

Incorporation of the UN Convention on the Rights of the Child in national law

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Abstract

Incorporation is amongst the legislative measures of implementation of the UN Convention on the Rights of the Child (CRC) recommended by the Committee on the Rights of the Child. This article will discuss incorporation of the CRC in national law. It will show how incorporation is understood in different contexts, and highlight possible tensions between child rights and international law discourse and analysis. It begins by reviewing literature on incorporation of human rights treaties before discussing how incorporation is conceptualised in the context of the CRC. The focus then shifts to a review of studies that provide insights into how incorporation and legal integration of the CRC impact on how children's rights are treated in national legal systems. While primarily a commentary on the available literature the authors reflect on the significance of incorporation and how this is understood for academic and legal analysis, and what the evidence tells us about its contribution to the realisation of children's rights.

Introduction

A State Party to the UN Convention on the Rights of the Child (CRC) is required to undertake 'all appropriate legislative, administrative, and other measures' to implement the rights guaranteed to children (CRC, Article 4).¹ Although a State party has no discretion and must comply with this obligation (UN Committee 2013, para.18; VCLT 1969, Article 26; HRC 1981, para.1), in common with other international human rights treaties the CRC does not prescribe the means by which the CRC is to be implemented. A number of UN Treaty Monitoring Bodies (TMBs) have commented on mechanisms for the realisation of human rights, including through legal measures of implementation. For example, the Committee on Economic Social and Cultural Rights

For practical reasons the review undertaken in this paper focuses on research published in the English and Scandinavian languages. Without doubt research published in other languages would provide additional insights.

¹ Article 4 is not the only CRC article to specify the manner in which rights are to be implemented, it is however a primary obligation applying to all CRC articles.

(CESCR) states that international human rights standards should 'operate directly and immediately' within the domestic legal system enabling individuals to seek enforcement of their rights (CESCR 1998, paras.4-5). The CESCR does not expressly require incorporation of the International Covenant on Economic Social and Cultural Rights (ICESCR) in national law, but does comment that such an approach is desirable (ibid, para.8). The CESCR recommends 'direct incorporation' so that all the terms of the ICESCR are 'retained intact' in order to avoid potential problems of translating its provisions into national law (ibid, para.6). The Human Rights Committee (HRC) takes the view that while incorporation of the International Covenant on Civil and Political Rights (ICCPR) in the domestic legal order is not an absolute requirement, it nevertheless invites States parties to consider incorporation in order to 'facilitate full realization of Covenant rights' (HRC 2004, para.13). However, neither the ICESCR nor the HRC goes as far as to specify what is meant by the term 'incorporation'.

Incorporation is amongst the legislative measures of implementation discussed by the Committee in the Rights of the Child (the Committee) in *General Comment No.5, General Measures of Implementation of the Convention of the Rights of the Child* (UN Committee 2003). The Committee perhaps goes further than other TMBs to particularise what incorporation should imply for national legal systems, insisting that incorporation should mean the 'provisions of the [CRC] can be directly invoked before the courts and applied by national authorities and that the [CRC] will prevail where there is a conflict with domestic legislation or common practice' (ibid, para.20). The Committee has also stated that ensuring the principles and provisions of the CRC can be directly applied and appropriately enforced is 'fundamental' (ibid, para.2). It has been suggested that the Committee 'strongly encourages' incorporation, and prioritizes this amongst the legal measures of implementation to be adopted by States (Kilkelly 2019, p.325; Hoffman 2019). However, it has been noted that the Committee's approach may be at variance with legal tradition in many States (Thorburn Stern, 2019; Kilkelly, 2019), and it has been argued that insisting on primacy of the CRC often creates conflict with national law and practice (Hoffman 2019; Williams, 2012).

This article will discuss incorporation of the CRC in national law. It will highlight how the way in which incorporation is understood in different contexts differs tension between child rights and international law discourse and analysis. The article begins

by reviewing literature on incorporation of human rights treaties before discussing how incorporation is conceptualised in the context of the CRC. The focus then shifts to impact and a review studies which provide insights into the impact of incorporation and legal integration of children's rights in national legal systems. While primarily a commentary on the available literature the authors reflect on the significance of incorporation of the CRC and how this is understood for academic and legal analysis, and what the evidence tells us about its contribution to the realisation of children's rights.

Incorporation

While there is a rich literature on children's rights comparatively little has been written on incorporation of the CRC in national law (edited collections on children's rights include: Tobin (ed.) 2019; Kilkelly and Liefaard (eds.) 2018; Ruck *et al* (eds.) 2017; Vandenhoele *et al* (eds.) 2015; Williams and Invernizzi (eds.) 2011). It is therefore necessary to turn first to accounts of incorporation of human rights in international law discourse to develop an understanding of what this means. It is immediately apparent from the general literature that the meaning of incorporation is far from settled. Some accounts adopt a broad view in which incorporation may be understood as a variety of processes through which States 'internalize human rights treaties and absorb international human rights norms into the national legal system' (Alston and Goodman 2013 ,p.1047). Boyle, for example, describes incorporation as the 'domestic internalisation of international norms' through various 'pathways' which include: constitutionalising an international standard; the legislative or administrative adoption of international human rights norms; complying with the decisions of an international complaints mechanism; or, judicial incorporation through the common law' (Boyle 2019, p.9 drawing on Resnick 2006). A narrower analysis, focusing specifically on the legal aspects of incorporation is apparent from a 2014 report by the Venice Commission of the Council of Europe which examined the implementation of human rights treaties in domestic law in Europe and Latin America (Venice Commission 2014). The Venice Commission identifies a diverse range of legal techniques deployed by States to incorporate international human rights treaties in national law, but suggests that the choice to incorporate a human rights treaty, and the technique adopted to do so, is largely dependent on whether a State demonstrates a monist or dualist system in relation to international law. The Venice Commission's report notes

that in monist systems it is common practice for international treaties which a State has ratified to constitute part of the domestic legal order without the need for transposition by means of national legal instruments. This is contrasted with dualist systems which require international treaties to be transformed into national law by means of a statute or other national law, without which international law will not apply directly within the domestic legal order. Nollkaemper makes a similar distinction and speaks of 'automatic incorporation' whereby international law is made part of national law through the accepted operation of a written or unwritten rule, and 'transformation' of international obligations into national law through domestic legislation to make them enforceable by a domestic court as the two main approaches to making international law applicable on the national level adopted by states (Nollkaemper 2011, pp.73-74; see also, Björgvinsson 2016; Crawford 2012). Incorporation through domestic legislation has also been described as domestication (Egede 2007), legislative assimilation (Garcia Mendez 2007), quasi-incorporation (Van Alstine 2009), and sectoral incorporation (Lundy *et al* 2012). A significant factor influencing how this terminology is deployed is how incorporation is understood at regional level. Leary suggests that automatic incorporation (in the same sense used by Nollkaemper) is the preferred approach in some European, African and Asian countries, and many Latin American countries (Leary 1982). She opines that Commonwealth and Nordic countries² are more likely to favour the use of national legislation to give effect to international norms at domestic level, referring to this as legislative incorporation (*ibid*). In the Nordic countries, some commentators have noted that incorporation and transformation are considered legal-technical terms with different meanings, the first referring to when an international treaty or parts of it become domestic law, the second being when national legislation is revised or amended to comply with the treaty obligations (see for example Bring *et al* 2014; Scheinin 1996).

A common starting point in literature describing the relationship between international law and national law, including in the examples mentioned above, is the distinction between monist and dualist legal systems (for example Bjorgvinsson 2016; Alston and

² The Scandinavian countries are: Sweden, Norway, Denmark (sometimes, but not always Finland). The Nordic countries are: Sweden, Norway, Denmark Finland and Iceland. Usage varies, with English-speaking researchers tending to use 'Scandinavia' generically. Here the correct usage based on the relevant research is 'Nordic' countries.

Goodman 2013; Crawford 2012; Skelton 2011; Heyns and Viljoen 2001). This has become something of an orthodoxy even though it in practice is difficult to find a national legal system that is purely monist or dualist, and several authors have questioned the utility of the classification to analyse how incorporation takes effect and its impact on national legal systems. Verdier and Versteeg for example argue that the distinction has fundamental limitations for classifying national approaches to international law (Verdier and Versteeg 2017). The Venice Commission's assessment is that the monist/dualist classification does not provide an adequate mechanism to determine the factors that influence the integration of a human rights treaty into domestic law, and many countries have features of both systems (Venice Commission 2014). What emerges from general accounts of incorporation is a varied terminology to categorise how States seek to internalize international human rights instruments. Full discussion of this terminological variation is beyond the scope of this paper but it is worth noting that it reflects differences apparent between national legal systems on giving effect to international law at the domestic level, and demonstrates that there is no strict rule on how adherence to international human rights treaties is to be achieved in national law.

Incorporation and enforcement

In April 2014 an Optional Protocol to the CRC on a Communications Procedure (OPIC) came into force.³ OPIC introduces a procedure enabling children or their representative to bring a complaint (communication) before the Committee provided a State Party to the CRC has also accepted the competence of the Committee to receive complaints through ratification or accession to the protocol. As at September 2019, only 134 of the 196 States Parties to the CRC had failed to take any action to sign or ratify OPIC.⁴ The protocol has been criticised, in particular for compromising the adjudication of economic, social and cultural rights to accommodate concerns raised by some States about the justiciability of these rights (Beco, 2013). Despite this, and the fact that Committee decision under OPIC will not be enforceable against a State Party, Sandberg has suggested that it will result in decisions which 'more accurately

³ OPIC available here:

<https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

⁴ Information available here:

https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC-OP-IC.pdf

can draw the line between what is a right of the child and what is not ... [and it] is to be hoped that [it] will make the CRC a sharper legal tool to be used in the courts.' (Sandberg, 2014, p.20).

The Committee, in common with other TMBs is not endowed with mechanisms to enforce treaties and so incorporation provides the means by which enforcement becomes possible via national court-based adjudication (Smith-Cannoy 2014; Oberleitner 2012). Alston and Goodman note that incorporation is amongst the mechanisms deployed by the international system to compel States to comply with their human rights obligations (Alston and Goodman 2013). But as Polonko *et al* observe in a study of law reform in the context of child maltreatment, the question of incorporation (of the CRC), and its status in the hierarchy of national legal norms are distinct aspects of reform (Polonko *et al* 2016). While enforcement differs from incorporation, it is often discussed as an aspect of incorporation (for example Oberleitner 2012). Boyle argues that 'incorporation of international law into domestic law means embedding legal standards as set out in international law and making them enforceable at the domestic level' (Boyle 2018, p.10). Focussing on socio-economic rights she cites a number of jurisdictions where this has underpinned litigation and enforcement by the courts. Similarly, Daly *et al* refer to 'hard methods' of legal incorporation 'characterised by the possibility of legal enforcement of rights through the courts' before going on to conclude that 'incorporation through domestic law remains the most effective means of ensuring compliance with human rights treaty obligations' (Daly *et al* 2019, p.5 and case study 2). Daly *et al* note that incorporation leads to strong reliance by the courts (giving the example of incorporation of the CRC in Norway)(for discussion see Sandberg 2014; Søvig 2009), and that constitutional incorporation is most effective to support progress on human rights because of the message it sends about the position of rights in the legal hierarchy. In contrast, others have noted that incorporation itself does not guarantee enforcement and that more may be needed before redress for human rights violations is available via the courts (for example Skelton 2018; see also contributions in Leifaard and Doek (eds.) 2015). In this respect, the distinction between monist and dualist systems may provide some (limited) insight into the likely impact of incorporation in different States. The Venice Commission notes a tendency in monist systems to grant human rights treaties a 'rather high status' in the national legal order (Venice Commission 2014, para.18).

However, the Venice Commission recognises that monism does not automatically entail legal superiority of international law and comments that the justiciability of rights ‘depends solely on their nature and content’ and not on any transposition into national law (ibid).

Incorporation and the CRC

Tobin notes that the Committee requires clarity as to whether or not the CRC is automatically incorporated into domestic law or whether separate legislation is required (Tobin 2019, p.115). Beyond this the Committee avoids describing the means by which incorporation of the CRC is to be achieved, and instead focuses on what incorporation should mean in practice (see above, Introduction). The literature on incorporation of the CRC is limited, with the majority of studies carried out for UNICEF (for example Lundy *et al* 2012; UNICEF 2008; UNICEF 2007a; UNICEF 2007b; Alston and Tobin 2005; UNICEF 2004). These often begin with or recognise the distinction between monist and dualist systems, or between common law and civil law jurisdictions (for example UNICEF 2008, 2007a, 2007b, Alston and Tobin 2005). A study of the impact of the CRC in diverse legal systems by UNICEF discusses law reform in selected common law and civil law jurisdictions as well as in Muslim countries and plural legal systems (UNICEF 2007a). Garcia Mendez, in her contribution to this research comments that ‘legislative assimilation’ is the route normally taken under common law jurisdictions whereas some form of constitutionalization is favoured in civil law countries (Garcia Mendez 2007). Other studies have introduced terminology to provide new ways of understanding incorporation in the context of children’s rights. For example, a UNICEF study on law reform and the CRC refers to direct incorporation, describing this in terms consistent with the language used by the CESCR and the Committee’s understanding of incorporation (UNICEF 2007b). However, this research also refers to a sectoral approach to law reform whereby national legislation in different areas is amended or revised to ensure conformity with the CRC, consistent with the transformative approach seen in, for example, Nordic countries (ibid). An examination of legal implementation of the CRC in 12 countries by Lundy *et al* for UNICEF-UK in 2012 introduces (or confirms) a typology of incorporation which seeks to capture the complexity of legal implementation encountered in practice (Lundy *et al* 2012). This study refers to direct incorporation whereby the CRC is ‘fully transformed’ into domestic law at either legislative or constitutional level, ‘indirect

incorporation' whereby legal mechanisms give the CRC some effect in the domestic legal order, and 'sectoral incorporation' when relevant provisions of the CRC are transposed into relevant national sectoral laws (ibid, p.3). In a follow-up article in 2013 the study authors further explain that direct incorporation can involve transposition of the CRC into national legislation in full or in part: the latter being where select articles are transposed (Lundy *et al* 2013).

The UNICEF study on law reform found that direct and automatic incorporation was more likely to be the norm in civil law jurisdictions, and far less likely in countries with a common law system (UNICEF 2007b). The same study also found that (at the time) the CRC had been incorporated at a constitutional level in one-third of the 52 countries examined, and directly into national law in the remaining two-thirds (ibid). Similarly, a UNICEF study in 2004 examined 50 countries and found that most of these had incorporated the Convention, although it is apparent that in this research incorporation is used to include sectoral approaches (UNICEF 2004). The study by Lundy *et al* found that full and direct incorporation had taken place in just three of the 12 countries examined for that research, and of these only one (Spain) could be said to have incorporated the CRC into its constitution in its entirety (Lundy *et al* 2012). Lundy *et al* also found that in the majority of States incorporation had been by way of indirect or sectoral approaches. In 2019 McCall-Smith's analysis of a number of country case studies using the typology set out in the Lundy *et al* report confirms the prevalence of sectoral approaches (McCall-Smith 2019).

Indirect and sectoral approaches

As noted in the introduction to this article, a direct approach to incorporation of the CRC will mean that its provisions may be directly applied and enforced. An alternative is indirect incorporation. This approach gives the CRC some legal effect within national a legal system but does not give rise to any rights which are directly enforceable before domestic courts or tribunals. This approach is discussed by Kilkelly in her 2019 article on transformative approaches to legal implementation of the CRC. She notes that indirect incorporation has led to States taking 'creative approaches designed to give the [CRC] further effect at national level' (Kilkelly 2019, p.323). Pointing out that indirect incorporation may include legislation to require action at national level to give further effect to CRC, Kilkelly gives the example of Ireland which has amended its

Constitution to require provision to be made for the right of the child to be heard and the child's best interests to be given consideration in child care and family law proceedings (see also Harrington 2007). Hoffman and Williams, writing on indirect incorporation in the context of devolution and multi-level governance in Wales, argue that Welsh legislation requiring Welsh Ministers to take account of the CRC in the exercise of their functions (to include policy and proposals for legislation) has introduced 'new rules of engagement' between government and children, meaning careful attention has to be given as to how to safeguard and promote children's rights (Hoffman and Williams 2013, p.170). Kilkelly notes the potential of indirect incorporation to reinforce statutory implementation of the CRC, as well to raise awareness about and support for more far-reaching implementation measures among decision-makers as they become 'sensitised to the merits of deeper incorporation', but nonetheless concludes that indirect incorporation 'falls short of giving substantive protection to children's rights at a constitutional level' (Kilkelly 2019, p.7). In the broader context of international law, the indirect approach has much in common with what Van Alstine describes as quasi-incorporation or partial incorporation, as well as the legislative or administrative adoption of international human rights norms (Van Alstine 2009). According to Van Alstine quasi-incorporation means that domestic legislation is based on, or is subject to international law obligations, or government departments and officials are required to take relevant human rights treaty obligations into account.

A number of commentators have identified an indirect interpretive route to incorporation of international law at national level. This is beyond the scope of this paper to fully explore, but it is worth noting Koh's observation that international norms become transformed or internalised in national law as States interpret and apply them at domestic level (Koh 1999). Boyle identifies this as one of the pathways to internalisation of human rights, while Campbell argues that it is the mechanism by which the European Convention on Human Rights is incorporated into UK law (Boyle 2018; Campbell 2001). Campbell, commenting on the UK Human Rights Act 1998, argues that while this legislation is often seen as having fully incorporated the European Convention on Human Rights into UK law, this is misleading. Instead, Campbell argues, incorporation is 'largely confined to matters of interpretation' (Campbell 2001, p.80). Williams, writing on implementation of the CRC takes a broad

view of incorporation, arguing that this e CRC may find its way into law through indirect means by absorption into jurisprudence, or as a point of reference for government policy, or even professional values or occupational standards (Williams 2007; see also Williams 2015). This absorption of the CRC into national law through an interpretive approach may be seen as a departure from formal understandings of incorporation. However, Hoffman has argued that a function of legislation to incorporate the CRC might be to establish child rights norms as the underpinning framework for government policy and Ministerial decision-making (Hoffman 2019).

On sectoral incorporation a UNICEF study in 2008 found that consolidated children's statutes were 'fast emerging as a trend' among States Parties to the CRC (UNICEF 2008, p.ii and pp.35-36). At the time of the study 69 States Parties (from 193) had enacted consolidated children's statutes, i.e. legislation as general frameworks for the enactment of legislation to protect children, or legislation establishing such frameworks or make provision for children in particular sectors where children's rights are relevant. Sectoral law reform appears to be a significant aspect of legal implementation in many States. In 2007 UNICEF found this to be the 'prevailing trend', something confirmed by Lundy *et al* in 2012 (UNICEF 2007b, p.103; Lundy *et al* 2012). Polonko *et al* note that there is variation amongst States on which principles or rights are incorporated, and that these ranged from specific rights (e.g. health rights) to incorporation of general principles such as best interests (Polonko *et al* 2016). A report by UNICEF in 2006 noted that greater progress is made toward incorporating rights that meet traditional notions of welfare-protection (e.g. health), than children's civil rights (e.g. privacy, freedom of expression)(UNICEF 2006). Other studies have noted that how sectoral approach may result in the gradual adoption of the CRC over-time (for example UNICEF 2004). However, Polonko *et al* suggest this is only in 'rare-cases' (Polonko *et al* 2016, p.36). Lundy *et al* found the sectoral approach was having 'mixed results' as reforming legislation tended to focus primarily on areas of child protection, the family, and juvenile justice (Lundy *et al* 2012, p.19). While States will often claim that national sectoral law reflects the requirements of the CRC this is disputed. Williams, for example, is sceptical and observes that 'it is rare to find domestic reform explicitly based on the objectives generated by the textual system of the [CRC]' (Williams 2012, p.226). However, the UNICEF study on law reform identified sector-specific reforms that could be seen as supportive of realisation of aspects of the CRC,

while Goonesekere, commenting on law reform in sub-Saharan Africa, suggests that in some countries sector specific legislation supplementing a core children's statute may be more appropriate than wholesale incorporation, arguing that the breadth of coverage of the CRC means it is 'unrealistic to incorporate it totally as a single enactment enforceable in domestic law' (Goonesekere 2007, p.246; see also on CRC in African context Kaime 2011).

The impact of incorporation

Commentators often assert the value of incorporation. For example, Kilkelly suggests that incorporation at a constitutional level is a 'high water mark' of recognition for children's rights (Kilkelly 2011a, p.145). Hoffman, drawing on insights from Wade, and Cassel on the instrumental value of human rights legislation more broadly, describes indirect incorporation as a 'normative' approach and suggests that legislation to embed human rights sends a message about children in society and confirms the application of children's rights to law and policy (Hoffman 2019 drawing on Cole 2012 and Cassell 2001; see also Edgar and Thwaites 2018; Arts 2014). Tobin meanwhile is more circumspect, commenting that incorporation does not tell us everything about the status of children in society, while recognising that incorporation can contribute to increasing respect for the rights of children as well as emphasising their legal status on the domestic level (Tobin 2005, p.88) Thorburn Stern writing on incorporation in Sweden comments that raising the profile of children and children's rights was amongst the reasons for incorporation, while Lundy *et al* highlight how starting a debate on incorporation at the national level helps confirm children as rights-holders (Thorburn Stern 2019; Lundy *et al* 2012). Thorburn Stern notes that the debate on incorporation in Sweden in part led to a discussion about children's legal status and whether it needs to be strengthened (Thorburn Stern 2019). Kilkelly, in contrast, comments that automatic incorporation avoids the risk associated with political or public debate which might result in a decision not to incorporate the CRC, or to incorporate only select provisions, where national legislation is required (Kilkelly 2019). Lundy *et al* conclude that direct incorporation raises the profile of children's rights, and leads to children being more likely to be perceived as rights-holders and a culture of respect for children's rights (Lundy *et al* 2012; see also Kaime 2011). Similarly, Hoffman and O'Neill in a 2018 study on the impact of indirect incorporation in Wales conclude that incorporation has raised the profile of children's rights in policy

development and has empowered children as rights holders (Hoffman and O'Neill 2018).

An aspect of legal implementation not much discussed in the literature is how opportunities for incorporation arise. Alston and Tobin, in a report on legal and institutional aspects of implementation for UNICEF in 2005 comment that in States where authorities or traditions value constitutional expression or recognition of social policy a strong case can be made for incorporation following ratification (UNICEF 2005), p.21). Drakeford and Sullivan draw attention to moments of significant constitutional change within States, such as that brought about by devolution, as opportunity to promote children's rights (Drakeford and Sullivan 2013). Williams, and also Hoffman demonstrate how devolution in Wales has allowed Welsh institutions to progress on indirect incorporation of the CRC at sub-State level (Williams 2013, Hoffman 2019). Bennett Woodhouse suggests that it is at times of constitutional change that the door is open to incorporation of rights, while Tobin observes that constitutions coming into effect after the CRC is adopted are more likely to reflect children's rights (Bennett Woodhouse 1999; Tobin 2005). Other research has also confirmed the relevance of coordination within government as well as between government and NGOs, the perceived importance of human rights, the extent of any pre-existing human rights culture, and political will as factors influencing incorporation of the CRC (e.g. Lundy *et al* 2012).

Impact on Enforcement

A benefit often assumed for incorporation of the CRC is that it will lead to better enforcement of children's rights. It has been observed that the Committee does not have an effective mechanism to enforce the CRC at national level (e.g. *ibid*; Hoffman 2019; Sloth Nielsen 2018). This has been described as the CRC's 'Achilles heel' (Kilkelly 2011b, p.184). Alternative mechanisms and procedures to monitor compliance with human rights standards internationally have been developed. The mechanisms that apply to the CRC have been described by Balton as 'rather limited' and include periodic reporting by and examination of States Parties by the Committee (Balton 1990, p.127). However, the Committee has no power to enforce any recommendations it might make following such examination, and it has been observed that the Committee relies on 'diplomacy rather than legal sanction' (Kilkelly 2001,

p.309; see also Donnelly 2007, and Heyns and Viljoen 2001). The Committee does not include enforcement in its description of incorporation, but does require that '[f]or rights to have meaning, effective remedies must be available to redress violations' (UN Committee 2003, para.24). Tobin argues that this means that it is implicit that a remedy should be provided where a child's rights are violated (Tobin 2019).

In the general literature there is recognition of the potential of the courts to enforce human rights and to provide a remedy for violation (Edgar *et al* 2018; Wind 2016; Diver and Miller (eds.) 2016; El Boudouhi 2015; Fauchald and Nollkaemper 2012; Nolan 2011; Stein and Lord 2008; Fatima 2005). This is often linked to the status and legitimacy of human rights in the national legal system and legal culture. However, in particular in relation to socio-economic rights, commentators disagree about the role of judges to enforce international standards at national level (for an introduction to the debates on either side see Gearty and Mantouvalou, 2013; see also Tobin 2019, on the justiciability of social, economic and cultural rights in the context of the CRC) Although this debate is beyond the scope of this paper, it is worth noting that scholars on children's rights have also considered this issue, including in the context of incorporation. For example, Williams opines that children's marginalisation within the justice system, their limited resources and reliance on others to take action on their behalf undermines the effectiveness of court based remedies (Williams 2012). For Williams this suggests a stronger focus on incorporation of the CRC to promote deliberative processes of policy development, rather than a reliance on legal redress for violation (*ibid*). Hoffman, also arguing for incorporation to focus on compliance through political rather than judicial mechanisms contends that while integration of the CRC in national legal systems has a function to promote behaviours that deliver CRC consistent policy outcomes, there is a risk that reliance on court based determination of children's rights will lead to rights becoming 'petrified into a 'legalistic paradigm' ' (Hoffman 2019, p.377, drawing on Koskenniemi 1999, p.99). Tobin comments that litigation remains an important strategy to secure realisation of the CRC, it tends to be 'reactive rather than preventive' and has a focus on 'addressing individual grievances rather than systemic change' (Tobin 2019, p.117).

Research shows that incorporation of the CRC and enforcement are not synonymous. Lundy *et al*, in their study for UNICEF-UK, found that children may not have any means

of effective enforcement even in countries which had incorporated the CRC and where there were relatively comprehensive constitutional provisions for children (Lundy *et al* 2012). Commentators have noted that if, and how the CRC is enforceable depends not only on incorporation, but on the manner of incorporation and the standing given to the CRC in the national legal hierarchy. Kilkelly and O'Mahony suggest that how the CRC is incorporated is key to whether or not it leads to enforcement, and Thorburn Stern in a recent study of incorporation of the CRC in Sweden makes a similar point (Kilkelly and O'Mahony, 2007; Thorburn Stern 2019). What is apparent however is that where the CRC is not incorporated children or their representatives may have difficulty in obtaining redress for rights violations, particularly in those jurisdictions where human rights that have not historically been referred to as part of the national legal framework, or where judges are reluctant to accept the notion of children's rights (e.g. Lundy *et al* 2012; Kilkelly 2011). Liefaard and Doek, reflecting on an edited collection of studies on the CRC in domestic and international jurisprudence, conclude that in the absence of national laws to incorporate the CRC the courts may not see it as pertinent, and the justiciability of certain categories of children's rights may be called into question (Liefaard and Doek, (eds.) 2015, p.2).

Lundy *et al*, in the follow-up article to their 2012 study for UNICEF-UK point out that incorporation provides opportunities for the CRC to be used in litigation but note that their study had not found evidence that incorporation leads to a flood of strategic litigation involving children (Lundy *et al* 2013, p.454). The authors conclude that in countries where direct enforcement is a possibility the main impact of incorporation was that the CRC was more likely to be cited in routine cases involving children (*ibid*). Research for UNICEF in 2007 suggests, based on a small number of examples, that where there is direct incorporation the Convention children's rights are more likely to feature and be influential in cases before judicial tribunals, and may provide some underpinning for administrative decision-making (UNICEF 2007a). Hoffman and O'Neill, in their report on the impact of indirect incorporation in Wales note that while this has potentially enhanced legal accountability, this has not emerged as a significant contribution toward accountability for children's rights compliance (Hoffman and O'Neill 218).

A significant development in the context of incorporation and enforcement is how the

CRC is regarded by regional human rights systems, and how it is applied by supra-national courts in the application and interpretation of regional human rights treaties. In the European context, Kilkelly observes that European Court of Human Rights (ECtHR) increasingly uses the CRC to inform the interpretation of human rights guaranteed by the European Convention on Human Rights where children or their families are affected (Kilkelly 2015). However, also at the European level, Stalford argues that the Court of Justice of the European Union (CJEU) is reluctant to engage with the CRC when exercising its jurisdiction in relation to EU law in application to children (Stalford 2015). Smyth however points out that CRC rights are indirectly channelled into EU law through, for example, application of the Charter on Fundamental Rights of the European Union by the CJEU (Smyth 2014). In the regional context of the Americas, Feria-Tinta notes that the Inter-American Court of Human Rights deliberately and consistently uses the CRC to interpret the obligations of State parties under the American Convention on Human Rights (Feria-Tinta, 2015; see also Butler, 2005). In the African regional human rights system, the African Charter on the Rights and Welfare of the Child draws heavily on the CRC having been introduced to complement the CRC in the African context (Gyan Nyarko 2018). However, the impact of the Charter at national level is debated. Sloth-Nielsen and Kruuse argue that the Charter (as well as the CRC) has influenced the jurisprudence of South African courts (Sloth-Nielsen and Kruuse, 2013). Mbise however suggests that the CRC dominates and that the Charter is not well known amongst civil society, government or children and has 'remained in the shadows' of the CRC (Mbise, p.1235).

Impact on Policy

Daly *et al* observe that incorporation can lead to 'concrete change particularly in terms of ensuring regard is given to rights in policy development processes' (Daly *et al* 2018, p.5, referring to intermediate measures which others refer to as indirect incorporation). However, they also comment that the complexity of implementation makes it difficult to establish causation between legal measures and policy outcomes, and several commentators on incorporation of the CRC have drawn attention to the difficulty of confirming causation between incorporation and outcomes for children (*ibid*; see also Harris-Short 2003; Byrne and Lundy 2015; Thorburn Stern 2017; Hoffman and O'Neill 2018). Another challenge for research in this area is identified by Polonko *et al* who point at variation in the way incorporation is conceptualised makes it difficult to

generalise about law reform in different States, which in turn makes comparative research on outcomes problematic (Polonko *et al* 2018). Compounding this problem is the finding from research that even where States exhibit superficial similarities in their approach to international law, there are often internal differences which make comparative research problematic. Alston and Tobin, for example, note that while constitutional recognition should mean the CRC being fully acknowledged in domestic systems in monist States, in practice these States deploy various techniques to limit the practical impact of automatic incorporation (Alston and Tobin 2005; see also Garcia Mendez, 2007).

Despite the challenges for research, in general studies suggest that States that have incorporated international human rights are likely to be those in which conditions consistent with respect for rights, including children's rights, exist (Lundy *et al* 2013). McCall-Smith, argues that in States that have incorporated the CRC there is a higher degree of implementation of children's rights than in countries which have chosen not to incorporate the CRC (McCall-Smith 2019). Lundy *et al* in their study for UNICEF-UK found that where there is incorporation children are more commonly perceived as rights-holders and the CRC becomes an influential touchstone at national level for policy makers, and for advocates, but also that opportunities arise for strategic litigation (Lundy *et al* 2012). They also found that incorporation can lead to States becoming 'increasingly creative as to how they approach the process of implementing the [CRC]', with the introduction of processes such as impact assessment that contribute to implementation and engage policy-makers with stakeholders (*ibid*, p.101). An example of this creative approach given by Kilkelly, as well as by Daly *et al*, is indirect incorporation in Wales (Kilkelly 2019; Daly *et al* 2018). Hoffman and O'Neil's research on indirect or quasi-incorporation in Wales suggests that it has been effective to raise the profile of children's rights within government, and has been influential on policy development leading in some cases to better policy output (Hoffman and O'Neill 2018). The research also confirms that indirect incorporation led to the introduction of Child Rights Impact Assessment, as well as structural innovations such as compulsory child rights training for all officials and a Child Right Advisory Group as a forum to engage civil society in policy development (*ibid*). These are aspects of implementation recommended by the Committee, and which studies have confirmed are essential to effective realisation of children's rights (UN Committee

2003, para. 26 forward; Lundy *et al* 2012). The relationship between legal implementation and non-legal measures is highlighted by Lundy *et al* who observe that effective implementation of the CRC, is 'highly contingent upon the measures adopted by a particular State', not just whether incorporation is a feature (Lundy *et al* 2012, p.19). And, as Tobin observes, ultimately the Committee is concerned with the 'cumulative impact' of all legislative measures and their contribution to implementation in practice (Tobin 2019, p.115).

Synthesis

On one view incorporation may be understood as a malleable concept which might involve a range of processes taking place over time to internalize or absorb international norms into national law and practice. Other accounts are more prescriptive, focusing on constitutional systems and processes for making international law treaties applicable at the domestic level, with less consideration given to the effect this has within national systems. What emerges from the literature is both a diverse terminology to describe incorporation, and differences of understanding about what this should mean in practice. This extends to the relationship between incorporation and enforcement. In some accounts this is assumed, in others the connection remains unclear until established by legislation or application by national judiciary. Literature on incorporation of the CRC engages with the wider literature in some areas, in particular to highlight how constitutional arrangements (monist/dualist) and justice systems (common law/civil law) impact on how incorporation takes place. However, what is also apparent is that a paradigm typology has emerged to describe modes of incorporation in application to the CRC which adopt some of the terminology and analysis in the general literature, but seems to be more firmly established in the child rights researchers' lexicon, and more embedded as a way of describing the diversity of incorporation of the CRC in practice. What is also apparent is that in many respects this typology departs from more formal accounts of incorporation of human rights treaties and international law generally. An issue for scholars is the extent to which this has given rise to fragmentation between child rights discourse and human rights discourse more widely, and the possible impact of this for future conceptual and comparative research, and studies on the significance of incorporation for

implementation.⁵ It is also worth noting that the typology of incorporation now commonly deployed in the child rights literature departs from the expectations of incorporation established by TMBs and in particular the Committee. Despite this, it may be seen as useful to describe incorporation of the CRC in different countries and therefore to facilitate discussions about prevalence. Adopting the typology, research has confirmed that incorporation in some form is a feature in many States that are party to the Convention, but that full and direct incorporation is less significant, with many States favouring the sectoral approach which means less disruption to the national legal order (especially at the constitutional level), and which engages most obviously with narrow areas of policy and practice that are traditionally regarded as having an impact on children.

While there is a considerable body of research on the Convention, legal measures of implementation and law reform, there are hardly any studies that focus exclusively on the impact of incorporation. There is a clear need for research in this area, and for research to differentiate and delineate more explicitly the impacts from the various approaches encountered in practice. The typology of incorporation tends to be employed loosely in child rights research, making it challenging to establish the impact of particular modes of incorporation.

With some exceptions, accounts of legal implementation of the Convention begin by describing its status in national law, with less attention to the social or political conditions which influence the whether or not, and how, incorporation takes place, or the strategies adopted by campaigners in response these conditions. In those studies that have examined impact there is a tendency to generalise from generic understandings of incorporation, or analysis is necessarily confined to a relatively small sample from which it is difficult to extrapolate to different constitutional or jurisdictional systems. A particular issue for research is the lack of evidence to confirm the strengths and weaknesses of different approaches to incorporation, which inhibits comparative analysis. However, despite limitations, there is a developing body of evidence to confirm that incorporation has an instrumental value, in particular to signal

⁵ Cantwell has discussed the perils of treating children's rights (and the CRC) as something different to human rights law in general (Cantwell 2011).

the status of children and children's rights within society, and to confirm children as rights-holders. The available research also confirms that incorporation can lead to better recognition of children's rights by the courts and increased visibility of the Convention in litigation, as well as providing opportunities for strategic litigation. However, the evidence does not suggest that enforcement and opportunities to enforce rights through litigation as the primary impacts of incorporation. Rather, incorporation may be seen as potentially having a range of impacts. These include influencing administrative decision-making and policy, leading in some cases to policy more consistent with children's right. What is often unclear however is how incorporation is a factor in policy development alongside other legal and non-legal measures of implementation, and if or how this leads to better outcomes for children.

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