet, Lembrechts and Vanderhole, 'Introduction: A critical approach to children's rights', in Vanderhole (ed), *Routledge International Handbook of Children's Rights Studies* (2015) at 5.

own human rights, and as competent to exercise these rights independently ... this new image of childhood became one of the foundations of the CRC.<sup>29</sup> Agency is central to the CRC Committee's definition of a child rights approach (quoted above), which the Committee characterises as 'the declaration of the child as rights holder and not a beneficiary of benevolent activities of adults'.<sup>30</sup> Similarly, Julia Sloth-Nielsen and Helen Kruuse describe 'a constitutional vision of childhood as being defined by agency rather than purely welfarist-leaning dependency' as being 'consistent with the CRCs [*sic.*] conception of childhood as a state of evolving maturity'.<sup>31</sup>

However, it is not always easy to neatly categorise a constitution as either a 'special protection' or a 'children's rights' constitution (a point acknowledged by Tobin, particularly at the boundary between the 'special protection constitution' and the 'children's rights constitution').<sup>32</sup> It is not uncommon for constitutions to include provisions that cast children in both of these roles; indeed, the CRC itself contains a mixture of 'special protection' and 'children's rights' provisions.<sup>33</sup> The analysis below will demonstrate that relatively few constitutions in the Council of Europe can be said to take entirely one approach or the other. Thus, rather than assigning constitutions to a single, rigid category, this paper situates constitutions along a spectrum of agency so as to allow for a more meaningful assessment of the extent to which the document as a whole leans towards a paternalistic special protection approach or towards a child-centred, child rights approach.

Finally, the third spectrum, discussed in Part 5 below, seeks to fill a gap in the previous studies by examining *Enforceability*: how enforceable are children's constitutional rights in a particular national constitution? This may range from completely unenforceable through a range of increasingly strong remedies along the spectrum. The absence of the issue of enforceability from previous studies means that the picture that they present is missing a crucial piece – one which determines both the practical value of constitutional provisions and the extent to which they comply with the jurisprudence of the CRC Committee. When it comes to children's rights, Michael Freeman argues that 'we must get beyond rhetoric. Rights without remedies are symbols, nothing more.'<sup>34</sup> And, as already noted, the Committee on the Rights of the Child has stressed the importance of enforceability in General Comment No. 5.<sup>35</sup>

Admittedly, both Freeman and the CRC Committee were referring to the enforceability of children's rights in general rather than to the enforceability of constitutional rights in particular. Nonetheless, the point remains applicable: unless constitutional rights of children carry remedies for their enforcement, they are reduced to mere symbols that miss out on much of the added value that constitutional status can bring. Constitutional symbolism is not entirely without value, and some of that value has already been alluded to under the *Visibility* spectrum. Dylan Lino argues that constitutional symbols can help to positively shape attitudes, particularly towards groups who have been excluded in the past, and to serve as a focal point for political activism.<sup>36</sup> However, there is a

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<sup>29</sup> Verhellen, *supra* n 3 at 43.

<sup>30</sup> Committee on the Rights of the Child, *supra* n 9 at para 65.

<sup>31</sup> Sloth-Nielsen and Kruuse, *supra* n 25 at 675. See further Freeman, 'Taking children's rights more seriously', (1992) 6 *International Journal of Law, Policy and the Family* 52 at 65: 'To respect a child's autonomy is to treat the child as a person and as a rights holder.'

<sup>32</sup> Tobin, *supra* n 2 at 111, where he acknowledges that the extent to which states make the transition from a special protection or welfare based approach to a rights based approach varies, and gives the example of the Article 54 of the Albanian Constitution, which he says 'tends to straddle both classifications'.

<sup>33</sup> See Verhellen, *supra* n 3 at 50-2.

<sup>34</sup> Freeman, *supra* n 22 at 8.

<sup>35</sup> Committee on the Rights of the Child, *supra* n 6 at para 24.

<sup>36</sup> Lino, *supra* n 21 at 12.

limit to that value. Lino goes on to argue that mere symbolic constitutional recognition is, in a sense, self-contradictory. Where provisions are constitutionalised but rendered non-justiciable, this repudiates their constitutional significance, and ignores real grievances of excluded groups.<sup>37</sup> Lino concludes:

... symbolic recognition should not be dismissed out of hand, as it can have important benefits for those being recognised. But the best way to pursue symbolic recognition in written constitutions is through substantive constitutional reforms: the symbolism of properly constitutional recognition is more potent and coherent than wholly symbolic 'constitutional' recognition ... If a particular group is of such fundamental significance to the polity as to be recognised within the written constitution, surely such recognition should be constitutional in more than name only.<sup>38</sup>

The limits of symbolism are perhaps even more pronounced when it comes to children's rights than for adults' rights due to the democratic deficit inherent in the fact that children, for the most part, cannot vote. While constitutionalising children's rights can have a positive impact on political discourse, it must always be remembered that the political sphere is one from which children are systematically excluded. They have no independent capacity to advocate for their rights in political circles, and are entirely reliant on others to do so on their behalf. The effectiveness of indirect representation of children's interests by parents and lobby groups is reduced by the fact that some groups of parents are marginalised in the political system, and that the interests of parents and those of their children do not always align.<sup>39</sup> Moreover, even though voting adults can (unlike children) pursue their rights claims through political means, they still enjoy constitutional rights as a safety net in circumstances where democratic means are ineffective. As Aoife Nolan has persuasively argued, building on the work of John Hart Ely,<sup>40</sup> the disenfranchisement of children means that the safety-net of constitutional enforcement would appear even more necessary for children than for adults, and thus the case for counter-majoritarian judicial enforcement of rights is particularly strong in the case of children's rights.<sup>41</sup> The extent to which this is possible is thus a key indicator of the quality of protection offered to children's rights by a national constitution.

In summary, building on previous studies in this area, this paper has identified three key spectrums by reference to which the quality of the protection offered to children's rights by national constitutions will be assessed. The aim is to provide a typology through which a holistic and nuanced analysis can be made of the extent to which any given constitutional scheme coheres with the child rights approach envisaged by the CRC and the jurisprudence of the CRC Committee. I will argue that as a constitution scores more highly on each spectrum, it achieves a greater level of harmony with this child rights approach.

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<sup>37</sup> Ibid. at 13.

<sup>38</sup> Ibid. at 14.

<sup>39</sup> For a discussion of the limits to which the interests of children can be represented by others in the democratic system, see Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (2011) at 43-92. Nolan concludes at 92 that 'children's views are not taken into account in democracy, due both to their exclusion from direct participation in majority-decision making processes and the frequent failure of those who do directly participate to effectively represent children's views and interest. Thus, children have neither a direct nor indirect input into majority-decision making processes ...'

<sup>40</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

<sup>41</sup> Nolan, *supra* n 39 at 43-133. A similar point is made by the Committee on the Rights of the Child, General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002 at para 5.

### 3. THE VISIBILITY SPECTRUM

The visibility of children and of children's rights in national constitutions varies along a spectrum ranging from constitutions in which children are entirely invisible (Point 1) to constitutions that contain dedicated, detailed provisions setting out the constitutional rights of children and the duties that the state has to vindicate such rights (Point 4). In between these two extremes lie constitutions that contain provisions on education, without any other reference to children (Point 2); or that, in addition to education provisions, make some limited reference to children, either in discrete provisions addressing issues such as child labour or declaring the equality of children, irrespective of the marital status of their parents, or in general provisions on the family (Point 3). Drawing on a detailed analysis of the constitutions of Council of Europe member states, examples of each point on the spectrum will be given here. It is significant to note that by far the largest grouping on the spectrum, comprising over 20 member states, is states that have detailed constitutional provisions on children's rights.

#### A. Point 1: Invisible

At the low point of the spectrum, there are just two member states that currently have no constitutional provisions on children in a codified constitution: France and the United Kingdom (UK). In both cases, however, significant qualifications apply to this initial statement. Section 55 of the French Constitution provides that '[t]reaties or agreements duly ratified and approved shall, upon publication, have an authority superior to that of legislation, subject, for each separate agreement or treaty, to reciprocal application by the other party.' The CRC has been ratified by France, and its self-implementing provisions can be applied directly by national courts, although the Cour de Cassation has held that at least some provisions of the Convention cannot.<sup>42</sup> The UK does not have a codified written constitution; however, there are various disparate sources of UK constitutional law that make provision for children's rights. The Human Rights Act 1998 indirectly incorporates the European Convention on Human Rights (ECHR) into domestic law, and there are many examples of the national courts giving effect to children's rights by interpreting national law in light of the right to family life under Article 8 of the Convention or declaring it incompatible with Article 8.<sup>43</sup> Pending the outcome of the Brexit process, the EU Charter of Fundamental Rights (which protects children's rights, *inter alia*, in Article 24) also forms part of UK law.<sup>44</sup> Moreover, the devolved Governments in

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<sup>42</sup> *Lejeune* case, Assemblée Nationale, Rapport No 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, *supra* n 2 at 96-7 and Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child* (UNICEF: 2007) at 7.

<sup>43</sup> 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; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, and *Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). See further Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era', (2006) 69 *Modern Law Review* 299. Note that the ECHR also contains various other rights of relevance to children. The right to freedom from inhuman and degrading treatment under Article 3 and the right to education under Article 2 of the First Protocol are particularly relevant, but other provisions have also generated case law concerning children's rights. See generally Kilkelly, *The Child and the European Convention on Human Rights* (1999).

<sup>44</sup> European Union (Amendment) Act 2008.

Scotland and Wales have taken measures to provide a degree of indirect incorporation of the CRC in their regions.<sup>45</sup>

Until relatively recently, Austria and Norway could also have been situated at this point. However, in 2011, Austria enacted a new constitutional law specifically on children's rights.<sup>46</sup> In 2014, Norway followed suit, when a new Article 104 dedicated to the protection of children's rights was inserted into its constitution, along with a new Article 109 on the right to education.<sup>47</sup> Moreover, the CRC forms part of the domestic legal order in Norway and takes precedence over conflicting national statutes.<sup>48</sup>

## **B. Point 2: Education**

The second point on the spectrum is Education, for the reason that an acknowledgement of the importance of education, or of a right to education, is the basic minimum level of constitutional acknowledgment of children in the states where children are not invisible in the constitutional text. Put another way, it is the first context in which they become visible in constitutional law. Education is sometimes the only context in which provisions on constitutional rights make reference to children. Seven member states have constitutions that are silent on children's rights generally, but nonetheless contain provisions dealing with education, which is clearly a human right that is particularly applicable to (and significant for) children: Bosnia and Herzegovina,<sup>49</sup> Cyprus,<sup>50</sup> Denmark,<sup>51</sup> Liechtenstein,<sup>52</sup> Luxembourg,<sup>53</sup> Monaco<sup>54</sup> and the Netherlands.<sup>55</sup> Thus, education could be described as the entry point for children on to the constitutional stage.

The presence of a constitutional right to education – particularly one that is enforceable through the courts – has significant potential to advance a children's rights agenda. This is primarily because of the importance of education as a foundational right, the enjoyment of which is a pre-requisite to the enjoyment of other rights.<sup>56</sup> Education impacts on a range of other rights of children – most obviously, on the child's development and realisation of his or her potential (emphasised throughout the CRC),<sup>57</sup> but also specific rights such as the right to health. Moreover, a broad interpretation of education provisions can result in them having an expansive impact beyond the context of scholastic education in schools. This will particularly be the case for children with

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<sup>45</sup> See Children and Young People (Scotland) Act 2014 (section 2 of which requires public authorities in Scotland to report at intervals of three years on their implementation of the CRC) and the Rights of Children and Young Persons (Wales) Measure 2011 (which requires all Welsh Ministers to have due regard to the substantive rights and obligations within the UNCRC and its optional protocols).

<sup>46</sup> Bundesverfassungsgesetz über die Rechte von Kindern, 15 February 2011, Article 4.

<sup>47</sup> *Initial Report of Norway to Committee on the Rights of Persons with Disabilities*, 2 July 2015 at para 40, available at: [www.ohchr.org/Documents/Issues/Disability/SocialProtection/States/Norway.docx](http://www.ohchr.org/Documents/Issues/Disability/SocialProtection/States/Norway.docx) [last accessed 8 April 2019].

<sup>48</sup> See Lundy et al., *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (2012) at 58-9.

<sup>49</sup> Constitution of Bosnia and Herzegovina, Section 3(l).

<sup>50</sup> Constitution of Cyprus, Article 20.

<sup>51</sup> Constitution of Denmark, Section 76.

<sup>52</sup> Constitution of Liechtenstein, Article 15.

<sup>53</sup> Constitution of Luxembourg, Article 23.

<sup>54</sup> Constitution of Monaco, Article 27.

<sup>55</sup> Constitution of the Netherlands, Article 23.

<sup>56</sup> See O'Mahony, *supra* n 25 at 126-8.

<sup>57</sup> See the Preamble and Articles 6, 18, 23, 27, 28, 29 and 32.

disabilities or special educational needs (who, for example, benefitted extensively from constitutional litigation based on the education provisions of the Irish Constitution),<sup>58</sup> but also has the potential to impact on issues in other areas such as healthcare.

Having said that, education provisions do not always take the form of children's rights provisions, or even rights provisions *per se*. Some constitutions (namely those of Germany,<sup>59</sup> Ireland,<sup>60</sup> Liechtenstein,<sup>61</sup> Luxembourg<sup>62</sup> and the Netherlands<sup>63</sup>) contain provisions on education that focus entirely on the rights and duties of parents and the state, without making any reference to an individual right of children to receive education. However, a constitutional right to education may have been recognised by way of court decision (as in Ireland)<sup>64</sup> or in regional constitutions (as in Germany).<sup>65</sup>

### C. Point 3: Education+

Point 3 of the *Visibility* spectrum is named Education+ because it includes countries whose constitutions include the minimum of a provision on education, plus some other discrete and basic provisions relating to how children should be treated before the law. With the exception of France and the UK (the two states at Point 1), all other member state constitutions contain education provisions at a minimum; and so, as we move along the spectrum towards increasing visibility of children in constitutions, the question becomes: what else is there in addition? The first common addition to education provisions are constitutional provisions setting out minimum standards on the employment of children in the workforce (such as in Armenia<sup>66</sup> and Malta<sup>67</sup>), or constitutional provisions stipulating that all children are equal before the law, irrespective of the marital status of their parents (as in Andorra,<sup>68</sup> Germany<sup>69</sup> and San Marino<sup>70</sup>). Since the provisions in question go no further than one of these two discrete issues (at least not explicitly<sup>71</sup>), this approach still constitutes

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<sup>58</sup> See O'Mahony, *Educational Rights in Irish Law* (2006), Chapters 6 and 7.

<sup>59</sup> German Basic Law, Article 7.

<sup>60</sup> Constitution of Ireland, Article 42.

<sup>61</sup> Constitution of Liechtenstein, Articles 15 and 16.

<sup>62</sup> Constitution of Luxembourg, Article 23.

<sup>63</sup> Constitution of the Netherlands, Article 23.

<sup>64</sup> The right of children to receive education was recognised by the Irish Supreme Court in *Crowley v Ireland* [1980] IR 102 at 122 as being correlative to the duty of the State to provide education.

<sup>65</sup> Gesley, 'Germany', in *Constitutional Right to an Education in Selected Countries* (2016) at 15, available at: <https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf> [last accessed 8 April 2019].

<sup>66</sup> Constitution of Armenia, Article 32.

<sup>67</sup> Constitution of Malta, Section 16.

<sup>68</sup> Constitution of Andorra, Article 13.3.

<sup>69</sup> German Basic Law, Article 6(5). See Jones and Merino-Blanco, 'The Influence of Constitutional Law on Family Forms in Germany and Spain', (2008) 23 *Child and Family Law Quarterly* 23 at 31-2. Note that while children's rights receive little express recognition in the federal German constitution, they have received a far higher level of recognition in the constitutions of the German Länder: see Lundy et al., *supra* n 48 at 44-5. See also *Third and Fourth Periodic Reports of Germany to the Committee on the Rights of the Child*, CRC/C/DEU/3-4, 20 October 2010 at para 21. A similar situation pertained in Austria prior to the constitutional reforms of 2011; see *Third and Fourth Periodic Reports of Austria to the Committee on the Rights of the Child*, CRC/C/AUT/3-4, 29 September 2009, para 18.

<sup>70</sup> Constitution of San Marino, Article 12.

<sup>71</sup> The absence of explicitly stated rights in the text of a constitution does not necessarily mean that the national courts have not read certain children's rights and associated obligations into the text. For example, in Germany, the obligation imposed on the state by Article 6(2) of the Basic Law to 'watch over' parents in the

a relatively minimal approach to constitutional provision for children's rights – stronger than Point 2 (Education), but weaker than Point 4 (Detailed children's rights provisions). It should be noted that provisions of this sort also feature in many other constitutions alongside or as part of more detailed and specific provisions setting out the rights of children and the obligations owed by the state to them, as will be seen further below.

Aside from these two specific issues, the next point at which children begin to commonly feature in the text of national constitutions is in provisions on the family that make some limited, indirect reference to children or to children's rights. These tend to be a general guarantee rather than confined to the discrete issues of employment or equality. However, they are rather vague in nature and tend to take what Tobin describes as a 'special protection' rather than a 'children's rights' approach.<sup>72</sup> The most common formulation in this category is a subsection of a general provision on the family that guarantees special state protection to parents and children; this approach can be seen in Estonia,<sup>73</sup> Iceland,<sup>74</sup> Italy,<sup>75</sup> Lithuania<sup>76</sup> and the Russian Federation.<sup>77</sup> The constitutions of Bulgaria,<sup>78</sup> the Czech Republic<sup>79</sup> and Macedonia<sup>80</sup> combine provisions of this sort with one of the provisions described at Point 3 on the spectrum (and, in the case of Bulgaria, a specific obligation to protect abandoned children). A slightly different approach is taken in Georgia, where the constitution approaches the same issue using more rights-based language, providing that '[t]he rights of the mother and the child shall be protected by law.'<sup>81</sup> The Greek constitution occupies the same point on the spectrum, containing 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,'<sup>82</sup> and continues by stipulating that '[f]amilies with many children ... are entitled to the special care of the State'<sup>83</sup> and that the state 'shall adopt special measures for the protection of youth'.<sup>84</sup>

Constitutions at Point 3 of the *Visibility* spectrum make reference to education plus one or more of three specific issues affecting children. They acknowledge the vulnerability of children and their need for special protection, either in general or in the specific context of the workplace or of discrimination based on parentage. Thus, the particular needs of children are made visible in the constitutional scheme in a way that goes beyond education alone, but either in a very discrete context or at a relatively vague level that does not elaborate on what those needs entail or what specific duties they impose on the state.

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performance of their duty to care for and bring up their children has been interpreted as mandating the state to protect children's rights and welfare; see Stintzing, 'Constitutional Values and Social Change – The Case of German Marital and Family Law', (1999) 13 *International Journal of Law, Policy and the Family* 132 at 134.

<sup>72</sup> See Tobin, *supra* n 2 at 94.

<sup>73</sup> Constitution of Estonia, § 27.

<sup>74</sup> Constitution of Iceland, Article 76. Discussions have been had about possible reform and the inclusion of a more comprehensive set of rights; see Lundy et al., *supra* n 48 at 80-1.

<sup>75</sup> Constitution of Italy, Article 31.

<sup>76</sup> Constitution of Lithuania, Article 38(2).

<sup>77</sup> Constitution of the Russian Federation, Article 38.

<sup>78</sup> Constitution of Bulgaria, Articles 14 and 47. See Todorova, 'Children's Rights in Bulgaria after the End of Communism', (2009) 17 *International Journal of Children's Rights* 623.

<sup>79</sup> Constitution of Czech Republic, Article 32.

<sup>80</sup> Constitution of Macedonia, Articles 40 and 42.

<sup>81</sup> Constitution of Georgia, Article 36.

<sup>82</sup> Constitution of Greece, Article 21(1).

<sup>83</sup> Constitution of Greece, Article 21(2).

<sup>84</sup> Constitution of Greece, Article 21(3).

#### D. Point 4: Detailed children's rights provisions

At the high point of the spectrum are constitutions that contain detailed children's rights provisions. These may take the form of stand alone provisions dedicated entirely to children, or detailed subsections of broader provisions dealing with the family that are dedicated to particular issues relating to children. It is common for these provisions to address the issues of employment, equality and protection described above at Points 3 and 4, and to build on them by elaborating the specific constitutional rights that children hold or specific duties that the state owes to children. Article 54 of the Albanian Constitution provides a good example of how these various provisions can be combined, and how they represent the movement along the visibility spectrum described here:

1. Children, the young, pregnant women and new mothers have the right to special protection by the state.
2. Children born out of wedlock have equal rights with those born within marriage.
3. Every 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.

In this provision, we see all elements of the previous point of the spectrum represented – equal status before the law irrespective of parent's marital status; special protection in the workplace; and special protection more generally. In addition to all of these, a right to be protected from violence, ill treatment and exploitation is also set out in subsection 3. Notably, both this provision and the general reference to special protection in subsection 1 are phrased as rights of the child rather than as duties of the state to protect children from such treatment. A similar approach can be seen in Hungary, which combines provisions on the first three issues<sup>85</sup> with a provision stating 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>86</sup>

Within the 20 or so member states that include detailed children's rights provisions in their constitutions, there is a considerable diversity of approach. In Spain, the constitution includes a child protection provision as a subsection of a broader provision on the family,<sup>87</sup> but additionally provides that '[c]hildren shall enjoy the protection provided for in the international agreements safeguarding their rights.'<sup>88</sup> Some states make a very broad and general reference to the rights of the child, but provide little or no definition of what those rights include; examples of this approach include Azerbaijan<sup>89</sup> and Latvia.<sup>90</sup> By contrast, other states such as Moldova<sup>91</sup> and Romania<sup>92</sup> have an initial broad statement that children are entitled to a special form of assistance in the pursuit of their rights, but go on to build on this by specifying examples of particular rights of children and particular duties that the state owes to them. Clearly, the latter score more highly on the *Visibility* spectrum than the former.

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<sup>85</sup> Articles XV and XVIII.

<sup>86</sup> Constitution of Hungary, Article XVI(1).

<sup>87</sup> Constitution of Spain, section 39(2); see Picontó-Novales, 'The Application of Spanish Child Welfare Law', (1998) 12 *International Journal of Law, Policy and the Family* 180 at 182.

<sup>88</sup> Constitution of Spain, section 39(4).

<sup>89</sup> Constitution of Azerbaijan, Article 17(vi).

<sup>90</sup> Constitution of Latvia, Article 110.

<sup>91</sup> Constitution of Moldova, Article 50(2).

<sup>92</sup> Constitution of Romania, Article 49(1).

The children's right most commonly specified in member state constitutions is the right to be protected from violence, abuse or exploitation. The phrasing of this varies: in Albania,<sup>93</sup> it is phrased as a right of children; in Montenegro<sup>94</sup> and Slovenia,<sup>95</sup> it is phrased as a guarantee owed to children; and in Portugal,<sup>96</sup> it is phrased as an entitlement of children. 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>97</sup> In Serbia<sup>98</sup> and Turkey,<sup>99</sup> the constitution imposes a duty of the state to protect children from such treatment, while in Ukraine<sup>100</sup> the constitution obliges the state to prosecute any violence against or exploitation of a child. In Belgium, the constitution uses quite a different formulation to address a broadly similar point, providing that '[e]ach child is entitled to have its moral, physical, mental and sexual integrity respected'.<sup>101</sup>

Some other examples of specific rights of children (or obligations to address certain needs of children) can be seen in a number of constitutions; for example, an obligation on the state to make special provision for disabled children (as distinct from a general obligation towards disabled persons) is set out in the constitutions of Croatia,<sup>102</sup> Latvia,<sup>103</sup> Moldova<sup>104</sup> and Romania.<sup>105</sup> The Serbian constitution contains a provision recognising a child's right to identity.<sup>106</sup>

Interestingly (and perhaps surprisingly), the four general principles of the CRC identified by the Committee on the Rights of the Child do not feature especially prominently in the constitutions of Council of Europe member states. While three of the four are referenced in Article 104 of the Norwegian Constitution (with non-discrimination being the exception), many constitutions incorporate just one or perhaps even none of the four. The right to life, survival and development features most prominently, with the emphasis being placed on the development aspect. Some countries stipulate that children have a right to the fullest possible development of their personality and potential (Hungary,<sup>107</sup> Portugal<sup>108</sup> and Switzerland<sup>109</sup>); others reference development in a negative sense by imposing duties on the state to protect children from specific dangers to their development, such as economic exploitation (Albania,<sup>110</sup> Hungary,<sup>111</sup> Moldova<sup>112</sup> and Romania<sup>113</sup>);

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<sup>93</sup> Constitution of Albania, Article 54(3).

<sup>94</sup> Constitution of Montenegro, Article 74.

<sup>95</sup> Constitution of Slovenia, Article 56(2).

<sup>96</sup> Constitution of Portugal, Article 69(2).

<sup>97</sup> Constitution of Poland, Article 72(1).

<sup>98</sup> Constitution of Serbia, Article 64.

<sup>99</sup> Constitution of Turkey, Article 41.

<sup>100</sup> Constitution of Ukraine, Article 52.

<sup>101</sup> Constitution of Belgium, Article 22 *bis*. See further Lundy et al., *supra* n 48 at 37.

<sup>102</sup> Constitution of Croatia, Article 63(3).

<sup>103</sup> Constitution of Latvia, Article 110.

<sup>104</sup> Constitution of Moldova, Article 50(3).

<sup>105</sup> Constitution of Romania, Article 49(2).

<sup>106</sup> Constitution of Serbia, Article 64. See Kovaček Stanić, 'Serbian Family Law: Rights of the Child', (2009) 17 *International Journal of Children's Rights* 585 at 593.

<sup>107</sup> Constitution of Hungary, Article XVI(1).

<sup>108</sup> Constitution of Portugal, Article 69(1).

<sup>109</sup> Constitution of Switzerland, Article 11(1).

<sup>110</sup> Constitution of Albania, Article 54(3).

<sup>111</sup> Constitution of Hungary, Article XVIII(1).

<sup>112</sup> Constitution of Moldova, Article 50(4).

<sup>113</sup> Constitution of Romania, Article 49(3).

while others emphasise the importance of education to the development of children (Andorra,<sup>114</sup> Croatia,<sup>115</sup> Portugal<sup>116</sup> and Spain<sup>117</sup>).

The other general principles of the CRC feature to varying degrees of prominence in national constitutions in the Council of Europe member states. Non-discrimination features relatively commonly, with 18 constitutions containing provisions addressing the equality of children; however, apart from Finland<sup>118</sup> and Portugal,<sup>119</sup> these provisions tend to be restricted to discrimination based on the marital status of parents and do not extend to discrimination on other grounds (although, of course, it is common for constitutions to contain general equality guarantees that are not specific to, and may be relied on by, children). The right of children to be heard in decisions that affect them is set out in the constitutions of Austria,<sup>120</sup> Ireland,<sup>121</sup> Norway<sup>122</sup> and Poland,<sup>123</sup> and also features in the constitutional case law of some other states.<sup>124</sup> Broader participation provisions feature elsewhere; three states have provisions stating that public authorities have a duty to establish conditions that allow children to participate freely in society (Sweden<sup>125</sup>) or in the political, social, economic, cultural and sporting life of the country (Moldova<sup>126</sup> and Romania<sup>127</sup>). The best interests principle is explicitly set out in the constitutions of just four member states (Austria,<sup>128</sup> Ireland,<sup>129</sup> Norway<sup>130</sup> and Serbia<sup>131</sup>), although it has featured in the constitutional case law of other states.<sup>132</sup>

In summary, analysis of the *Visibility* spectrum shows that the extent to which children are visible in the constitutions of Council of Europe member states varies considerably. A small minority of the 47 states score at the lower end of the spectrum where children are either completely invisible or are only mentioned in the context of an education provision, while just under half of the states score highly by including detailed provisions on children. In between these two extremes lie a significant number of states where children are mentioned only in respect of the specific issues of education, equal status and protection from harm or exploitation. The highest level of visibility is achieved by constitutions such as Austria, Poland or Portugal, which include dedicated, stand alone provisions that address a variety of key children's rights issues.

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<sup>114</sup> Constitution of Andorra, Article 20(1).

<sup>115</sup> Constitution of Croatia, Article 63(2).

<sup>116</sup> Constitution of Portugal, Article 73(2).

<sup>117</sup> Constitution of Spain, Section 29(2).

<sup>118</sup> Constitution of Finland, Section 6(2).

<sup>119</sup> Constitution of Portugal, Article 69(2).

<sup>120</sup> Bundesverfassungsgesetz über die Rechte von Kindern, 15 February 2011, Article 4.

<sup>121</sup> Constitution of Ireland, Article 42A.4.

<sup>122</sup> Constitution of Norway, Article 104.

<sup>123</sup> Constitution of Poland, Article 73(3).

<sup>124</sup> See, e.g., Long, 'The Impact of the UNCRC on the Italian Legal System', (2009) 17 *International Journal of Children's Rights* 155 at 161-162. See also *Third and Fourth Periodic Reports of Germany to the Committee on the Rights of the Child*, CRC/C/DEU/3-4, 20 October 2010 at para 91, and *Third and Fourth Periodic Reports of Spain to the Committee on the Rights of the Child*, CRC/C/ESP/3-4, 30 May 2008 at paras.308 and 451.

<sup>125</sup> Constitution of Sweden, Article 2.

<sup>126</sup> Constitution of Moldova, Article 50(5).

<sup>127</sup> Constitution of Romania, Article 49(5).

<sup>128</sup> Bundesverfassungsgesetz über die Rechte von Kindern, 15 February 2011, Article 1.

<sup>129</sup> Constitution of Ireland, Article 42A.

<sup>130</sup> Constitution of Norway, Article 104.

<sup>131</sup> Constitution of Serbia, Article 65.

<sup>132</sup> See, e.g., Askola, 'Cut-Off Point? Regulating Male Circumcision in Finland', (2011) 25 *International Journal of Law, Policy and the Family* 100 at 107 and *Third and Fourth Periodic Reports of Spain to the Committee on the Rights of the Child*, CRC/C/ESP/3-4, 30 May 2008 at paras.274-276. It also features in legislation in many states.

#### 4. THE AGENCY SPECTRUM

The *Visibility* spectrum assessed the scope of constitutional protection offered to children's rights; in contrast, the *Agency* spectrum will assess the manner of that protection. As highlighted in Part 2 above, the CRC requires a rights-based approach to children's needs and interests, which the CRC Committee defines in General Comment No. 13 as 'a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection. A child rights approach is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights ...'<sup>133</sup> The presence of participation rights in particular is one of the hallmarks of recognising the *Agency* of children; as argued by Habashi et al., 'efforts to incorporate only some aspects of the CRC, namely those entailed within the domains of protection and provision while excluding the domain of participation, enforces the images of vulnerability and maturity rather than encouraging children's potential as decision making partners.'<sup>134</sup>

An analysis of European constitutional instruments shows that the children's provisions in these documents can be positioned at different points on a spectrum ranging from a paternalistic approach which considers children as objects requiring protection of the law but lacking any autonomy or independent rights (Point 1), to a rights-based approach which reflects the concept of children as autonomous rights-holders who are empowered to independently assert those rights (Point 4). In between, there are constitutions that take a mixed approach by including both paternalistic and child-centred provisions, with the emphasis leaning in one direction or the other (Points 2 and 3). Significantly, *Visibility* and *Agency* do not walk entirely hand-in-hand; the fact that children are highly visible in a constitution does not mean that their agency is well respected.

##### A. Point 1: Paternalistic

One way for a constitution to take a paternalistic approach towards children would be to say very little about them, and thus to fail to expressly acknowledge that children are independent rights-holders. As such, it could be said that constitutions that score poorly on the *Visibility* spectrum will, for the most part, also score poorly on the *Agency* spectrum (if not necessarily always; it will be seen at Point 4 on the *Agency* spectrum that there are examples of constitutions which score poorly on *Visibility* but yet score highly on *Agency*).<sup>135</sup> On the other hand, a constitution might score well on *Visibility* and yet take a highly or even entirely paternalistic stance. Paternalistic constitutional provisions are ones which conceptualise children solely in terms of their vulnerability and need for protection without any acknowledgment of their capacity to be autonomous rights-holders. This approach rarely uses rights language and often groups children together with other perceived vulnerable groups like mothers. A good example of this approach can be seen in Articles 62 and 64 of the Croatian Constitution, which – notwithstanding its drafting after the enactment of the CRC,

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<sup>133</sup> Committee on the Rights of the Child, *supra* n 9 at para 59.

<sup>134</sup> Habashi et al., *supra* n 2 at 282.

<sup>135</sup> There are examples of constitutions which score poorly on *Visibility* but yet score highly on *Agency*: see the discussion of Point 3 on the *Agency* spectrum below.

and its inclusion of a detailed provision dedicated to children – takes a highly paternalistic approach that is devoid of the language of children’s rights:

62. The State shall protect maternity, children and young people, and shall create social, cultural, educational, material and other conditions promoting the right to a decent life.

64(1) Everyone shall have the duty to protect children and helpless persons.

(2) Children may not be employed before reaching the legally determined age, nor may they be forced or allowed to do work which is harmful to their health or morality.

(3) Young people, mothers and disabled persons shall be entitled to special protection at work.

While Croatia provides an example of high *Visibility* but low levels of *Agency*, it is more common for constitutions that score poorly on *Agency* to also score poorly on *Visibility* by including only a passing reference to children that is framed purely in terms of protection, with no reference to children possessing any rights (save perhaps for a reference to the ‘equal rights’ of children born within or outside of wedlock). Such provisions generally guarantee ‘special protection’ to children, either alone or in conjunction with their mothers or families. Examples of this approach include Bulgaria,<sup>136</sup> the Czech Republic,<sup>137</sup> Estonia,<sup>138</sup> Greece,<sup>139</sup> Macedonia<sup>140</sup> and Ukraine.<sup>141</sup> A further approach is where ‘childhood’ as a concept is deemed worthy of protection rather than children as individual human beings. This abstraction removes children further from being subjects of rights. This is the formulation used in the constitutions of Azerbaijan,<sup>142</sup> Lithuania<sup>143</sup> and the Russian Federation.<sup>144</sup>

## **B. Point 2: Predominantly paternalistic**

Whereas Tobin broadly labelled constitutions as either being ‘special protection’ constitutions or ‘children’s rights’ constitutions, the reality is that many Council of Europe member states have constitutions that contain both types of provisions, with the emphasis leaning either towards a paternalistic or a child-centred approach. While allowing children’s vulnerability alone to define them is paternalistic, the fact remains that children are especially vulnerable to certain types of harm and should be protected accordingly. As such, it is common to include provisions focused on child protection in national constitutions; Part 3 above showed that some of the most common constitutional provisions concerning children are those that refer to protection from violence, harm or exploitation (particularly economic exploitation). Such provisions commonly feature side-by-side with provisions that take a more modern view of children as rights-holders, but the balance between paternalistic and child-centred language can vary. Point 2 of the *Agency* spectrum includes constitutions which make some references to children as rights-holders, while still using

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<sup>136</sup> Constitution of Bulgaria, Article 14.

<sup>137</sup> Constitution of Czech Republic, Article 32(1).

<sup>138</sup> Constitution of Estonia, Section 27.

<sup>139</sup> Constitution of Greece, Article 21(1).

<sup>140</sup> Constitution of Macedonia, Article 42.

<sup>141</sup> Constitution of Ukraine, Article 51.

<sup>142</sup> Constitution of Azerbaijan, Article 34(II).

<sup>143</sup> Constitution of Lithuania, Article 38(2).

<sup>144</sup> Constitution of Russian Federation, Articles 7 and 38.

predominantly paternalistic 'special protection' language. A striking example of this contrast can be seen in Articles 73 and 74 of the Constitution of Montenegro:

Article 73

Mother and child shall enjoy special protection.

Article 74

A child shall enjoy rights and freedoms appropriate to his age and maturity.

A child shall be guaranteed special protection from psychological, physical, economic and any other exploitation or abuse.

Here, two provisions refer to children solely in terms of their vulnerability and need for protection, but they book-end a provision that employs a classic example of children's rights language by acknowledging that children's rights grow stronger as they grow older and more mature. Thus, a mixed approach is evident, albeit one that is more paternalistic than child-centred. A similar tendency can be seen in Slovenia:

Article 56 (Rights of Children)

(1) Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity.

(2) Children shall be guaranteed special protection from economic, social, physical, mental or other exploitation and abuse. Such protection shall be regulated by law.

(3) Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.

Again, while this provision avoids an entirely paternalistic approach by recognising the evolving capacities of children, the emphasis is on protecting children rather than recognising their agency.

### **C. Point 3: Predominantly child-centred**

The paternalistic emphasis contained in the mixed approaches of Montenegro and Slovenia is reversed elsewhere, so that, while the approach remains a mixed one, the emphasis is more child-centred. An example is provided by Article 11 of the Swiss Constitution:

Art. 11 Protection of children and young people

1 Children and young people have the right to the special protection of their integrity and to the encouragement of their development.

2 They may personally exercise their rights to the extent that their power of judgement allows.

In this example, there is one protective provision and one provision focused on agency; but the latter is phrased quite strongly, and is indicative of a child-centred philosophy rather than a paternalistic one. In Romania, the lines are blurred by the opening subsection of Article 48, which provides that '[c]hildren and young people shall enjoy special protection and assistance in the pursuit of their rights.' This provision, which could be interpreted with the emphasis either on 'special protection' or on assisting children 'in the pursuit of their rights', is followed by three classic

special protection provisions, before Article 48(5) concludes by providing that ‘public authorities are bound to contribute to secure the conditions for the free participation of young people in the political, social, economic, cultural and sporting life of the country’. Thus, the Romanian Constitution mixes the language of paternalism and protection with the language of rights, autonomy and participation. The text of the document itself appears somewhat more paternalistic than child-centred; but it has the potential to be read either way, and the limited English-language literature that is available suggests that the approach taken both in legislative implementation of children’s constitutional rights and in interpretation of those rights by the courts has been a largely child-centred one.<sup>145</sup>

The mixed approach evident at points 2 and 3 on the *Agency* spectrum is preferable to the paternalistic approach in that it provides at least some recognition of the agency of children as autonomous rights-holders and provides a platform upon which such an approach can be developed across government institutions. At the same time, the presence of more paternalistic references may act as a constitutional anchor for attitudes that view children solely in terms of vulnerability and protection, and thus serve to hamper the development of a true children’s rights perspective. Therefore, within the mixed approach, constitutions at point 3, which are predominantly child-centred, are clearly more in harmony with the CRC than the predominantly paternalistic constitutions at point 2.

#### **D. Point 4: Child-centred**

At the high point of the *Agency* spectrum are constitutions which portray children as independent, autonomous rights-holders. This does not mean that no reference is made to protecting children (even the CRC recognises that children should be protected from harm<sup>146</sup>); it means that, as a whole, the tenor of the provisions is rights-based. As explained above, the CRC requires a rights-based approach to children’s issues and concerns that gives expression to the rights of children as individual, autonomous rights-holders. Thus, constitutions that take a similar approach will achieve the greatest degree of harmony with the child rights approach envisaged by the CRC. Such an approach can be seen in Article 54 of the Albanian Constitution (quoted above) and Article 72 of the Polish Constitution:

(1) The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.

(2) A child deprived of parental care shall have the right to care and assistance provided by public authorities.

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<sup>145</sup> See, e.g., Simion and Criste, ‘Constitutional Protection of Children and Youth in Romania’, (2017) *Fiat Iustitia*, No. 1/2017 at 263, and *Third and Fourth Periodic Reports of Romania to the Committee on the Rights of the Child*, CRC/C/ROM/4, 18 November 2008 (discussing throughout Law 272/2004 on the protection and promotion of child rights).

<sup>146</sup> Note that the jurisprudence of the CRC Committee has been criticised for taking a paternalistic approach to the right of children to development: see Peleg, ‘Developing the Right to Development’, (2017) 25 *International Journal of Children’s Rights* 380.

(3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.

Here, we can see that all three subsections speak in terms of the rights of the child, and one of the four general principles – the right to be heard – is specifically included. Aside from Albania and Poland, other constitutions to include detailed provisions that are entirely or very heavily focused on children as independent rights-holders include Austria,<sup>147</sup> Norway,<sup>148</sup> Portugal<sup>149</sup> and Serbia.<sup>150</sup>

While the examples mentioned above are all detailed rights-focused provisions, there are other constitutions which are less detailed (and which therefore score lower on *Visibility*), but which still characterise children as autonomous rights-holders rather than as objects of protection. There are two types of provisions which are of particular relevance in this regard: those which provide for participation rights and those which recognise the evolving capacity of children. While they may feature as part of a detailed children's rights provision (such as in Poland, Romania or Slovenia), they may also feature in a constitution in which children's rights are less visible; but their presence provides a powerful recognition of the *Agency* of children. Finland is one example: aside from the right to education, Finland only includes a single child-specific provision in its constitution (section 6(3)), but it is a classic recognition of the agency of children as independent rights-holders: 'Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.' Sweden has a similar but arguably less effective provision stating that 'public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded.'<sup>151</sup> While in a similar vein to the Finnish provision, it does not address the issue of evolving capacities, and could be more explicit in emphasising the importance of the participation of children (rather than just referring to 'all', albeit in a provision that references children's rights in the next clause).

In summary, the *Agency* spectrum measures something different to the *Visibility* spectrum: the manner in which children are portrayed in a constitution (i.e. as objects of concern or as autonomous rights-holders) as distinct from the range of children's rights which are protected in the constitutional scheme. While low *Visibility* in a constitution often correlates with low *Agency* being afforded to children, this is not always the case, and exceptions arise in either combination. Perhaps the most interesting finding in this section is the tendency of a significant number of constitutions to take a mixed approach that is neither entirely paternalistic nor entirely rights-focused, with old-style special protection provisions appearing side-by-side with modern children's rights provisions.

As with *Visibility*, this paper argues that a constitution will be more in line with the child rights approach envisaged by the CRC if it scores highly on the *Agency* spectrum. Constitutions like those of Austria, Norway, Poland, Portugal and Serbia score highly on both spectrums, and are thus (subject to the analysis in Part 5 below) leading the way up to this point in the discussion. However, it is important to state that a clause which has high potential on paper for the recognition of children as autonomous rights holders can still be interpreted by courts in a paternalistic fashion if it is not accompanied by a change of culture and mind-set among the judiciary. Indeed, Article 72 of the Polish Constitution was cited above as an exemplar of point 4 on the *Agency* spectrum, and has been

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<sup>147</sup> Bundesverfassungsgesetz über die Rechte von Kindern, 15 February 2011.

<sup>148</sup> Constitution of Norway, Article 104.

<sup>149</sup> Constitution of Portugal, Article 69.

<sup>150</sup> Constitution of Serbia, Article 64.

<sup>151</sup> Constitution of Sweden, Article 2.

praised by the CRC Committee as embodying many of the principles of the CRC.<sup>152</sup> Nevertheless, there is evidence of the Polish Constitutional Court taking a relatively paternalistic stance that emphasises child welfare and protection over autonomy and participation,<sup>153</sup> and Poland has been the subject of criticism by the Committee for failing to ensure that domestic laws comply with the Convention, even in areas specifically addressed by constitutional provisions on children.<sup>154</sup> Enacting child-centred constitutional provisions is merely the first step; generating enthusiasm for a child-centred approach to interpreting and applying those provisions is another matter altogether.

## 5. THE ENFORCEABILITY SPECTRUM

While the earlier section on *Visibility* assessed the extent to which children's rights are given express recognition in the constitutions of member states, this only tells part of the story, since the inclusion of a right in a constitutional document does not necessarily provide a remedial avenue in the event of a failure to vindicate that right. A key indicator in assessing the level of constitutional protection of children's rights is the extent to which those rights are enforceable, whether through the courts or through another mechanism such as a children's ombudsman. Tobin makes the point that the 'significance of any constitutionally recognised right quickly diminishes when no means of enforcement is provided for ... with the additional complication that children often lack the capacity to exercise their rights, or otherwise to ensure enforcement, even in situations where the constitutional provisions look admirable on paper.'<sup>155</sup>

A comprehensive assessment of the enforceability of children's constitutional rights across all 47 Council of Europe member states is outside the scope of this paper, 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.<sup>156</sup> Instead, examples will be given of varying approaches to enforceability, which can vary along a spectrum from completely unenforceable, to enforceability through administrative remedies such as a children's ombudsman, to enforceability through the courts using weak or strong judicial remedies (such as interpreting laws in light of children's rights; 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).

Any attempt to draw firm conclusions on enforceability is further complicated by the fact that within a single constitution, some rights might be more enforceable than others: for example,

<sup>152</sup> Committee on the Rights of the Child, Concluding Observations regarding Poland, 30 October 2002, CRC/C/15/Add.194 at para 4.

<sup>153</sup> See, e.g., Case K 16/10, Constitutional Court of Poland, Judgment of 11 October 2011, in which legislation providing that children under 16 had no decision-making capacity in medical matters was upheld as compatible with Article 72. The Court justified this decision by describing child welfare as a 'fundamental value in the Polish legal order' and holding that Article 72(3) 'qualifies' the fundamental rights provisions of Article 41-47 by making their applicability to children conditional on a child's intellectual capacities and degree of maturity. I am grateful to Katarzyna Wazynska-Finck for bringing this case to my attention.

<sup>154</sup> See Committee on the Rights of the Child, Concluding Observations regarding Poland, 30 October 2002, CRC/C/15/Add.194 at paras 11, 30-34 and 44-45, and Concluding Observations regarding Poland, 30 October 2015, CRC/C/POL/CO/3-4 at paras 22-26 and 42.

<sup>155</sup> Tobin, *supra* n 2 at 118.

<sup>156</sup> See Maurás, 'Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child', (2011) 633 *The ANNALS of the American Academy of Political and Social Science* 52, who emphasises public policy as a key component of the enforcement and enforceability of children's rights, and Tobin, *supra* n 2 at 120-125, who examines the role played by access to justice, judicial conservatism and social legitimacy in contributing to the enforceability or otherwise of the constitutional rights of children.

civil and political rights tend to be more enforceable than economic and social rights.<sup>157</sup> Moreover, as important as the *Enforceability* spectrum is, it is essential to read it in conjunction with the other spectrums, since a state might have strong enforcement mechanisms for children's rights, but the rights that are protected might not in themselves be very strong. For example, while children's rights under the German Constitution are enforceable, the rights expressly included in that Constitution are limited to a right to education and a right to equal treatment before the law, irrespective of the marital status of the child's parents.<sup>158</sup> A further complication here is the role of international law in a domestic legal system. A country might have minimal protection for children's rights in its constitution, but it may have incorporated the CRC into its domestic law in a very strong form, meaning that the whole range of children's rights protected by the CRC are enforceable notwithstanding their absence from the text of national constitution. France and Spain provide good illustrations of this latter situation.<sup>159</sup>

With the above in mind, the analysis will proceed along a four-point spectrum: unenforceable (Point 1), administrative remedies (Point 2), weak judicial remedies (Point 3) and strong judicial remedies (Point 4). It is important to acknowledge that these are not water-tight compartments. Some scholars have questioned the validity of distinctions such as 'weak' and 'strong' judicial remedies,<sup>160</sup> and equally it will be seen that administrative remedies can overlap with judicial remedies. This is where the spectrum approach to analysis proves to be so useful, because it accounts for the fact that it is not always possible to draw a clear line demarcating the progression from one point to another; but at the same time, progression becomes visible on a larger scale where differences are clearer.

### A. Point 1: Unenforceable

In some (admittedly rare) cases, constitutions contain provisions regarding children's rights that are entirely non-justiciable, and may be expressly stated to be so. For example, the Irish Constitution contains a provision in Article 45 entitled 'Directive Principles of Social Policy', in which the state pledges, *inter alia*, to safeguard the economic interests of the weaker sections of the community (including, in particular, orphans),<sup>161</sup> and to endeavour to ensure that 'the tender age of children shall not be abused' and that citizens, including children, shall not be 'forced by economic necessity' to engage in labour 'unsuited to their sex, age or strength'.<sup>162</sup> However, these Directive Principles of Social Policy are made expressly non-justiciable: a preambular paragraph stipulates that they are for the guidance of the Oireachtas (Parliament) only, and shall not be cognisable by any court under any provision of the Constitution. Thus, no remedy is available in the event of a failure to vindicate the rights envisaged by these constitutional provisions. Provisions of this nature are entirely symbolic; and as discussed in Part 2 above, the benefits of purely symbolic provisions are extremely limited. Colm Ó Cinnéide has observed that 'the purely expressive nature of Article 45 in particular has prevented its provisions from acquiring any meaningful legal or political traction ... As a

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<sup>157</sup> Tobin, *supra* n 2 at 119.

<sup>158</sup> Note, however, that the German courts have read certain children's rights and associated obligations into the text; see *supra* n 71.

<sup>159</sup> See text accompanying n 42 and 88 *supra*.

<sup>160</sup> See, e.g., Kavanagh, 'What's so weak about 'weak-form review'? The case of the UK Human Rights Act 1998', (2015) 13 *International Journal of Constitutional Law* 1008.

<sup>161</sup> Constitution of Ireland, Article 45.4.1°.

<sup>162</sup> Constitution of Ireland, Article 45.4.2°.

consequence, it has in effect become a constitutional dead letter.’<sup>163</sup> (It should be noted, however, that there are other provisions on children’s rights in the Irish Constitution that are enforceable through the courts, and some reference will be made to this below.)

## **B. Point 2: Administrative Remedies**

An increasingly common and relatively accessible form of remedy for breaches of children’s constitutional rights is through an administrative body such as some form of ombudsman (which may be a general ombudsman or a specific children’s ombudsman; the latter institution is present in a large majority of member states).<sup>164</sup> In keeping with the spectrum approach to analysis, the powers available to children’s ombudspersons varies considerably from state to state. At the weaker end, children’s ombudspersons have a function of acting as a spokesperson for children’s rights, lobbying government and perhaps preparing an annual report that is submitted to the legislature or executive.<sup>165</sup> A stronger power is where they are authorised to investigate individual complaints and make findings of failures by administrative agencies to adequately observe children’s rights, and to make recommendations on how this could be avoided in the future.<sup>166</sup> Recommendations of these sort are often not legally binding on the parties to whom they are addressed; however, they still have important potential to enforce and advance children’s rights. Osian Rees argues that ‘there is evidence of individual cases bringing about broader changes’,<sup>167</sup> and the CRC Committee has stated that children’s ombudspersons or other national human rights institutions ‘must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children.’<sup>168</sup>

In some states, an ombudsman has extensive powers beyond those mentioned above. For example, in Serbia, the Ombudsman is authorised to submit to the Government or to the National Assembly an initiative to amend laws and other regulations, if he/she deems that violations of the rights of citizens occur due to deficiencies in the regulations, as well as to initiate the passing of new laws or other regulations when he/she deems it significant for the realisation and protection of

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<sup>163</sup> Ó Cinnéide, ‘Zones of Constitutionalisation’ and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order’, (2014) 37 *Dublin University Law Journal* 173 at 197-8.

<sup>164</sup> The European Network of Ombudspersons for Children has 34 members; see [http://enoc.eu/?page\\_id=210](http://enoc.eu/?page_id=210) [last accessed 8 April 2019]. Other Council of Europe member states who are not members of this network also have a similar institution, such as Austria and Poland.

<sup>165</sup> Examples of this approach are referenced in UNICEF, Innocenti Digest: Ombudswork for Children (2007) at 9, available at: <https://www.unicef-irc.org/publications/pdf/digest1e.pdf> [last accessed 8 April 2019].

<sup>166</sup> Williams, ‘Effective Government Structures for Children?: The UK’s Four Children’s Commissioners’, (2005) 17 *Child and Family Law Quarterly* 37 at 50 argues that a children’s ombudsman which has the power to investigate individual complaints is ‘more of an effective ‘champion’ on the issues that the children themselves feel they need to raise individually’. As against this, the UNICEF Innocenti Centre argues that ‘because of the risk ombudsmen for children run of being engulfed by casework and because of the vastness of the issues they must tackle and the non-binding nature of their decisions, it is far from clear that such an approach is the most appropriate model for providing children with effective avenues for redress ... as an alternative to ombudsmen being the primary avenue for all complaints, their time might be better focused on developing comprehensive opportunities for children to challenge breaches of their rights through independent complaints procedures linked to all services.’ See UNICEF, *supra* n 165 at 7.

<sup>167</sup> Rees, ‘Dealing with Individual Cases: An Essential Role for National Human Rights Institutions for Children?’, (2010) 18 *International Journal of Children’s Rights* 417 at 434; see further *ibid.* at 426-9.

<sup>168</sup> Committee on the Rights of the Child, *supra* n 41 at para 13.

citizens' rights. The Government or the competent committee of the National Assembly are obliged to consider the initiatives submitted by the Ombudsman.<sup>169</sup>

A children's ombudsman is not the only way in which administrative remedies can be provided for breaches of children's constitutional rights. In addition to its Ombudsman's office having a vice-president specifically focusing on children's rights issues, Romania has established a National Authority for the Protection of Children's Rights to defend against children's rights violations at the hands of private actors.<sup>170</sup> In Hungary, a wide range of administrative bodies – some of which are dedicated child-focused bodies and some of which are not – are given specific responsibilities in order to assist the courts with the task of vindicating the constitutional rights of children. These include the Parliamentary Commissioner for Civil Rights; the representative of children's rights (child protection); the Office of the Ministerial Commissioner Responsible for the Rights of the Child; the Ministerial Commissioner for Education Rights; the General Prosecutor; and special interest forums in child protection and child welfare institutions. Each of these bodies has a variety of functions specifically directed towards remedying violations of children's constitutional rights, including receiving and investigating complaints, engaging in mediation, making recommendations and preparing reports.<sup>171</sup>

The line between Point 2 of the *Enforceability* spectrum (Administrative Remedies) and Points 3 and 4 (Judicial Remedies) can become blurred in some systems, where the Ombudsman for Children or other administrative agencies are authorised to commence litigation to enforce children's rights. This is the case in Serbia, where the Ombudsman is also authorized to initiate proceedings before the Constitutional Court for the assessment of the legality and constitutionality of laws, other regulations and general by-laws which govern issues related to the liberties and rights of citizens.<sup>172</sup> Similar powers are afforded to the Ombudsman in Poland,<sup>173</sup> Romania<sup>174</sup> and to some administrative agencies in Hungary.<sup>175</sup>

### C. Point 3: Weak Judicial Remedies

The most obvious way in which constitutional rights can be enforced is through litigation in the courts. However, litigation is not a remedy in itself, but rather a gateway to a variety of remedies; courts have a wide range of tools at their disposal to remedy rights violations, and some of those tools are more powerful than others. At Point 3 in the *Enforceability* spectrum are what

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<sup>169</sup> *Initial Report of Serbia and Montenegro to Committee on the Rights of the Child*, CRC/C/SRB/1, 31 August 2007 at paras 36-7.

<sup>170</sup> *Third and Fourth Periodic Reports of Romania to the Committee on the Rights of the Child*, CRC/C/ROM/4, 18 November 2008 at paras 16, 68, 69 and 75.

<sup>171</sup> *Second Report of Hungary to Committee on the Rights of the Child*, CRC/C/70/Add.25, 24 May 2005 at paras 57-69.

<sup>172</sup> *Initial Report of Serbia and Montenegro to Committee on the Rights of the Child*, CRC/C/SRB/1, 31 August 2007 at para 36-37.

<sup>173</sup> Rogalska-Piechota, 'The Ombudsman for Children for Poland: A Model for Namibia?', in Ruppel (ed), *Children's Rights in Namibia* (2009) at 398-400, available at: [http://www.kas.de/upload/auslandshomepages/namibia/Children\\_Rights/Children\\_w.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_w.pdf) [last accessed 8 April 2019].

<sup>174</sup> Selejan-Guta, *The Constitution of Romania: A Contextual Analysis* (2016), Chapter 6(IV)(B). See further *Third and Fourth Periodic Reports of Romania to the Committee on the Rights of the Child*, CRC/C/ROM/4, 18 November 2008 at paras 69-74.

<sup>175</sup> *Second Report of Hungary to Committee on the Rights of the Child*, CRC/C/70/Add.25, 24 May 2005 at paras 57-69.

constitutional lawyers tend to call ‘weak’ judicial remedies: remedies that draw the attention of the other branches of government to a rights issue, but do not actively interfere in the work of the executive or legislative branches. One example would be an award of damages; this is a weak remedy in that it is restricted to an individual plaintiff, and is really only directed at past behaviour rather than future compliance. Damages do not in themselves remedy an ongoing breach of rights since they do not compel the branch of government responsible for the rights violation to adjust its behaviour (although they do provide an incentive to do so). Damages have been awarded for breaches of the right to education under the Irish Constitution, although the courts have themselves acknowledged their inadequacy as a remedy.<sup>176</sup>

Another example of a weak judicial remedy is declaratory relief, whereby a court declares that a right exists or is being violated, but leaves it to the other branches to decide on how to address that violation. This approach can be seen in the UK; the Human Rights Act 1998 (which, in the absence of a codified written constitution, provides a source of constitutional law that performs similar functions to a constitutional bill of rights) grants courts the power to make declarations of incompatibility where Acts of Parliament cannot be interpreted in a manner that is compatible with the UK’s obligations under the ECHR.<sup>177</sup> A number of such declarations have been made on the basis of a failure to vindicate a right of a child under the ECHR.<sup>178</sup> Notably, however, a declaration of incompatibility under the Human Rights Act 1998 does not render the offending law invalid<sup>179</sup> – it merely draws the executive’s attention to the incompatibility in question. It is up to the Government to respond and to cause the legislation to be amended in order to bring it into line with the ECHR.<sup>180</sup> Although theoretically, the Government might refuse to do so, the evidence indicates that, to date, it has invariably taken the necessary action (albeit sometimes rather reluctantly).<sup>181</sup>

Declaratory relief also operates under the Irish Constitution, whereby the courts will sometimes declare that a constitutional right has been breached, but make it clear that the purpose of the declaration is to elicit a response from the executive branch, whose function it is to decide upon the detail of how the right should be vindicated.<sup>182</sup> In essence, this approach shows a willingness to find that particular policies fall short of vindicating constitutional rights, but not to stipulate the details of a policy that would adequately discharge constitutional obligations. A similar approach is evident in the case law of the German Constitutional Court in relation to the constitutionally guaranteed minimum standard of living. The Court has ordered the Government to review a welfare benefit

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<sup>176</sup> See, e.g., *Cronin v Minister for Education* [2004] 3 IR 205 at 214, as discussed in O’Mahony, *supra* n 58 at paras 8-08 to 8-16.

<sup>177</sup> Section 4(2).

<sup>178</sup> See *supra* n 43.

<sup>179</sup> Section 4(6).

<sup>180</sup> In circumstances where a declaration of incompatibility has been made under section 4, section 10 of the Act authorises a Minister by order to ‘make such amendments to the legislation as he considers necessary to remove the incompatibility’.

<sup>181</sup> Kavanagh, *supra* n 160 at 1025. See further Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2014-16* (2016) at 45-62, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf) [last accessed 8 April 2019].

<sup>182</sup> See, e.g., *O’Donoghue v. Minister for Health* [1996] 2 IR 20 at 71, where O’Hanlon J stated: ‘In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant.’

policy that had failed to adequately evaluate child-specific rights and needs;<sup>183</sup> similarly to the Irish case law, the Court was willing to declare the policy in question unconstitutional, but the task of reformulating it in line with the Constitution fell to the executive, not the courts.

#### **D. Point 4: Strong Judicial Remedies**

As described here, strong judicial remedies involve the courts issuing decisions that have the effect of immediately and directly addressing a rights violation. As with Point 3, this can take a number of different forms. At the lower end, involving less judicial interference with the work of the other branches of government, lies the mechanism used in some states where the courts interpret lower laws in light of constitutionally-protected children's rights. This occurs in the UK, where the Human Rights Act 1998 (which, as already noted, fulfils a similar role in UK law to a constitutional bill of rights) obliges courts to interpret laws in a manner that is compatible with the UK's obligations under the ECHR.<sup>184</sup> It may seem counter-intuitive to suggest that a mere interpretive duty is a stronger form of remedy than a declaration of incompatibility. However, an interpretive duty can in fact have a stronger remedial impact on an individual plaintiff (as well as on other, similarly situated individuals) than a mere declaration, since it does not require any additional measures by another branch of government to draft a new law – it immediately renders the existing law rights-compliant, and depending on how it is used, it may approach the point of blurring the lines between interpretation and amendment.<sup>185</sup>

Courts can go one step further by directly invalidating a law. For example, in Liechtenstein, the Constitutional Court found that a law imposing an age limit of 16 for family reunification pertaining to children of third-state foreigners 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>186</sup> Another example can be seen in Romania, where the Constitutional Court struck

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<sup>183</sup> *Hartz IV* case, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, February 9, 2010, discussed in Nolan, *supra* n 39 at 251-2.

<sup>184</sup> Section 3(1). See, e.g., *Hand and Anor v George* [2017] EWHC 533 (in which the Adoption of Children Act 1926, which excluded adopted children from being considered as 'children' for the purposes of testamentary dispositions of property, was 'read down' using section 3(1) of the Human Rights Act 1998 to uphold the claimant's right not to be discriminated against under Articles 14 and 8 of the ECHR). For a discussion of how section 3(1) can be used to prioritise children's rights, see Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act', (2004) 67 *Modern Law Review* 889.

<sup>185</sup> See, e.g., *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291, in which an application of section 3(1) by the Court of Appeal to the implementation of child care orders under the Children Act 1989 was subsequently overturned by the House of Lords on the basis that it was a judicial innovation passing well beyond the boundary of interpretation. On the duty under section 3(1) of the Human Rights Act 1998, see Kavanagh, *supra* n 160 at 1018, who argues that 'whatever else we may say about it, it seems inapt to describe it as weak. As interpreted by the higher courts in the UK, it has been understood as a 'strong adjuration' to render legislation compatible with Convention rights even if it goes against the unambiguous wording and clear intention of the statute ... Indeed, it is precisely because of its strength that the judicial use of § 3 has been accused of being indistinguishable from legislative amendment.' Kavanagh observes at 1037 that Parliament has never overruled or modified a section 3 interpretation, 'even in cases where there is evidence of considerable political disgruntlement about the judicial decision.'

<sup>186</sup> Second Report of Liechtenstein to Committee on the Rights of the Child, CRC/C/136/Add.2, 14 July 2005 at para 84.

down a law that made the payment of universal child benefit conditional upon attendance at a minimum level of compulsory schooling.<sup>187</sup>

Invalidating a law is an effective remedy where the violation complained of is a function of law; however, it will clearly be irrelevant where the issue is solely one of policy and there is no law to point to. This is particularly relevant in the sphere of resource allocation and socio-economic rights, where the problem may well be attributable to executive inaction rather than to any particular action on the part of a branch of government. Declaratory relief (as discussed above) is one way of drawing attention to a rights violation of this nature; indeed, for separation of powers reasons, it will often be the preferred way. However, should declaratory relief not be responded to, the only option remaining to a court is to issue an injunction compelling a government agency to take specified steps to remedy the rights violation in question. The Irish courts experimented with mandatory injunctions in a number of cases concerning the constitutional rights of children with severe behavioural disorders who were a danger to themselves and others, and required integrated secure accommodation and educational facilities.<sup>188</sup> However, the Supreme Court ultimately held that the orders granted were a breach of the separation of powers and therefore an impermissible invasion into the sphere of the executive branch.<sup>189</sup> In any system of government where the separation of powers plays a significant role, mandatory orders will be a problematic form of remedy; nonetheless, the South African Constitutional Court has developed a methodology for the enforcement of socio-economic rights that includes the possibility of mandatory injunctions, including in cases involving children's rights.<sup>190</sup>

In summary, the *Enforceability* spectrum displays an extremely wide range of mechanisms that are potentially available to remedy violations of children's constitutional rights. It is not possible at this stage of research to present comprehensive findings on the state of the enforceability of children's constitutional rights across Europe; the conclusions on this spectrum are more preliminary in nature. What can be said is that there is something of an inverse relationship between the accessibility of a remedy and its potential strength and effectiveness. The strongest remedies, like invalidating legislation and mandatory injunctions, involve overcoming expensive, time-consuming litigation as well as a general judicial reluctance to grant such far-reaching remedies. The more accessible remedies, like children's ombudspersons, tend to have more limited powers. Ideally, there is a place for both – the accessibility of weaker remedies make them an essential way of addressing lower-level violations, while stronger judicial remedies provide a way of overcoming more intractable problems. Moreover, since one of the key benefits of constitutionalising children's rights is to elevate them to a higher status than conflicting lower laws, it is important that the possibility exists of courts resolving such conflicts in favour of children's constitutional rights, lest the benefits of constitutional status be limited to mere symbolism. Thus, while Point 2 should not be dispensed with, a constitution that additionally benefits from the remedies discussed under Points 3 or 4 of the *Enforceability* spectrum will provide greater potential for the advancement of children's rights.

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<sup>187</sup> *Third and Fourth Periodic Reports of Romania to the Committee on the Rights of the Child*, CRC/C/ROM/4, 18 November 2008 at paras 604-605.

<sup>188</sup> *DB v Minister for Justice* [1999] 1 ILRM 93 and *TD v Minister for Education* [2000] 3 IR 62.

<sup>189</sup> *TD v Minister for Education* [2001] 4 IR 259. See O'Mahony, *supra* n 58 at paras 8-22 to 8-105.

<sup>190</sup> See, e.g., *Minister of Health v Treatment Action Campaign*, Case CCT 8/02, Judgment of 5 July 2002, as discussed in Nolan, *supra* n 39 at 170-180.

## 6. CONCLUSION

As outlined in Part 2, the text of the CRC and the jurisprudence of the CRC Committee present a holistic vision of children's rights which emphasises the importance of granting children enforceable legal rights in manner that develops their capacity to claim their rights as autonomous individuals. The Convention does not require states parties to include provisions on children's rights in their national constitutions, but the Committee welcomes such inclusion where it occurs. The analysis in this paper has shown that within the Council of Europe, almost every state has included at least some reference to children or children's rights in its national constitution; however, the quality of such provisions varies widely (see Figure 1 below). The spectrum analysis conducted in Parts 2, 3 and 4 provides a framework that can be used to assess the quality of a particular scheme with a view to establishing the extent to which it is in harmony with the child rights approach envisaged by the CRC and the jurisprudence of the CRC Committee. It argues that constitutional provisions on children's rights should, if they are to achieve harmony with this approach, have a certain combination of characteristics: high *Visibility* of children in the constitutional scheme, high levels of *Agency* attributed to children as rights-holders, and high levels of *Enforceability* in the event that rights are not vindicated by government institutions and agencies.

All three spectrums have an important role to play, as they address different aspects of a child rights approach. *Visibility* addresses the need to keep children's rights to the fore in adjudication, legislative processes and policy formation. *Agency* addresses the importance of doing this in a way that genuinely concerns children's *rights*, as opposed to a paternalistic approach that focuses exclusively or predominantly on protecting children, to the exclusion or diminution of affording them autonomy and the capacity to influence their own lives. However, of the three spectrums, the key to unlocking the full potential of constitutional provisions on children's rights is *Enforceability*. Where remedies for violating constitutional rights are either absent or very weak, the constitutional rights of children are reduced to little more than symbols. Symbolism is not entirely without value in constitutional law, but that value is decidedly limited, and is certainly far more limited than the value of rights which carry effective remedies for their enforcement. Thus, while some of the most impressive constitutional schemes on paper are those listed in Part 4 above that score highly on both *Visibility* and *Agency*, the value of those schemes in practice is strongly linked to how well they score on *Enforceability*. At the same time, since access to justice is often a significant problem for children, *Enforceability* presents one of the biggest challenges in the field of children's constitutional rights. The South African Constitution provides a particularly progressive model of how this challenge might be addressed.<sup>191</sup>

Indeed, South Africa offers the clearest example internationally of a constitution that scores highly on all three spectrums. Within the Council of Europe, quite a few countries score highly on two of the three spectrums, but few, if any, score consistently highly across all three. Poland would have come close at one point; but, as noted in Part 5 above, the Polish Constitutional Court has retained a somewhat paternalistic mind-set, and the power to invalidate legislation has been undermined by recent regressive measures aimed at curbing the influence of the Constitutional

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<sup>191</sup> Section 28(1)(h) of the South African Constitution recognises a right 'to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'. See further Bonthuys, 'The Best Interests of the Child in the South African Constitution', (2006) 20 *International Journal of Law, Policy and the Family* 23 at 32-3.

<sup>191</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at para 18.

Court.<sup>192</sup> Romania also scores quite well, displaying high *Visibility*, a mixed approach to *Agency* that has been predominantly interpreted in a child-centred way by the courts, and a range of remedies that includes accessible administrative remedies as well as strong judicial remedies (including striking down legislation). But probably no European country can be situated at the highest point of all three spectrums.

This paper does not claim that constitutions that score highly on the three spectrums correlate with a strong level of protection of children's rights in practice – such a claim could not be made without the benefit of an enormous amount of empirical research which would go far beyond the scope of this study. Moreover, examples have been quoted above of countries in which constitutions that contain children's rights provisions that look good on paper do not correlate with strong protection for those rights in practice.<sup>193</sup> The argument of this paper is focused not on the actual level of rights protection on the ground, but on the degree of harmony with the child-rights approach envisaged by the CRC that constitutional schemes achieve. A state whose constitution meets the criteria set out above might not necessarily be the most CRC-compliant state on the whole; but it will be the state whose constitution best reflects the child rights approach envisaged by the Convention.

Finally, it should be noted that the potential of constitutional provisions cannot be realised without being accompanied by a culture shift among political and legal actors, so that they are committed to upholding and enforcing children's rights provisions and judgments. This is not something that can happen overnight. Experience in South Africa demonstrates how judges can, over time, become more comfortable with a child rights approach and make more effective use of constitutional provisions;<sup>194</sup> but also how the potential of provisions will remain dormant until that point is reached.<sup>195</sup> Thus, giving constitutional status to children's rights should be seen as a starting point rather than an end in itself, and even constitutions that score highly on all three spectrums need to be accompanied by measures that will encourage courts and other government institutions to embrace them and place them at the heart of law-making, policy and adjudication.

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<sup>192</sup> See, e.g., Tadeusz Konciewicz, 'Farewell to the Polish Constitutional Court', *VerfassungsBlog*, 9 July, 2016, <http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/> [last accessed 8 April 2019], DOI: <http://dx.doi.org/10.17176/20160710-100611>.

<sup>193</sup> See text accompanying n 152-154 *supra*.

<sup>194</sup> Sloth-Nielsen and Kruuse, *supra* n 25.

<sup>195</sup> Sloth-Nielsen, 'Children's rights in the South African courts: An overview since ratification of the UN convention on the rights of the child', (2002) 10 *International Journal of Children's Rights* 137.

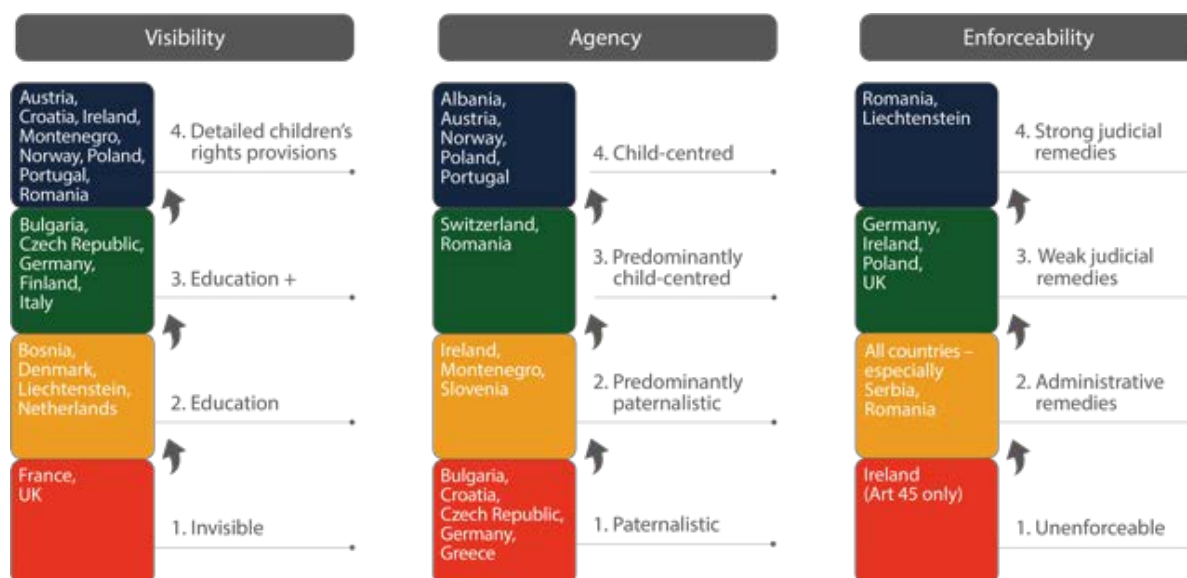


Figure 1: Selected Council of Europe member states situated on the three spectrums.

#### ACKNOWLEDGEMENTS

This article draws on preliminary research which I conducted as part of the preparation of a report for the Venice Commission: see Grabenwarter et al., *The Protection of Children's Rights: International Standards and Domestic Constitutions* (Strasbourg: Council of Europe, 2014), available at: [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) [last accessed 8 April 2019]. I am particularly grateful to Professor Ursula Kilkelly for her collaboration in the early stages of this work, and for her support for my continuation of it after her other commitments intervened. I am also grateful to Kate Scannell for providing graphic design of the spectrum analysis in Figure 1.