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Children's Constitutional Rights in the Nordic Countries

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Contents

PART 3
Best Interests of the Child in Nordic Law

PART 4
Children's Right to Participation in Nordic Law

Preface

As child law researchers in the Research group for child law, we were pleased when children's rights and children as rights-holders were recognised in the comprehensive reform of the Norwegian Constitution in 2014. Constitutionalisation of children's rights immediately triggered our curiosity: Does enshrining children's rights in section 104 of the Constitution improve implementation and enforcement of those rights by providing advocacy tools and by mandating courts, legislators, policy-makers and practitioners to take children's rights seriously? Does a section dedicated to children's rights provide superior visibility and enforceability than a more limited provision would have done?

Contrasting selected domains of Norwegian law before and after amendment of the Constitution would certainly have given us some answers. However, we thought that a comparison with our Nordic neighbours would provide a more fertile ground for analysing the interrelationship between constitutional rights and implementation of those rights in practice. Luckily, our Nordic colleagues responded enthusiastically to our invitation to participate in a Nordic research project. In April 2018, a seminar was held in Tromsø, gathering all researchers participating in the project for three days of presentations and intensive discussions. This book is the fruit of the seminar and the research project.

We would like to thank the Faculty of Law at University of Tromsø – The Arctic University of Norway for economic and administrative support. The meticulous work law student Marion Aslaksen Ravna has done during the editing stage has been invaluable for us. Further, we wish to extend our thanks to Pernilla Leviner, Director of the Stockholm Centre for the Rights of the Child, Faculty of Law, Stockholm University, as the editor of Stockholm Studies in Child Law, for her enthusiasm, Bea Rimmer and Lindy Melman at Brill for their help and advise, and Satu Svahn for language editing.

Last but not least, we would like to express our gratitude to all the contributors in this book – it has been a pleasure working with you and we look forward to future cooperation.

Trude Haugli
Anna Nylund
Randi Sigurdsen
Lena R. L. Bendiksen
Tromsø, June 2019

Abbreviations

CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
Eur	European
HFD	Högsta förvaltningsdomstolen (Supreme Administrative Court)
HR	Høyesterett (Supreme Court)
Int	International
J	Journal
L	Legal
LoR	Lov og Rett (law journal published in Norway)
NGO	Non-Governmental Organisation
NJA	Nytt juridiskt arkiv (periodical publishing Swedish Supreme Court rulings)
Q	Quarterly
Rep	Report(s)
Rev	Review
Rt	Norsk Retstidende (periodical publishing Norwegian Supreme Court rulings)
U	University
UN	United Nations
YB	Yearbook

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PART 1

Introduction to Children's Constitutional Rights

CHAPTER 1

Introduction to Children's Constitutional Rights in the Nordic Countries

Anna Nylund

1 An Introduction to Children's Constitutional Rights

Thirty years ago, the adoption of the United Nations Convention of the Rights of the Child (CRC) reaffirmed children as rights-holders and the existence of children's rights as a particular set of human rights. The CRC represents a comprehensive child law perspective and can, as such, serve as a model for countries aspiring towards a genuine child-rights-approach in their national constitutional law. However, the CRC does not entail an obligation to provide constitutional protection of children's rights. It mandates only appropriate legislative and administrative protection supplemented by other measures implementing the rights enshrined in it.[1]

Although protection of children's rights in an international convention is essential, the question arises whether and how enshrining these rights in national Constitutions enhances the level of protection and opportunities to vindication of the rights. Constitutional protection could render visibility to children as rights-holders and could avail stronger arguments in favour of treating children as 'fully-fledged human beings'.[2] Additionally, it could propel implementation and enforcement of those rights.[3] In challenging

1 Committee on the Rights of the Child, *General comment no. 5, general measure of implementation of the Convention on the Rights of the Child* (*arts. 4, 42 and 44, para. 6*) (27 November 2003) CRC/GC/2003/527 para 21 appears to support this view.

2 Didier Reynaert and others, 'Introduction: A critical approach to children's rights' in Wouter Vandenhole and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 3.

3 See Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability', (2019) Human Rights Law Review (in press), with further references for a closer discussion of the topic. See also eg Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011); Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 Int'l J of Children's Rights 5–23 doi:10.1163/092755607X181711; John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 South African Journal on Human Rights 86–126.

the adult-centricity of the legal system, and the prevalent ideas of autonomy, children's rights face multiple impediments on numerous levels. Effective implementation necessitates shifts in attitudes, practices and regulation through various mechanisms such as training and providing sufficient resources.[4] Enshrining rights in the Constitution mandates change. In the words of Julia Sloth-Nielsen and Helen Kruuse, constitutional protection signifies that children's rights 'cannot be overlooked, rendered perfunctory or written out of the script'.[5] The combined effect of national and international protection, the consolidation between national constitutional law and international instruments will plausibly be superior to using one method only.[6]

Whether or not children are explicitly mentioned in the Constitution is probably an insufficient indicator of the extent to which children's rights are rendered efficient. A specific provision on children's rights in the national Constitution could have mere symbolic value. Conversely, a Constitution that remains silent on the issue does not necessarily entail weak protection of children's rights in practice. A recent study by the Venice Commission uncovered significant variation in the extent to which children's rights are explicitly set down in Constitutions across Europe.[7] In it, children's rights were analysed through a spectrum of three indicators: visibility, agency and enforcement.[8] The Venice Commission study found striking variations among protection of children's constitutional rights across Europe: some countries considered 'child-friendly' scored surprisingly low on all parameters. Neighbouring countries with similar cultures, laws and societies received disparate scores. Due to the scope and methods chosen, the study was unable to measure the

4 Wouter Vandenhole, 'Children's Rights from a Legal Perspective: Children's Rights Law' in Wouter Vandenhole and others (eds) *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 38–39.

5 Julia Sloth-Nielsen and Helen Kruuse, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007–2012' (2013) 21 Int'l J of Children's Rights 646, 677.

6 Committee on the Rights of the Child, *General comment no. 5* (n 1) paras 18–23.

7 European Commission for Democracy through Law (Venice Commission), Report on the Protection of Children's Rights: International Standards and Domestic Constitutions (3 April 2014) Opinion no 713 / 2013. CDL-AD (2014) 005.

8 Later, O'Mahony has developed and refined the methodology, see O'Mahony (n 3) and Trude Haugli and Anna Nylund, 'Children's constitutional rights in the Nordic countries: Do constitutional rights matter?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

interlinkages between constitutional law and children's rights as implemented in legal regulation and practice.

Therefore, the question arises whether differences in constitutional law influence implementation and enforcement of children's rights. Is constitutional protection reflected in legal regulation, practices and thinking in various domains or does constitutional protection offer merely symbolic recognition of children's rights? Does the level of constitutional protection of children's rights reflect primarily recognition of children as autonomous rights' holders and the attitude towards children or could other factors offer a more convincing explanation? Do constitutional rights 'trickle down' to statutory law, case law and other sources of law, and to legal practices and, if so, how? Is level of protection of children's rights primarily contingent on how and to which extent children's rights are manifested in 'ordinary' law rather than constitutional law? And if so, does constitutional protection provide additional benefits? A more detailed study could perhaps reveal that some provisions primarily reiterate existing legal principles whereas other provision were enacted to provide improved tools for advocacy of children's rights.

This volume attempts to explore the interconnections between children's constitutional rights and the implementation and enforcement of children's rights by studying the five Nordic countries: Denmark, Finland, Iceland, Norway and Sweden. The primary aim is to bring new insight on children's constitutional rights and their impact on children's legal rights in practice by applying a critical child law perspective. While the Nordic countries have similar societies, cultures and legal systems, the constitutional protection of children's rights ranges from a single provision on educational rights, to a dedicated provision for children in form of a shorthand version of the CRC. These countries offer an interesting object to examine the interrelationship of the wording of the Constitution and implementation of rights. This volume examines which children's rights are included – directly or indirectly – in the Nordic Constitutions and how these rights are interpreted and enforced in national law. The aim is to analyse factors influencing these interpretations.

Three central rights have been selected for further scrutiny: the best interests of the child, the right to participation and the right to family life. The study of these rights enables a closer investigation of central rights in addition to more general discussions of constitutional rights.

Before proceeding to a more detailed account of our study, a short introduction to the Nordic countries in general and constitutional law and children's rights, in particular, is given in the next two parts.

2 Nordic Law and Societies

2.1 *A Brief Introduction to the Nordic Countries*

The Nordic – or Scandinavian – countries[9] Denmark, Finland, Iceland, Norway and Sweden have close cultural, economic, geographic, historical, linguistic, legal and social ties. Their shared legal history can be traced back to the high middle ages. Between the Reformation in the early 1500s and the Napoleonic wars in the early 1800s, there were two Nordic countries: Denmark and Sweden. Iceland and Norway were under Danish rule, and Finland under Swedish rule. In the aftermath of the Napoleonic wars, Finland became part of the Russian empire, but retained most of its Swedish laws. Norway had a union with Sweden, but had its own legal system based on Danish law and developed own legal institutions. Norway gained independence in 1905. Finland declared independence from Russia in 1917. After independence, Finland has maintained its close ties to Sweden: Swedish law has been the main source of influence for legal development. Iceland became independent from Denmark in 1944 but has since retained its legal ties to Denmark. This division between the East-Nordic countries, Finland and Sweden, and the West-Nordic countries, Denmark, Iceland and Norway, is still visible.[10] Since the 1870s, Nordic legal cooperation has resulted in similar laws and in the Nordic countries serving as a central form of inspiration for legal reforms.[11]

The Nordic countries have similar societies. The economies are organised in a similar manner in what is sometimes called the 'Nordic model'. The societies seek to blend a market economy with generous welfare benefits and universal services offered free-of-charge or for a moderate charge: day care, after-school care, health service and so forth.[12] Welfare benefits are tax-funded, universal

9 The term Nordic is preferred in this volume, as it is more precise. Geographically, only Norway and Sweden are situated on the Scandinavian Peninsula. Often Denmark is included in Scandinavia, since Danish is a Scandinavian language. So is the Icelandic language, although Iceland is geographically situated between North America and Europe. The Finnish language is not Scandinavian. Indeed, unlike most European languages, it is not even Indo-European. However, the historical, societal, cultural and legal structures in Finland are similar to the other Nordic countries.

10 See also Pia Letto-Vanamo and Ditlev Tamm, 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019).

11 See Pia Letto-Vanamo and Ditlev Tamm, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic Cooperation: A European Region in Transition* (Routledge 2015); Letto-Vanamo and Tamm (n 10) 14–16.

12 Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 28.

and awarded to the individual rather than the family.[13] Each member of society is expected to provide for himself or herself by working, and pension rights are individual, thus both parents work in most families and many children go to day care from the age of 12–18 months.[14] Child welfare services are family service oriented, relying on voluntary, preventive and in-home services. The focus is therapeutic and needs-based interventions.[15] Consequently, even juvenile delinquency is treated primarily as a child protection issue.[16]

The Nordic countries are liberal: co-habitation is ubiquitous, and same-sex partnerships are recognised as a parallel to marriage. Decision making in politics, and in many other organisations, is based on consensus and corporatism. Culturally, people in the Nordic countries value egalitarianism, low hierarchy, directness, collectivism and gender equality.[17]

Legislation is characterised by single statutes rather than comprehensive codes. For instance, parental responsibility and child protection are regulated in separate acts. In Nordic law, the preparatory works of statutes are an important source of law describing the aims of the statute, the leading principles, the relationship to other statutes, and giving general guidelines on interpretation. Although legal thinking and legal concepts derive from Roman-Germanic law, law is less theoretical, and argumentation is pragmatic, practical and informal. The style of legal writing and argumentation in legislation and other legal texts is designed to enable lay persons to comprehend the content.[18]

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13 Jørn Henrik Petersen, 'Nordic Model of Welfare States' in Letto-Vanamo, Ditlev Tamm Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019); Torben M. Andersen and others, *The Nordic Model: Embracing Globalization and Sharing Risks* (The Research Institute of the Finnish Economy 2007).

14 For an overview of Nordic family law, see Ingrid Lund-Andersen and Annette Kronborg, 'Marriage and Family Relations' in Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), Nordic Law in European Context (Springer 2019); Hrefna Friðriksdóttir, 'Nordic Family Law: New Framework: New Fatherhoods' in Guöný Björk Eydal and Tine Rostgaard (eds), *Fatherhood in the Nordic Welfare States: Comparing Care Policies and Practice* (Policy Press 2016); Annette Kronborg, 'Family Formation in Scandinavia: A Comparative Study in Family Law' (2016) 12(2) Utrecht Law Review 81–93.

15 Neil Gilbert, *Combatting Child Abuse: International Perspectives and Trends* (OUP 1997) 232ff.

16 Tarja Pösö, Marit Skivenes and Anne-Dorthe Hestbæk, 'Child Protection Systems Within the Danish, Finnish and Norwegian Welfare States: Time for a Child Centric Approach?' (2014) 17 Eur J of Social Work 475.

17 Gillian Warner-Søderholm, 'But We're Not All Vikings! Intercultural Identity within a Nordic Context' (2012) 29 J of Intercultural Communication.

18 Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki, 'Nordic Law – Between Tradition and Dynamism' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007).

The Nordic countries have simple three-tiered court systems with little specialisation. The systems consist of District Courts, Courts of Appeal and the Supreme Court. Until 2018, Iceland was an exception with a two-tiered system. Finland and Sweden have administrative courts in addition to general courts. The Finnish administrative court system is two-tiered, the Swedish system is three-tiered, with Administrative Courts, Administrative Courts of Appeal and the Supreme Administrative Court. The Nordic Supreme Courts are primarily courts of (quasi-)precedent, each hearing approximately 100–140 cases annually. The case law is not formally binding, but lower courts still treat is as if it were binding.[19] Depending on the country, quasi-courts also have an important role, particularly in child protection law, where the Danish Council of Appeal (*Ankestyrelsen*) and Norwegian County Social Welfare Boards (*Fylkesnemndene for barnevern og sosiale saker*) make the decisions on coercive measures.

The relationship to the European Union (EU) divides the Nordic countries: they are the paramount example of multi-speed integration. Denmark has been an EU Member State since 1973 but does not participate fully in home and justice affairs. Finland and Sweden have been Member States since 1995, participating fully in the EU. However, Sweden has not introduced the euro as its currency. Iceland and Norway have been part of the single market since 1994 through the Agreement on the European Economic Area (EEA).[20] Through the EEA Agreement, EU law regulating the single market is applicable in Iceland and Norway. However, rules on home and justice affairs are not part of the EEA Agreement.

2.2 *Constitutional Law in the Nordic Countries*

The Nordic countries are majoritarian democracies: the doctrine of division of powers is central, but the Parliament is the paramount institution, as it secures popular sovereignty.[21] In respecting popular sovereignty, courts have

19 Anna Nylund and Jørn Øyrehagen Sunde, 'Courts and Court Proceedings' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019).

20 Several agreements in the field of family govern inter-Nordic relations. The Nordic countries have also ratified many of the Hague Conventions on family law or are bound by them through EU membership, but there are some exceptions. For an account of the interplay between international, European and Nordic law in the field of family maintenance, see Anna Nylund, 'Family Maintenance and Multi-Speed Integration: A Norwegian Perspective' in Anna Nylund and Magne Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Intersentia 2019).

21 Jaakko Husa, 'Constitutional Mentality' in Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), N*ordic Law in European Context* (Springer 2019) and Jaakko Husa, *Nordic Reflection on Constitutional Law: A Comparative Nordic Study* (Peter Lang 2002).

traditionally been reluctant to perform judicial review, because in doing so they would challenge the 'will' of the people. Rights-based argumentation and debates have been scarce in the Nordic countries, although the importance of constitutional rights has increased in recent years.[22]

When studying the Nordic Constitutions, differences in structure and age are noteworthy. The Norwegian Constitution of 1814 is the oldest. It was inspired by the French and American revolutions, but an extensive bill of rights was enacted only in the 2014 comprehensive reform. Consequently, human rights in the Norwegian Constitution reflects the state-of-the-art of the 2010s. The Icelandic Constitution dates from 1944. It has been amended seven times, including a reform in 1995 when the provisions on human rights were modernised and enhanced. The Danish Constitutions dates to 1953 and includes primarily classical freedom rights. The Swedish Constitution consists of four separate acts and has done so for centuries. The four constitutional acts were subject to a comprehensive reform in 1974, and the provisions of human rights have been amended a couple of times since then, most recently in 2010. The Finnish Constitution had, until 2000, the same fragmented structure as the Swedish constitutional acts. A bill of rights was adopted in 1995 to the then constitutional acts, and it was implemented in the 1999 Constitution.

Although the Nordic Constitutions, with the exception of the Danish Constitution, give courts explicitly the right to perform judicial review, courts have been traditionally cautious and exercised their powers with a marked self-restrictedness. In Finland, courts may reject to apply a law only when it is in clear controversy with the Constitution. Until recently, Finnish courts did not have a right to perform judicial review and Swedish courts had the right only when the conflict was obvious (*uppenbar*). The Icelandic and the Norwegian Supreme Courts are the exception, as they have been more willing to (openly) perform judicial review.[23] In the Nordic countries, judicial review is

22 Jaakko Husa, 'Nordic Constitutionalism and European Human Rights: Mixing Oil and Water?' (2010) 55 *Scandinavian Studies in Law* 101, 106; Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 Int'l J of Const L 505–531, doi: 10.1093/icon/mor035; Ran Hirschl, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review' (2011) 9 Int'l J of Const L 446, 450 notes that the Nordic countries have been 'agnostic, at best, toward American-style high-voltage constitutionalism, rights talk, and judicial activism'. See also the Nordic J of Human Rights 2009 volume 9 no 2 for articles discussion judicial review in the Nordic countries.

23 Eivind Smith, 'Courts and Parliament: The Norwegian System of Judicial Review of Legislation' in Eivind Smith (ed), *The Constitution as an Instrument of Change* (SNS Förlag 2003) 171; Ragnhildur Helgadóttir, 'Nonproblematic judicial review: A case study' (2011) 9 Int'l J of Constitutional Law 532. doi: 10.1093/icon/mor055; Husa, 'Constitutional

decentralised and concrete: any court may find an act of parliament unconstitutional and in doing so the court sets the act aside only in the case at hand, while the act itself remains formally in force.[24]

The Nordic Supreme Courts do not have a political role. Rather, the role of the Supreme Courts has traditionally been to respect the will of the Parliament by avoiding open conflict. The wide range of legal sources available to the courts enable them to evade these conflicts: by interpreting statutory law in the light of the Constitution, the statute is made conform to the Constitution. Judicial self-restraint is mirrored in self-restraint of the legislator, particularly, in the East Nordic countries. In Finland, the Constitutional Law Committee (*Perustuslakivaliokunta*) of the Parliament reviews the constitutionality of bills through an abstract preview. In Sweden, the Council on Legislation (*Lagrådet*) has a similar function but has a far weaker position.[25]

The Nordic countries have implemented several international human rights treaties and instruments. The European Convention on Human Rights (ECHR) has been particularly influential since it has a semi- or quasi-constitutional status. Nordic courts use the ECHR in their argumentation, but do so often indirectly by paraphrasing the case law or referring to national scholarship or text books on the Convention, rather than citing case law of the European Court of Human Rights (ECtHR) directly. The Norwegian Supreme Court is the exception, with extensive use of direct citations. It refers to the ECHR significantly more often than its Nordic counterparts do.[26] Denmark belongs to the other end of the spectrum: there is an outspoken reluctance to transfer

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Mentality' (n 21) 52–54 and 56–57; Inger-Johanne Sand, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 Nordic Journal of Human Rights 160–169.

24 Husa, 'Constitutional Mentality' (n 21); Helgadóttir (n 23); Joakim Nergelius, 'Judicial Review in Swedish Law: A Critical Analysis' (2009) 27 Nordic Journal of Human Rights 142; Tuomas Ojanen, 'From Constitutional Periphery Toward the Centre: Transformation of Judicial Review in Finland' (2009) 27 Nordic Journal of Human Rights 194; Sand (n 23); Sten Schaumburg-Müller, 'Parliamentary Precedence in Denmark: A Jurisprudential Assessment' (2009) 27 Nordic Journal of Human Rights 170; Eivind Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 Israel LR 369.

25 Jaakko Husa, 'Guarding the constitutionality of laws in the Nordic countries: A comparative perspective' (2000) 48 AmJCompL 345; Husa, 'Nordic Constitutionalism' (n 22) 101.

26 Anne Lise Kjær, 'European Legal Concepts in Scandinavian Law and Language' (2011) 80 Nordic Journal of Human Rights 321.

sovereignty to international organisations ensuing from Danish constitutional mentality is present there.[27]

The ECHR combined with the EU and EEA law has shifted the balance of power from the Parliament towards courts. They have spurred a turn towards more overt judicial review. Still, Nordic courts have not fully embraced their new powers and are often hesitant to refer to other human rights conventions than the ECHR.[28]

3 Children's Rights in Nordic Constitutional Law

The content and style of each of the Nordic Constitutions indicates the date of enactment or most recent comprehensive reform. Although all human rights are also children's rights, the question remains to which extent the Constitutions have provisions entailing rights specifically aimed at children.

All Nordic Constitutions contain rights that are indirectly aimed at children. The right to education is present in all Nordic Constitutions.[29] The Danish Constitution, which is primarily restricted to freedom rights, has no other provisions entailing rights specifically or mainly for children.

The Finnish, Icelandic, Norwegian and Swedish Constitutions have a provision banning discrimination.[30] The Swedish constitutional acts mention

27 Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 Int'l J of Const L 470, doi: 10.1093/icon/mor039.

28 Husa, 'Nordic Constitutionalism' (n 22).

29 The Danish Constitutional Act section 76 (Danmarks Riges Grundlov lov nr 169 af 05/06/1953, an unofficial English translation available at <https://www.thedanishparliament.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx>) accessed 2 May 2019; Finnish Constitution section 16 (Suomen perustuslaki/Finlands grundlag 731/1999. an unofficial English translation available at <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731>) accessed 2 May 2019; Icelandic Constitutional Act art 76 (Stjórnarskrá lýðveldsins Íslands, No 33/1944. An unofficial English translation available at <https://www.government.is/Publications/Legislation/Lex/?newsid=89fc6038-fd28-11e7-9423-005056bc4d74>) accessed 2 May 2019; the Norwegian Constitution section 109 (Kongerike Norges Grunnlov 17. mai 1814, an unofficial translation available at <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>) accessed 2 May 2019; Swedish Instrument of Government, chapter 2 section 18 (Regeringsformen 1974:152, an unofficial translation is available at <https://www.regeringen.se/4a7991/contentassets/d72cd40d7c4441dc84f930fd88efe365/the-constitution-of-sweden.pdf>) accessed 2 May 2019.

30 The Finnish Constitution section 6; the Icelandic Constitution art 65; the Norwegian Constitution section 98; Swedish Instrument of Government chapter 2 section 12.

primarily ethnic and racial discrimination. The Finnish Constitution has a provision granting equality, and banning discrimination *inter alia* based on age. The right to family life is protected directly in the Icelandic and Norwegian Constitutions.[31] The Finnish, Icelandic and Norwegian Constitutions grant citizens the right to basic social security benefits.[32]

The Finnish, Icelandic, Norwegian and Swedish Constitutions explicitly mention children. Of these, the Norwegian Constitution has the most comprehensive regulation. Section 104 is devoted to children's rights and is a shorthand of the rights entailed in CRC. It enshrines provision, protection and participation rights, as well as the best interests-principle. In the Finnish and Icelandic Constitutions, children are referred to in connection with other rights. Section 6 of the Finnish Constitution protects equality. Subsection 3 explicitly recognises children's right to be treated as equals and that children have the right to influence matters pertaining to themselves. The Icelandic Constitution mentions children explicitly in article 76 on social security and education. Subsection 3 obliges the state to provide children protection and care. The Swedish Instrument of Government chapter 1, section 2 is of a declaratory nature expressing the foundational values of the Swedish state. Subsection 5 lists *inter alia* children's rights, stating that the public has an obligation to protect children's rights. The provision does not give children any rights, however, it does explicitly recognise the existence of children's rights.

The variation in protection of children's rights in constitutional law is significant, at least formally. Other factors may, however, mitigate these differences. The Finnish, Icelandic, Norwegian and Swedish Constitutions include a provision that recognises human rights in general. Except for Iceland, the respective provisions also impose on authorities a duty to guarantee human rights.[33] These provisions indicate that the listed rights may not be comprehensive. Therefore, the analysis of constitutional rights should not be limited by the wording of the Constitution, but also include semi- or quasi-constitutional rights. Considering that Nordic law recognises a wide range of sources, principles or tenets of law as expressed in preparatory works, court cases and legal doctrine, these may *de facto* express human rights and even elevate the right contained in them above statutory law. Hence, the wording of the Constitution alone may not be decisive for the level and nature of protection.

31 The Icelandic Constitution art 71 subsection 1; the Norwegian Constitution section 102.

32 The Finnish Constitution art 19; the Icelandic Constitution art 76, Norwegian Constitution section 110.

33 Finnish Constitution section 22; Icelandic Constitution section 64; the Norwegian Constitution section 92; Swedish Instrument of Government chapter 1 section 2.

4 The Design of the Present Study

This study of children's constitutional rights is limited to the Nordic countries. Studying culturally, legally and societally similar countries with diverging extent of constitutional protection of children's rights enables us to minimise the impact of other factors and hence to attribute differences – at least to some extent – to differences in constitutional law. A further benefit is that most institutions have similar foundations in terms of design, ideas, principles and regulation, which increases comparability. However, limiting the study to related countries constricts transferability of the results. For instance, in countries with a rights-based legal culture and more intensive judicial review, the impact of the wording of the Constitution could be stronger than in the Nordics. Administrative principles and structures as well as cultural issues could also influence implementation and enforcement of children's rights.

This study employs primarily a legal analysis of children's rights from a critical child-law perspective. Detailed discussions on constitutional law are, hence, beyond the scope of our study, as are broader qualitative and quantitative inquiries on implementation, perceptions, policies, etc.

The work is organised in five parts. The first part (chapter 2) concerns human dignity of children, giving the ideological background of recognising children as autonomous and independent rights-holders, and functions as a backdrop for the rest of the contributions. It explores the tensions between autonomy and vulnerability and their implications for children's rights. The text is not tied to a specific country, although the author draws primarily on examples from Norwegian law.

The next parts analyse children's constitutional rights in specific Nordic countries. The chapters cover four topics: a general discussion on children's constitutional rights, the best interests-principle, participatory rights and the right to family life. Each contribution addresses one of the topics from the perspective of a single country. The contributions within each category do not follow a standard format – these are not national reports (*Länderberichte*), rather they reflect both core common issues and topical questions in each country. Because giving a full analysis of each country is beyond the scope of this book, each author has had discretion to select the most pertinent issues and examples from her perspective. Thus, the contributions also reflect the research interests of each author, and as all countries are small-to-medium size, oftentimes they also reflect the research done in each country. We believe this structure balances the need for coherence and comparability with the possibility to explore topics that are relevant and emerging in each of the countries studied.

Chapters 3–7 discuss children's constitutional rights, in general, in each of the five Nordic countries. Each chapter explains the rights enshrined in the Constitution and implementation and enforcement of those rights. Because the CRC and a few other human rights covenants, most notably the ECHR, have a semi- or quasi-constitutional status in several of the Nordic countries, the status of the CRC is also covered to some extent. The variation in the degree to which Nordic Constitutions enshrine children's rights is mirrored in the content and depth of analysis in each chapter.

Chapters 8–10 investigate how the principle of the best interests of the child is recognised in each country studied, chapters 11–15 discuss participatory rights, and chapters 16–19 family life.

The principle of the best interests is interesting both due to its pivotal role and due to its open character. While most, if not all, agree that the best interests of the child should be a primary consideration, the indeterminate character risks rendering it void of substantive content: it could be used to justify almost any outcome.[34] The question is how the principle is interpreted in the Nordic countries and whether there any differences among the countries and different domains. What is the current definition(s) and how has the definition(s) changed over time?

The right to participation in decision-making is vital for exercising self-determination and the hallmark of an autonomous individual. However, patriarchal attitudes emphasising the need to protect children and provide care often bar children from participation. In effect, there seems to be a perceived contrariety between participation and the best interests of the child. From the perspective of children's rights, no such opposition exists. On the contrary, participation and best interests oftentimes dovetail, and even augment, each other.[35] Again, the contributions explore the incongruences and lacunae in national constitutional protection and the implementation of these rights, both for collective and individual participation rights.

The right to family life is central for children in numerous contexts. Despite proliferation of alternative forms of family, new forms of reproduction and altering societal patterns, the concept of family is still based on idea of monogamous heterosexual couple and their biological children. A key question is how the right to family life is understood in the Nordic countries, and whether the understanding varies from one country and context to another.

34 Eg Robert van Krieken, 'The Best Interests of the Child and Parental Separation: On the Civilizing of Parents' (2005) 65(1) Modern Law Review 25–48, describes it as a 'black hole'.

35 Eg Freeman (n 3) p. 14.

An exploration of the right to family life reveals the tension between traditional views of children as their parent's 'property' and views of children as autonomous individuals.

The three specific rights were chosen because two of them reflect two of the four general principles in the CRC as recognised by the Committee on the Rights of the Child (CRC Committee):[36] the best interests-principle (article 3) and participation (article 12). The general principles in CRC article 6 enshrining the right to survival and development of the child are oftentimes not considered problematic in the Nordic countries.[37] The principle of non-discrimination (CRC article 2) was excluded both because analysing children's rights illustrates the ways and the extent to which children are discriminated against vis-à-vis adults and because discussing vulnerable children, in particular, would have necessitated a far more voluminous study. Furthermore, rights primarily aiming at provision are not included in this study, because education and health care is universally available free-of-charge or at a very low cost in all Nordic countries, and social benefits for children and their families are also abundant. The right to family life was chosen because it is a pivotal right and it is enshrined in section 104 of the Norwegian Constitution, which is the Nordic Constitution with the widest coverage of children's rights.

The chapters within the four thematic groups are arranged according to the extent and manner of formal constitutional protection. Thus, Norwegian law is presented first followed by Finland, Iceland, Sweden and finally Denmark.

Children's constitutional rights are compared and contrasted in chapter 20 with regard to the question of whether and how enshrining children's rights in the Constitution is entangled with implementation and enforcement of those rights.

Studying children's rights in Nordic constitutional law serves additionally to exemplify some of the current issues and debates on children's rights in the

36 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) CRC/GC/2003/5 at para 12.

37 In its concluding observations on the periodic reports of the Nordic countries CRC Committee expresses no concern and recommendations in relation to article 6, except for the comments on Sweden, where suicide prevention is mentioned. See Committee on the Rights of the Child, *Concluding observations Norway* CRC/C/NOR/CO/5–6, 1 June 2018; *Concluding observations Denmark* CRC/C/DNK/CO/5, 26 October 2017; *Concluding observations Sweden* CRC/C/SWE/CO/5, 6 March 2015 Part B para 21–22 (suicide is mentioned), *Concluding observations Iceland* CRC/C/ISL/CO/3–4, 23 January 2012; *Concluding observations Finland* CRC/C/FIN/C/4, 3 August 2011.

Nordic countries. These debates, *inter alia*, on balancing autonomy and protection, may help to unveil current trends in legislation, policy and research.

References

Andersen TM and others, *The Nordic Model: Embracing globalization and sharing risks* (The Research Institute of the Finnish Economy 2007).

Committee on the Rights of the Child, *General comment no. 5, general measure of implementation of the Convention on the Rights of the Child* (*arts. 4, 42 and 44, para. 6*) (27 November 2003) CRC/GC/2003/527.

Esping-Andersen G, *The Three Worlds of Welfare Capitalism* (Polity Press 1990).

European Commission for Democracy through Law (Venice Commission), *Report on the Protection of Children's Rights: International Standards and Domestic Constitutions* (3 April 2014) Opinion no 713 / 2013. CDL-AD (2014) 005.

Freeman M, 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5–23 doi:10.1163/092755607X181711.

Friðriksdóttir H, 'Nordic family law: new framework-new fatherhoods', in GB Eydal, T Rostgaard (eds), *Fatherhood in the Nordic Welfare States: Comparing Care Policies and Practice* (Policy Press 2016). 53–78.

Gilbert N, *Combatting Child Abuse: International Perspectives and Trends* (OUP 1997).

Helgadóttir R, 'Nonproblematic Judicial Review: A case study' (2011) 9 International Journal of Constitutional Law 532–547. doi: 10.1093/icon/mor055.

Hirschl R, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review' (2011) 9 International Journal of Constitutional Law 446–469.

Husa J, 'Constitutional Mentality' in Letto-Vanamo P, Tamm D and Mortensen BOG (eds), *Nordic Law in European Context* (Springer 2019) 41–60.

Husa J, 'Nordic Constitutionalism and European Human Rights: Mixing Oil and Water?' (2010) 55 Scandinavian Studies in Law 101.

Husa J, *Nordic Reflection on Constitutional Law: A Comparative Nordic Study* (Peter Lang 2002).

Husa J, 'Guarding the constitutionality of laws in the Nordic countries: A comparative perspective' (2000) 48 AmJCompL 345.

Husa J, Nuotio K and Pihlajamäki H, 'Nordic Law: Between Tradition and Dynamism' in Husa J, Nuotio K and Pihlajamäki H (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007).

Kjær AL, 'European Legal Concepts in Scandinavian Law and Language' (2011) 80 Nordic Journal of Human Rights 321.

Kronborg A, 'Family Formation in Scandinavia: A Comparative Study in Family Law' (2016) 12(2) Utrecht Law Review 81–93.

Lavapuro J, Ojanen T and Scheinin M, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505–531, doi: 10.1093/icon/mor035.

Letto-Vanamo P and Tamm D, 'Nordic Legal Mind', in Letto-Vanamo P, Tamm D and Mortensen BOG (eds) *Nordic Law in European Context* (Springer 2019) 1–19.

Letto-Vanamo P and Tamm D, 'Cooperation in the Field of Law' in Strang J (ed), *Nordic Cooperation: A European Region in Transition* (Routledge 2015).

Lund-Andersen I and Kronborg A, 'Marriage and Family Relations', in Letto-Vanamo P, Tamm D and Mortensen BOG (eds), *Nordic Law in European Context* (Springer 2019) 97–113.

Nergelius J, 'Judicial Review in Swedish Law: A critical analysis' (2009) 27 Nordic Journal of Human Rights 142–159.

Nolan A, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011).

Nylund A, 'Family Maintenance and Multi-Speed Integration: A Norwegian Perspective' in Nylund A and Strandberg M (eds), *Civil Procedure and Harmonisation of Law* (Intersentia 2019) 209–230, in particular, 226.

Nylund A and Sunde JØ, 'Courts and Court Proceedings' in Letto-Vanamo P, Tamm D and Mortensen BOG (eds), Nordic Law in European Context (Springer 2019) 201–213.

Ojanen T, 'From Constitutional Periphery Toward the Centre: Transformation of Judicial Review in Finland' (2009) 27 Nordic Journal of Human Rights 194–207.

O'Mahony C, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19 Human Rights Law Review (in press).

Petersen JH, 'Nordic Model of Welfare States' in Letto-Vanamo P, Tamm D and Mortensen BOG (eds) *Nordic Law in European Context* (Springer 2019) 21–39.

Pösö, T, Skivenes M and Hestbæk AD, 'Child Protection Systems Within the Danish, Finnish and Norwegian Welfare States: Time for a Child Centric Approach?' (2014) 17 Eur J of Social Work 475.

Reynaert D and others, 'Introdcution: A critical approach to Children's Rights' in Vandenhole W and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015).

Rytter, JE, and Wind M, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470–504, doi: 10.1093/icon/mor039.

Sand, IJ, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 Nordic Journal of Human Rights 160–169.

Schaumburg-Müller S, 'Parliamentary Precedence in Denmark: A Jurisprudential Assessment' (2009) 27 Nordic Journal of Human Rights 170–184.

Sloth-Nielsen J and Kruuse H, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007–2012' (2013) 21 International Journal of Children's Rights 646.

Smith E, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 Israel Law Review 369–388.

Smith E, 'Courts and Parliament: The Norwegian System of Judicial Review of Legislation' in Eivind Smith (ed), The Constitution as an Instrument of Change (SNS Förlag 2003) 171.

Tobin J, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 South African Journal on Human Rights 86–126.

Vandenhole W, 'Children's rights from a legal perspective: Children's rights law' in Vandenhole W and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015).

Van Krieken R, 'The Best Interests of the Child and Parental Separation: on the Civilizing of Parents' (2005) 65(1) Modern Law Review 25–48.

Warner-Søderholm G, 'But We're Not All Vikings! Intercultural Identity within a Nordic Context' (2012) 29 J of Intercultural Communication.

CHAPTER 2

Children's Right to Respect for Their Human Dignity

Randi Sigurdsen

1 Introduction and Main Question

The starting point in section 104 of the Norwegian Constitution, which is devoted to children's human rights, is the statement that 'Children have the right to respect for their human dignity.'[1] The position of the concept of human dignity in the Norwegian Constitution indicates that it is a central idea for children's rights. Although the concept of human dignity is well known and often used in human-rights discussion, it is heavily debated.[2] Some of the questions are linked to the uncertainty about the content of the concept, and others about the connection between human dignity and human rights. These questions cannot be overlooked in the discussion of section 104, especially since discussions of human dignity have almost, without exception, had their origin in the adult world. One of the significant differences between minors and grown-ups is autonomy. Normally adults have full autonomy, while children lack this right, a right that is regarded so highly, and often brought into the discussion about the content of human dignity. This is among the factors influencing a diverging approach to human dignity in a children's rights context.

In this article, I will give a presentation of the reason for including human dignity into this specific section of the Norwegian Constitution. In order to discuss the legal effect of such a provision in the Constitution, it is necessary to explore the content of the concept. None of the other Nordic countries has a similar statement in their Constitutions, and there is no similar provision on

1 The Norwegian Supreme Court has not by December 2018 given any interpretation of section 104, first sentence.

2 In Norwegian legal literature the concept of human dignity is especially discussed by Bjørn Henning Østenstad, *Heimelsspørsmål i behandling og omsorg overfor psykisk utviklingshemma og aldersdemente* (Fagbokforlaget 2011) 94–151. The conference held in 2012 where a multidisciplinary group discussed the concept of human dignity from their various disciplinary perspectives is an example of the international debate. The book edited by Christopher McCrudden, *Understanding Human Dignity* (Oxford University Press 2013) is to an extent outcome of the conference.

human dignity elsewhere in the Norwegian Constitution.[3] A question to be asked is whether children are a vulnerable group, and more vulnerable than the rest of the population, and if a statement in the Constitution on human dignity is of special benefit for children.

It is beyond my scope to discuss human dignity in an international context, even limited to human dignity from a child-law perspective. Still, human dignity is an international concept. National legislation on human rights has strong links to international conventions, international courts and official human rights organisations, which apply and interpret human rights. Therefore, it is not possible to overlook the international discussion and the conflicting understandings of human dignity.

2 Human Dignity in the Founding Documents of the Norwegian Constitution

A search into the founding documents gives no explicit answer to why children`s right to respect of their human dignity became a part of s. 104, and subsequently not an answer to why the concept of human dignity follows from the first sentence. To answer these basic questions, in this context, it is necessary to start by looking into the discussion in the appointed Human Right's Commission (Commission) and their reason to include a specific section on children's human rights in the Constitution. The Commission stressed that although human rights are universal and there is no age limitation, children have certain special needs, and this fact must be reflected in the Constitution to secure their human rights.[4] Their distinctive needs follow from their dependence on adults, in particular, their parents or persons with similar responsibility. Children's vulnerability is another reason pointed out in the founding documents for children's need for special protection of their human rights.[5] I will return to the concept of vulnerability later in this paper.

3 But the Finnish Constitution makes multiple references to dignity as an important principle vis-à-vis constitutional rights.

4 Dokument 16 (2011–2012) *Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnlov*en, 19. desember 2011 (Report from the Human Rights Commision to the Presidium of the Parliment on Human Rights in the Constitution, 19 December 2011) (Dok 16) 189. The report is available only in Norwegian <https://www.stortinget.no/Global/pdf/Dokumentserien/2011–2012/dok16-201112.pdf> accessed 20 February 2019.

5 Dok 16 (n 4) para 32.5.1.

The Commission also emphasised that a section in the Constitution designed with the purpose of highlighting special aspects of children's human rights will have symbolic, political and legal effect.[6] Children are the future of every nation. As the Commission stressed, childhood is of special importance, and the nation has a responsibility to provide adequate conditions so that children, in time, can evolve into responsible grown-ups. This is the symbolic side of the provision. The political effect is connected to obligations for the legislature and courts. Lawmakers, as well as judges and other decision makers, are obliged to pay attention to the concept of children's human rights. This will cause a legal effect, in addition to the effect that follows when other provisions in the Constitution or provisions in other parts of the Norwegian legal system are interpreted. These interpretations cannot be contradictory to the Constitution. To fortify children's human rights, the content of s. 104 had to differ from the other provisions in the Constitution's Bill of Rights. The intention was to formulate Section 104 as a supplement to the other provisions in the Bill of Rights.[7]

With this as a backdrop to the reason why human dignity became a part of s. 104, the Commission starts their reasoning for enshrining human dignity in the Constitution with a reference to the necessity to underline children as equal human beings. They have no less value than adults.[8] Children cannot be treated unfairly just because they are children. The Commission explicitly said that they preferred the principle of equality to the principle of non-discrimination.[9] In addition they emphasised that s. 104 should be read in conjunction with the principle of equal treatment as follows from s. 98, which states: 'All people are equal under the law. No human being must be subject to unfair or disproportionate different treatment.' Furthermore, the Commission stated that a provision declaring children as equal human beings will underline children as holders of all the other human rights, unless otherwise is decided.[10] The Commission stressed that the aim to declare children as equal to adults through the reference to human dignity would be a 'signal' provision (*fanebestemmelse*).[11] The signal would extend to imply equality between children and adults, and among children, but not as far as to treat children as adults or give children similar rights as adults.

6 Dok 16 (n 4) para 32.5.1.
7 Dok 16 (n 4) para 32.5.1.
8 Dok 16 (n 4) para 32.5.2.
9 Dok 16 (n 4) para 32.5.2.
10 Dok 16 (n 4) para 32.5.2.
11 Dok 16 (n 4) para 32.5.2.

The debate in the Norwegian Parliament (*Stortinget*) followed the same line of argumentation as the Commission in this regard, and stressed that children are equal human beings and that the Bill of Rights apply to children as well.[12]

Human dignity as a legal concept was brought into the Constitution without any interpretation of the content or any reference to the ongoing international debate about the role of human dignity in relation to human rights. The Commission did not, *inter alia*, give any reason why children need the special protection human dignity might give. But as part of the process of the comprehensive Constitutional reform, an obvious aim was to strengthen children's legal position.

To clarify whether human dignity is a suitable concept to strengthen children's legal position, the theoretical foundation for human dignity has to be explored. This includes the historical background of the concept of human dignity and the essence of the concept. Thereafter, some current questions on human dignity of special interest from a child prospective will be discussed, *inter alia*, the relation between human dignity and autonomy and whether human dignity is a right or a principle.

3 The Concept of Human Dignity—a Short Presentation

3.1 *A Historical and Ideological Basis for Human Dignity*

Human dignity, as well as other international legal concepts, cannot be understood in the same way worldwide. The concept has to be interpreted and understood in a national context, due to differing societies, economic resources, cultures and legal systems. A division between a national and an international understanding of human rights terms is well known, for instance, in legal practice, the European Court of Human Rights (ECtHR) leaves a margin of appreciation to each member state. However, the concept needs a core to have influence as an international guide. If not, human dignity will serve as a rhetorical flourish, a loose term, and a term that does not convey state obligations. The challenge is to establish the core of international human rights provisions, to emphasise the importance as international legal instruments.

The first question to ask is whether it is possible to identify this core. Here, several points of confusion occur. Is human dignity a social, religious or philosophical concept, or is it a concept that depicts values from these enterprises? Do these values establish the core of the concept, if such a core exists? These

12 Innst. 186 S (2013–2014).

are questions discussed by several academics.[13] I will, therefore, give a short summarisation of what, in my view, are the central elements in, and points of, these discussions.

First of all, it is useful to look back at the history. The idea of human dignity has deep historical roots, but it is hard to identify when the concept entered the legal scene.[14] The claims of liberty and equality in the revolutions in both the United States (1776) and France (1789) might be a starting point.[15] Even though human dignity is not included in the Declarations of the Rights of Man, conditions for dignity to emerge as a legal concept later on, were created. Earlier on, the word *dignity* was reserved to the 'dignities', those with privileges.[16] The Constitution that was implemented in Norway some decades later (1814) was based on the same ideas, although neither the words human rights nor dignity can be recognised in the text. Human dignity can hardly be discussed without reference to the philosopher Immanuel Kant and the categorical imperative: individuals should not be treated simply as a means to an end.[17] In the nineteenth and twentieth centuries, social and political movements brought new elements to the ideas of human dignity. The abolition of slavery and child labour in Western Europe in the nineteenth century has to be viewed in light of a growing respect for human dignity. The idea of human dignity played a significant role in religious debates about what constituted human well-being.[18] The wars in these centuries, culminating in the horrors of the Second World War, strengthened the debate of human dignity. These historical examples reflect a philosophical, religious and social approach to the concept of human dignity. Each of them bring, to some extent, different values into the human dignity debate.

13 In June 2012, a multidisciplinary group were brought together in a conference held in Oxford, United Kingdom to discuss the concept of human dignity. The outcome of the conference is to be found in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013). Questions related to children and human dignity were not a subject in the conference.

14 Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions', in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 113–121 (117).

15 Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' (n 14) 118.

16 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655–724 (656).

17 Immanuel Kant, 'Metaphysics of Morals' Section 38 of the Doctrine of Virtue.

18 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 660–662.

Kant's philosophy has played a significant role in establishing a non-religious based concept of dignity. In my opinion, his ideas have established a bridge to the legal concept of dignity – all human beings are of the same equal value. This essence in the legal concept of dignity is clearly rooted in United Nations documents of human rights. Through these texts, human dignity indubitably entered the legal scene. The reference to human dignity as inherent in every person follows from the preamble of the Universal Declaration of Human Rights (1948) and further enshrined under article 1. Since then, the concept is regularly enshrined in UN declarations and conventions, for instance, the Declaration of the Rights of the Child (1959) and in the preamble of Committee on the Rights of the Child (CRC) (1989).

The architects behind United Nations Charter and the Universal Declaration of Human Rights, amongst them Jacques Maritain and René Cassin, emphasised that dignity has a practical meaning in establishing human rights to promote the common good. Human dignity is the basis on which human rights could be said to exist.[19] Beyond an agreement of dignity as a central starting point in the theory of human rights, it is rather unclear why and how the concept gained this position, despite the prominent position the concept has come up with in international human rights instruments.[20] However, the concept of human dignity provides a theoretical basis for the idea of human rights in absence of any other common consensus. With human dignity as a foundation for human rights, it signals that every human being has worth and is worthy of respect, and this grants them their rights. And at the core is, as Aharon Barak has put it, humanity.[21]

The discussion of the concept of human dignity contains elements and values from several disciplines, and these are interwoven into a multi-layered concept. For the purpose of this article, it is not necessary to delve deeper into the long-term controversy of the concept of human dignity. Nevertheless, although it is difficult to land a universally accepted legal definition of human dignity, the term has its substance. The history of the term is rather long, but it is, as Christopher McCrudden emphasises, a relatively new scholarly

19 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 662–663 and 676–677; Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' (n 14).

20 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 678.

21 Aharon Barak, 'The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 361–380 (363).

phenomenon.[22] This is a reason why it is hard to unveil the substantive elements that establish the core.

3.2 *The Core of the Concept of Dignity—from the Perspective of the Child*

In the search for the core of human dignity, an option is to take a positive or negative approach. The positive approach can be described as an attempt to identify core components of human dignity. One example where the legal concept of dignity is visible is in the European Union Charter of Fundamental Rights (EU Charter) article 1, which reads: 'Human dignity is inviolable. It must be respected and protected.' This is a statement of inviolability and a corresponding duty to respect and protect human dignity. Further, the EU Charter lists several provisions that can be regarded as components of human dignity; the right to life (article 2), the right to respect for physical and mental integrity (article 3), the prohibition of torture, inhuman and degrading treatment and punishment (article 4), and the prohibition of slavery, forced labour, and human trafficking (article 5).

The negative approach suggests that dignity may best be understood in the light of factors that encroach upon personal integrity, in particular, humiliating and degrading treatment. Jürgen Habermas points out different types of humiliation that is in conflict with the idea of human dignity.[23] The features of the concept of human dignity appear as an effect of the violations. Whether the positive or the negative approach is the best way to approach the vagueness of dignity might be discussed. Still, the negative approach appears to hold an advantage, as vagueness implies a need for dynamic interpretation. A positive definition could be considered as comprehensive, which is a disadvantage.

For instance, the list of provisions in the EU Charter mentioned above can hardly be more than examples of what dignity can be. The provisions in articles 25 and 31, where reference to dignity appears in relation to 'the right of the elderly to lead a life of dignity …' and 'the right to working conditions which respect … dignity', are rather confusing. Do elderly people require more respect for their dignity than the rest of the population? What about children, young or old with disabilities, refugees. Do they not need to lead a life of dignity? And what about the conditions of life for those who are not part of the workforce, among them children?

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22 Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 1–58 (4).

23 Jürgen Habermas, 'Human Dignity and the realistic utopia of human rights' (2010) 41 Metaphilosophy 465–480 (467–468).

Defining human dignity broadly is more confusing than enlightening. When the concept is diluted thus, it loses its power. The EU Charter is an example of this. The provisions in articles 2 through 5 are uncontroversial, at least in Western, democratic societies, and they will be secured through the provision in article 1. The measure of these articles is to protect everyone. However, when human dignity is parcelled in relation to limited groups, the question of interest is whether this group of people is more likely to have its dignity infringed upon. If so, the group may be characterised as more vulnerable than the average population.

The equality principle is as already said, apparently designated as a core of human dignity by the Norwegian Human Rights Commission. This point of view is coinciding with the Universal Declaration on Human Rights, which states: – 'All human beings are born free and equal in dignity and rights'.[24] Every human being is equal to respect for human dignity as every human being is worthy of respect and every person has rights from the moment they are born. Human dignity requires reciprocity – I must respect your human dignity as you must respect mine. Also, in international literature, equality is said to be a part of the core of human dignity.[25] So, when a group of the population has special needs, it is important to highlight their human dignity to secure a basis of equal treatment. The principle of equality does not, however, refer to equal treatment in every respect. Equality as a part of human dignity underline that some rights apply to everyone. Respect for human dignity cannot be fulfilled without safeguarding these rights. Therefore, some rights have to be a part of the core of human dignity. Identification of these rights is too complicated to be an aim of this article. It could, in principle, be argued that the violation of any right violates dignity. But dignity argumentation cannot be taken this far. If it were, the distinctive contribution of the normative justification of the principle would be lost.

Still, there are some rights that, in my opinion, are crucial to the respect of children's human dignity. The question is which types of humiliation are in conflict with the idea of children's right to respect for their human dignity. This represents the negative approach to human dignity.

Violation of a child's physical or psychological integrity is a violation of the child's human dignity. The UN committee of the CRC has underpinned the

24 Universal Declaration on Human Rights, article 1.

25 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 690 with further references and 681; Bernhard Schlink, 'The Concept of Human Dignity: Current Usages, Future Discourses' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 631–636.

connection between human dignity and physical and psychological integrity of children.[26] The concept of integrity and human dignity are linked together.[27] The right to life can be looked upon as a part of the right to the protection of personal integrity. Prohibition of torture and inhuman or degrading treatment and prohibition of slavery are also parts of the protection of personal integrity.

Disrespect for family and private life will infringe human dignity. Also, the lack of opportunity to have one's voice heard, to be an object and not a subject in public or legal processes, are other elements contrary to the respect for human dignity.

The purpose of identifying basic values underlying the concept of human dignity is to give it strength in a legal debate. From a child's perspective, it is important to identify rights that are likely to be violated due to their inferiority and dependency. The vaguer the concept is, the more likely it will be devalued, will lose an evolving function and will be regarded as a rhetorical nullity that does not strengthen children's legal position. The strength follows from the basic values, which are not subject to change, and are timeless. However, these basic values are, as Christopher McCrudden writes, adaptable to changing ideas of what being human constitutes.[28] In this regard, the concept has a high level of generality, and is open to dynamic interpretation.

4 Dignity without Autonomy?

Freedom is a term connected to both dignity and equality. These terms are closely connected in the preamble and in article 1 of the Universal Declaration of Human Rights, as well as in other human right conventions.[29] Freedom is a foundation for autonomy. However, this leads necessarily neither to the conclusion that freedom is part of the concept of human dignity, nor that freedom and autonomy may be used as synonyms in a discussion on human dignity. The

26 UN Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13 para 2 and 7.

27 The concept of integrity is discussed in a child law perspective of eg Michael Freeman, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children* (Ashgate 2011) 21–36 (31); Ursulla Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999) 149; *General Comment no. 13* (2011) (n 26) para 3(b) and 7(c).

28 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 677.

29 See eg The European Convention on Human Rights and UN Convention on the Rights of the Child.

possible link between dignity and freedom will not be discussed here, nor will whether freedom fits under the panoply of dignity. I will focus on the interconnection between dignity and autonomy, a theme discussed by several legal philosophers and authors.[30]

Autonomy is linked to the concept of rationality. The ability of rational thought is what separates humans from other animals. Human beings are able to adapt information, use the information in the actual situation, be aware of alternative solutions, and make a choice and stand by it. Without the power of reason, this process would be impossible. Normally, an adult person does not need to prove him or her to hold all the elements that are required to have the full status of autonomy. Children pose a problem in this regard, but so do adults with cognitive disabilities, for instance, dementia. Firstly, children do not possess the same level of freedom as adults. Children are not in the same position as adults to make free choices. This fact is a central part of the concept of childhood. Secondly, children at least young children, do not have the same extent of intellectual skills as most adults, therefore, they are considered immature. Despite the lack of intellectual skills and limited experience, even very small children have views in personal matters. As stressed by the UN Committee on Children's Rights, the right to be heard, without meeting any personal demands in personal matters, is fundamental.[31] The starting point is the assumption that everyone is capable of having views. It is not up to the child to prove her or his capacity.[32] So, even if a person is not able to express reason for his or her standpoint, the person might still have an opinion, perhaps based on earlier experiences. Preventing individuals – young or old – from stating their views freely in matters affecting them is contrary to respecting their dignity. Therefore, the right to be heard is more fundamental than the right to act autonomously. As Conor O'Mahony observed, personal autonomy is subject to restrictions and limitations.[33] So, it has to be, to protect the human dignity of every individual. If not, people may make autonomous choices to a type of conduct that violates human dignity of other people. The many restrictions in the law, such as exists in criminal law, are examples of legitimate and necessary restrictions on personal autonomy and self-determination. This is the

30 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 656–663; Conor O'Mahony, 'There is no such thing as a right to dignity' (2012) 10 International Journal of Constitutional Law 551–574 (565).

31 UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12 para 2.

32 General Comment no. 12 (n 31) para 20.

33 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 566.

reason why the connection between respect for human dignity and autonomy has to be weaker than between dignity and the possibility that persons can express their views in personal matters. Human dignity and autonomy cannot be mixed together. Instead, these two concepts have to be seen in light of each other.

Until children reach a level of cognitive maturity, there is a general perception that they must be protected. Children's need for protection is one of the central values that the CRC is built upon, and so is the right to be heard. The latter right shall not easily be put aside in order to protect children. Instead, opportunities for the child to be heard shall be promoted, to stimulate the development of the personality and the child's evolving capacities.[34] In contrast with the rights of most other groups, the rights of the child might be understood as conflicting, for example, with protections dealing with the right to be heard. Instead, these rights have to be interpreted in the light of each other in order to promote the human dignity of the child.

Protection of those who are not able to secure their own interests and rights has to be a part of the concept of human dignity. If someone is excluded from the concept due to their lack of autonomy, there is no equality for human beings. Individuals belonging to vulnerable groups have a particular need for respect of their human dignity, and because children are marginalised and disadvantaged, they need the protection that human dignity gives.[35]

5 Is Respect for Human Dignity a Right or a Principle?

The concept of human dignity is unquestionably powerful. The uncertainty is how this power should be conveyed. There appears to be two different approaches in the legal understanding of human dignity and thus how the concept might have a pivotal role in a legal debate. The concept may be regarded as the founding *principle* that human rights derive from, or as a human *righ*t in itself. If human dignity is to be considered as a right, it invokes a rule. A right differs from a principle. In Robert Alexy's words: 'Principles require that something be realized to the greatest extent legally and factually possible. They are thus not definitive but only prima facie requirements.'[36] The character of rules he describes as follows: '… rules insist that one does exactly as required, they

34 General Comment no. 12 (n 31) para 79.

35 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 565–566.

36 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press reprinted 2010) 57.

contain a decision about what is to happen within the realm of the legally and factually possible.'[37] Which of these conflicting understandings of human dignity is the 'correct' one has to be discussed in both an international and national context. The power of the concept may be strengthened or weakened according to the approach. Another issue is whether dignity embodies a negative or positive obligation of the State. These discussions are extensive. Thus, I will only refer to the main arguments.

Human dignity is inherent to all humans and is an individual concept, in the way that everyone shall be treated with respect for their human dignity. This gives an assumption of a right – a right to dignity – a right in the meaning of being treated with dignity or to lead a dignified life.[38] In some Constitutions, human dignity is expressed as a right. Two examples are the South African and the German Constitutions, whose wording has been origin to the subject of debate by legal scholars.[39] Article 1 of German Basic Law states as follows:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Read in conjunction with article 79(3), the constitutional right to human dignity is not subject to change through a constitutional amendment, even if the German Constitution does not actually use the phrase 'right to dignity'. The concept has, however, generally been treated as a right in interpretations of the Constitution.[40] It is an absolute right. Section 10 of the Constitution of the Republic of South Africa reads as follows: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' Although the word 'right' is used directly in the text or the wording is interpreted as a 'right', it has

37 Robert Alexy, *A Theory of Constitutional Rights* (n 36) 57.
38 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 559.
39 Robert Alexy, *A Theory of Constitutional Rights* (n 36); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012); Jürgen Habermas, 'The Concept of Human Dignity and the realistic Utopia of Human Rights' (n 23).
40 See eg Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 23); Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 681.

been discussed whether the character of a principle is more significant.[41] If human dignity is understood as a right, a consequence is that the 'right' might be understood as a right of free disposal. As dignity is a characteristic of man, it cannot be at the disposal of the individual. Nobody can waive their human dignity. This fact is a reason why it is problematic to use the term 'right' in relation to human dignity.[42] In this might be a reason why alleged violations of human dignity brought before the Constitutional Court in Germany are coupled with alleged violations of other individual rights.[43]

Because the concept of dignity has a link to equality, it expresses an underlying value of human rights. Violation of human rights is often a violation of human dignity. The assumption that every human right has a dignity core,[44] substantiates the understanding of human dignity as a principle and, as a principle, it has to contain a degree of vagueness. Human dignityis more than the human rights derived from it, because the obligation to respect human dignity exists even though the concept is not used in legislation or court practice. It is crucial that respect for human dignity is understood as a strong obligation on the state authorities. This gives human dignity clearly the character of a principle, which requires it to be realised to the greatest extent possible.[45]

When human dignity is expressed in a Constitution, it clearly signals a foundational value and principle. Rules that follows from a Constitution have to be interpreted in the light of the principles. The concept of human dignity expands the interpretation horizon the constitutional rights. Furthermore, the concept influences interpretation of all others rules as well. This gives the concept of dignity a legally significant influence in the interpretation of the constitution as a document. The specific rights enshrined in the Constitution bind the lawmaker.

The founding documents of the Bill of Rights in the Norwegian Constitution indicate, albeit not explicitly, that human dignity is the foundational principle for the s. 104, and a foundation for other child specific rights.

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41 See eg Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 680–681.

42 In the unofficial translation of s 104 into English the word 'right' is used: 'Children have the right to respect for their human dignity.' There is, however, no signs in the preparatory works of an intention to establish a right to dignity.

43 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 681.

44 Dieter Grimm, 'Dignity in a legal context and as an absolute right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 381–391 (390).

45 Robert Alexy, *The theory of constitutional rights* (n 36) 47–48.

6 Children as a Vulnerable Group

As already addressed, the concept of human dignity belongs to a category of constitutional norms that constrain public power.[46] From a child-law perspective this is of importance, because children are vulnerable and dependent on adults, but as already said, children are of no less value than adults are. These factors have influence on the meaning of human dignity of children and, consequently, which rights are of specific importance for children.

The assertion that children are vulnerable, however, has to be challenged. Vulnerability is not a specific characteristic of children, it is a fundamental part of being human.[47] We are all more or less vulnerable throughout life. In some stages, we are less, and in some stages, we are more vulnerable, typically in the beginning and end of life. No one can decide not to be vulnerable. We can try to avoid becoming vulnerable, for example, by having a healthy lifestyle, but we cannot eliminate all risks. One moment we are healthy and strong, the next we are weak and vulnerable, at the mercy of other people's good intentions. So, why is it so important to underline children's vulnerability in relation to human dignity as the Norwegian Human Rights Commission does? Many people face similar or the same challenges as children do, in a part or even, most of their lives. But children are in a special position, as they are both vulnerable and dependent, and they cannot free themselves from the bonds to the parents or other adults who have a responsibility towards them. Children need a safe environment to develop to grown-ups who are able to exercise their rights and duties that serves themselves and the society.[48]

In my opinion, a characteristic of a vulnerable person is inability to secure his or her interests and rights.[49] Two factors are particularly central to children's vulnerability – their age, a biological factor, and their dependence, a social factor. Everybody is a child from birth until their eighteenth birthday. This period of life contains the most fundamental changes, from lacking capacity to survive on one's own, to become an independent, self-sufficient person. The period of childhood embraces individuals who are well equipped to take care

46 Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131–140 (131).

47 Martha Albertson Fineman, eg 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251–275 (especially 266–269).

48 Innst. 186 (n 12) para 2.1.10.

49 See also Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press 2012) 243–263 (244).

of their own affairs, to others who are obviously not. This must be borne in mind in the discussion of vulnerability.

Law endows parents the right to secure the rights and interests of children. When the parents fulfil their obligations children are not particularly vulnerable, at least compared to other groups who are potential victims of dignity breaches, but lack someone who has a responsibility to claim their rights. Problems especially arise when parents do not fulfil their parental duties. In such cases, children are vulnerable, and even more vulnerable than other comparable groups, because of their legal bond to the parents, and their dependence on them, for instance, practically and economically. The barrier to oppose the individuals you are dependent on is one negative effect of dependence. Our legal system is based on the assumption that parents' decisions are in the best interests of the child. Whether the decisions infringe upon children's interests and rights may be difficult to decide. Children are supposed to obey their parents' decisions, and according to respect for family and private life, public services can only in some, strictly limited cases, supervise decisions made by the parents. Until children are of age to form their own opinions, and are more independent, they will have the status of being vulnerable, because of an uncertainty whether parents fulfil their legal duties. The combination of age and dependency places children in a twofold vulnerable situation. Proportional to increasing age and decreasing level of dependence, children will be little-by-little less vulnerable. Until then, the concept of vulnerability could be considered a litmus test – a test of how we deal with the most vulnerable in society. Section 104 of the Norwegian Constitution may be viewed in this perspective, where the reference to human dignity is of importance to neutralise vulnerability. However, children are not the only group to be potential victims of dignity breaches. Whether it is more important to protect children than others, is an extensive discussion.

Even though the concept of vulnerability has a positive resonance when the aim is to strengthen children's rights, there are also negative effects. The focus on vulnerability causes a gap between the vulnerable, the weak and the not vulnerable, in other words, the independent, strong person. Considering children to be vulnerable may result in a paternalistic attitude towards them. The effect may be 'us and them' and undermining of the idea of equality. To avoid a paternalistic approach to human dignity, the core of the concept has to be highlighted. An essential part is the right of freedom. Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights.' Even if the term freedom is not the same concept for children as for adults, children are not without rights of freedom. The right to be heard in all matters affecting the child is one of them.

The link between human dignity and the right to be heard is rooted in the Norwegian Constitution in s. 104 ss. 1. The first sentence declares the need to respect human dignity, while the second sentence discusses the right to be heard. The placement in the same subsection may be interpreted as a signal that an aim of the reference to the right to be heard is to avoid violation of human dignity.[50] The child is given a tool – the right to be heard. One purpose is to implement the meaning of the child when deciding the child's best interests (ss. 2). In this way, the intention is to avoid a vulnerable situation for the child. Also, the concept of equal worth is reinforced. As adults are afforded the opportunity to express their views on matters affecting them, so should children.

7 The Significance of the Concept Of Human Dignity in a Child-Right's Perspective

The debate concerning dignity can be described on two levels: the theoretical foundation and the more practical one as a guide to action – to seek the arguments rooted in human dignity as tools to address and amend the legal and social status of children. How these arguments shall be identified has no obvious answer – as there are conflicting understandings of what children's interests are, for example, for more protection or more influence in their own lives. And as we often see, dignity arguments are present on both sides in the debate.

The concept of human dignity is necessarily abstract to allow it a role in the human rights debate. In a constitutional context, human dignity is a foundation on which human rights are built. Constitutional rights have the purpose of realising the principle of human dignity. As these rights are established within the same source of law, they often partly overlap each other. For example, the best interests of the child and the right to be heard are a tandem. However, the abstract nature of human dignity means that the interpretation has to be contextual, be it a national, regional or global context. The interpretation shall bridge the gap between the abstract norm and the more practical norm.

Even if the concept of dignity is abstract, it has a pivotal role in bringing children's rights and their legal position to centre stage. It has both a political and symbolic effect. The political effect is that it underlines the position of children as rights holders, and the duty for the government, courts and officials

50 Dok 16 (n 4) para 35.5.3. For a more detailed discussion of children's right to participate, see Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

to respect those rights. All of them are obliged to take constitutional provision into account in their activities. This, in turn, gives the provision a practical and legal effect, just as the Commission's intention was.

In the history of human rights, human dignity has been a turning point. The history unveils that the question about human rights has started in the world of able-bodied adult males, persons who are aware of the benefit of rights, especially freedom rights. As the debate grows more mature, the question about rights is turned to groups that differ from the outset. Often the last groups brought into the human rights sphere are children and those with cognitive disabilities. In this perspective human dignity, with all its disadvantages, explicitly set down that at the core of human dignity is humanity, and as human beings we are equal, young and old. In this respect, human dignity serves as a cornerstone, or as the Norwegian Human Rights Commission put it, a signal provision in human rights' discussions. But, as a principle, human dignity also has a pivotal role even if it is not expressed in the Constitution or in other legal texts.

References

Alexy R, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131–40.

Alexy R, *A Theory of Constitutional Rights* (Oxford University Press reprinted 2010).

Barak A, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

Barak A, 'The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 361–380.

Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, 19. desember 2011 (Report from the Human Rights Commission to the Presidium of the Parliament on human rights in the Constitution, 19 December 2011).

Dupré C, 'Constructing the Meaning of Human Dignity: Four Questions' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 113–121.

Fineman M A, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251–275.

Freeman M, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children* (Ashgate 2011) 21–36.

Grimm D, 'Dignity in a legal context and as an absolute right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 381–391.

Habermas J, 'Human Dignity and the realistic utopia of human rights' (2010) 41 Metaphilosophy 465–480.

Herring J, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press 2012) 243–263.

Innst. 186 S (2013–2014).

Kant I, 'Metaphysics of Morals', section 38 of the Doctrine of Virtue.

Kilkelly U, *The Child and the European Convention on Human Rights* (Ashgate 1999).

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655–724.

McCrudden C, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 1–58.

Nylund A, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

O'Mahony C, 'There is no such thing as a right to dignity' (2012) 10 International Journal of Constitutional Law 551–574.

Schlink B, 'The Consept of Human Dignity: Current Usages, Future Discourses' in Christopher McCrudden (ed), *Understandig Human Dignity* (Oxford University Press 2013) 631–636.

UN Committee on the Rights of the Child, *General Comment no. 12: The right of the child to be heard* (1 July 2009) CRC/C/GC/12.

UN Committee on the Rights of the Child, *General Comment no. 13: The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13.

Østenstad B H, *Heimelsspørsmål i behandling og omsorg overfor psykisk utviklingshemma og aldersdemente* (Fagbokforlaget 2011).

PART 2

Children's Rights in Nordic Constitutional Law

CHAPTER 3

Constitutional Rights for Children in Norway

Trude Haugli

1 Introduction

Even though it has been altered and amended several times, the Norwegian Constitution (1814) is one of the oldest still functioning constitutions in the world, dating back to the time when Norway became independent of Denmark.[1] Before the bicentenary in 2014, the Parliament appointed a human rights commission (Commission) to revise the provisions on human rights in the Constitution.[2] Human rights were already well-secured in Norway through the Human Rights Act[3] and other legislative provisions; however, inclusion in the Constitution would nevertheless help to clarify and secure fundamental core values in the Norwegian society. In addition, the rights would be better protected against short-sighted political changes, as the Constitution is not as easily amended as ordinary legislation. It is also of importance to find the key human rights and values that must be balanced against each other in the same legislative act; in this case, the Constitution. By the end of the revising process the Parliament added Part E on human rights (Bill of Rights) to the Constitution, which consists of both entirely new provisions as well as revised versions of pre-existing provisions.

It is obvious that the Bill of Rights was highly influenced by international law. According to preparatory work and later on decisions from the Supreme Court, the Bill of Rights is to be interpreted and applied in the light of

1 The Norwegian Constitution of 17 May 1814 (Grunnloven). An unofficial translation of the Norwegian Constitution, provided by the Parliament, is available at <https://lovdata.no/dokument/NLE/lov/1814-05-17?q=lov-1814-05-17> accessed 16 January 2019.

2 Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettighetene i Grunnloven, 19 desember 2011. (Dok. 16). Report from the Human Rights Commission to the Presidium of the Parliament on Human Rights in the Constitution, 19 December 2011. The report is available only in Norwegian. See: <https://www.stortinget.no/en/In-English/About-the-Storting/News-archive/Front-page-news/2011-2012/The-Stortings-Human-Rights-Commission/> accessed 27 August 2019.

3 Act relating to the strengthening of the status of human rights in Norwegian law (the Human Rights Act) of 21 May 1999 (Menneskerettsloven).

its international background and treaty parallels.[4] This also follows from the Constitution s 92 'The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.'

On this background, it is natural to start by presenting some of this international framework. I will begin by presenting the Human Rights Act and how the European Convention on Human Rights (ECHR) and especially the UN Convention on the Rights of the Child (CRC) was incorporated into Norwegian law. In the following introduction to how children's rights are included in the Norwegian Constitution, I will draw a line between the CRC and the Constitution.[5] I will discuss how the CRC is reflected in the Constitution and what implication this has regarding the rights that are not reflected in this way. Even if it is a feature with almost all human rights, they apply to everyone, including children, there are some rights that are especially relevant or important for children. Some of those rights are made particularly visible in the new constitutional provisions out of political, symbolic and legal reasons. I will discuss the importance of these provisions for children, today and in the future. Finally, I will discuss implementation and enforcement of children's constitutional rights.

2 The Human Rights Act and the CRC

International human rights during the last decades have been given an increasingly strong position in Norwegian law often through case law.[6] During the 1990s, a new bill on human rights was drafted and adopted by the Parliament in 1999. The Norwegian Human Rights Act originally incorporated the European Convention on Human Rights (EHRC), the International Covenant on

4 The main courts of justice in Norway are The Supreme Court, The Courts of Appeal, and the District Courts. All of these can rule on both civil and criminal cases. In addition, there are a few specific courts of law restricted to limited areas of competence. Norway has neither a separate family court, administrative court, nor separate constitutional courts. The main courts rule on family cases and on constitutional matters.

5 The Venice Commission/Council of Europe Report on the Protection of Children's Rights, published in 2014 (Venice Report) serves partly as a model for the discussion <https://rm.coe.int/168062cf94> accessed 16 January 2019.

6 The legal system in Norway is dualistic. International law and domestic law form two different parts of the legal order. International law is not directly applicable by the Norwegian courts. The international conventions must first be implemented, either incorporated or transformed into Norwegian law by an act of Parliament.

Economic, Social and Cultural Rights (ICSCE) and the International Covenant on Civil and Political rights (ICCPR) into Norwegian law.[7] These conventions take precedence over any other conflicting domestic legislative provision, except the Constitution, and such provisions must be interpreted in accordance with the conventions.[8] One may say that these conventions became legal sources at a semi-constitutional level. When discussing which conventions were to be incorporated, the majority of the Parliament's standing committee on justice was of the opinion that the CRC and the UN Convention on Women's Rights should also be included.[9] The committee wanted the CRC to become a more concrete and binding legal instrument to be applied by the Norwegian courts in all areas of the lives of children and adolescents.[10] In the following debate at Odelstinget (Part of the Parliament), the majority instructed the Government to return to the Parliament with such a proposal.[11]

When following up on this instruction, the Ministry of Justice discussed in which way the CRC should be integrated into Norwegian Law, by making amendments to existing provisions on children and/or by incorporating the CRC through the Human Rights Act. A white paper was distributed with a proposal to integrate the CRC in different acts concerning children and not to incorporate the CRC through the Human Rights Act.[12] While the majority of the consultative bodies gave their support to full incorporation, there was still some support for the view of the ministry. For example, the Attorney General referred, *inter alia*, to the fact that the vague wording of the CRC could lead to increased power for the courts of justice in the field of children's rights at the cost of the Parliament.[13]

Still, four years after the adoption of the Human Rights Act, in 2003, the CRC was incorporated at a semi-constitutional level. Hence, in the event of a conflict with any other Norwegian legislative provisions, except the Constitution, the CRC prevails. The Ministry of Justice supposed that the question

7 The Human Rights Act (n 3) s 2.

8 The Human Rights Act (n 3) s 3.

9 Ot. prp. nr. 3 (1998–1999) Om lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) and Innst. O. nr. 51 (1998–1999) Innstilling frå Justiskomiteen om lov om styrking av menneskerettane si stilling i norsk rett (menneskerettsloven) (3 March 1999) 5. (Preparatory work to the Human Rights Act).

10 Innst. O. nr. 51 (1998–1999) (n 9) 5.

11 <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Odelstinget/1998–1999/990413/1> accessed 16 January 2019.

12 Ot.prp. nr. 45 (2002–2003) Om lov om endring i menneskerettsloven mv. (innarbeiding av barnekonvensjonen i norsk lov) 22.

13 Ot.prp. nr. 45 (n 12) 23.

of precedence would seldom occur and that incorporation would have little impact since it was assumed that Norwegian law in the whole fulfilled the requirements of the CRC or even provided better protection for children than the CRC.[14]

Simultaneously, as the CRC was incorporated, the Parliament made changes to several domestic child law provisions in order to bring the national legislation in accordance with the convention. Still, in some other areas, as in health legislation, the necessary changes have been only recently adopted.

3 Human Rights for Children in the Constitution

3.1 *Human Rights for All also Applies to Children*

Before the Parliament added Part E on human rights (Bill of Rights) to the Constitution in 2014, there was a discussion as to which rights should be included, as well as whether specific groups should have particular protection. Most key human rights apply to all people, including children.[15] Like adults, children have the right to life, right to freedom of speech, right to assembly and form associations, right not to be exposed to arbitrary differential treatment, right to necessary health care and entitled to participate in cultural life. They, like adults, are protected from slavery and torture, against arbitrary detention and against retrospective laws. Children also have, as far as possible, the same civil process and criminal procedural rights. On some points, children's rights are nevertheless limited. This applies especially to their participation in democratic decision making, where the right to vote and the right to be elected is limited by age.[16]

3.2 *Why a Separate Provision for Children?*

During the preparation of the Bill of Rights there was a discussion on whether particularly vulnerable groups should have their rights specifically protected.[17] The result was that only children were singled out for a separate provision, in addition to a continued separate protection of the Sami people.[18] This, of course, also apply to Sami children.

14 Ot.prp. nr. 45 (n 12) 23–24.
15 Dok. 16 (n 2) para 32.1.
16 Dok. 16 (n 2) para 32.1.
17 Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen, para 2.1.10.
18 Constitution s 108: 'The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.'

Some of the arguments were that even if children mainly possess the same human rights as adults, children may need additional protection, due to the fact that they form a particularly vulnerable group with special needs. Some rights are not covered by the general provisions, such as the child's right to participate. Special protection was already recognised in most European Constitutions, by the United Nations through the CRC, through the EU Human Rights charter and within Norwegian domestic legislation.[19] The conclusion was that a constitutional provision on children's rights should especially emphasise those children's rights that are not covered by other human rights provisions in order to safeguard children's special need of protection, participation and conditions that facilitate the child's development. This is the background for the adoption of a separate provision on children's rights in the Constitution.[20]

In the preparatory works, lawmakers clearly stated that the provision should have a strong political and symbolic meaning as well as legal significance.[21] As a political tool, the legislative and executive authorities have to consider the Constitution before making decisions. The symbolic value is that children are made visible in the Constitution and this makes a statement about the value of children in society. The provision also has legal significance as the primary source of law. It serves as an element in the interpretation of other legislative provisions as a legal practitioner should choose the option of interpretation that provides the best solution for the child. The provision will also serve as a barrier for new legislation, as future acts must not be contrary to the Constitution. This may be of importance for children in the future.

The spoken intention of the Parliament was not to create new rights, but to strengthen the protection of human rights in general, including children's rights, already protected in other instruments. All the general arguments for codifying human rights in the Constitution are valid also for children's rights.

3.3 *The CRC and the Constitution*

A special discussion was connected to the relationship between the CRC and the Constitution and whether the general principles of the CRC should be expressed in the Bill of Rights.[22] To do so was fully in accord with the tradition within constitutional law to ratify basic principles that may last over time and be of relevance, even if society is changing.[23] This tradition also explains why

19 Charter on fundamental rights of the European Union 2012/C326/02 (EU Charter).
20 Innst. 186 S (n 17) para 2.1.10.
21 Dok. 16 (n 2) para 32.1.
22 Dok. 16 (n 2) para 32.1.
23 Dok. 16 (n 2) para 11.4.1.

the Constitution does not mirror the whole CRC. It was in no way the intention of the constitutional reform to weaken the rights of the child, and the protection assigned by the Human Rights Act will, therefore, remain unabated, supplementing the Constitution.

The basic principles of the CRC are the principle of the child's right to participate, (CRC article 12) the principle of the best interests of the child (CRC article 3), the non-discrimination principle (CRC article 2) and the principle of the child's right to life and development (CRC article 6). They are all included in the new provision, even if not in the same words.

The constitutional provisions must be read and interpreted in the light of their treaty parallels. Still, the Supreme Court pronounces judgment in the final instance and has the final word when it comes to interpretation of the Constitution.[24] There is a slight possibility that the interpretation from the Supreme Court in the future may differ from the way international institutions interpret the human rights treaties.

> The Supreme Court has accentuated that although the developing case law from the European Court of Human Rights or other international bodies must be taken into serious consideration when interpreting and applying the Norwegian Constitution, it is still the Norwegian Supreme Court – and not the international tribunals, such as the European Court of Human Rights – that has the mandate to interpret, clarify and develop the Norwegian Constitution. This important reservation, and the emphasis on the Court's own responsibilities towards the new constitutional Bill of Rights, was first articulated in Maria (Rt-2015-93) …[25]

There are differing opinions among the Supreme Court Judges and times are changing in this field, when it comes to how case law and other statements from different international treaty bodies are considered.[26] As an example, in

24 The Norwegian constitution s 88 and s 89. Judicial review in Norway does not address the constitutionality of legislation itself. However, in cases before the courts, the courts have the power and the duty to review whether a law and other decisions made by the authorities of the state are contrary to the Constitution. The case can only be brought before the court by someone who has a legal interest in the relevant case.

25 Arnfinn Bårdsen, 'The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms' (Centre for European Law, Oslo, 18 September 2017) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> accessed 31 March 2019.

26 Arnfinn Bårdsen, 'Children's Rights in Norwegian Courts' (Seminar on Children's Rights, Kathmandu, 25 June 2015) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/childrens-rights-in-norwegian-courts---kathmandu-250615.pdf> accessed

a plenary judgement in 2015 the majority of the Supreme Court justices would not fully accept the General Comments from the CRC Committee.[27] This decision seems to turn on how clear the statements from the UN committee are and on whether the court looks upon the statements as expressions of current law or more as policy and aspirations of the committee.

4 Provisions on Children's Rights in the Constitution

4.1 *Section 104—an Overview*

The Norwegian Constitution, section 104:

> Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.
>
> For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.
>
> Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.

The provision has both a traditional approach on protection and a more modern approach presenting the child as rights-holder and the particular parts of the provision differ in nature. Some are as we shall see, meant to be enforceable legal rights, whereas other are better regarded as goal-oriented, political, symbolic or ethical statements.

This paragraph provides an overview of section 104 and the rights that are included in this provision. It is easy to recognize that the general principles are borrowed from the CRC, even if the wording slightly differs. The

31 March 2019; Arnfinn Bårdsen, 'Interpreting the Norwegian Bill of Rights' (Annual Seminar on Comparative Constitutionalism, Oslo, November 2016) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/interpreting-the-bill-of-rights-21112016.pdf> accessed 31 March 2019; Bårdsen, 'The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms' (n 25).

27 HR-2015-1388-P paras 153–154. See further Kirsten Sandberg, 'Best interests of the child in the Norwegian Constitution' in Trude Haugli and others (eds), Children's Constitutional Rights in the Nordic Countries (Brill 2019).

provisions on the best interests of the child, the right to be heard and the right to respect for family life will be separately discussed in following chapters in this book. Here those provisions will be presented in order to draw a general picture of the content of section 104. It is important to remember that section 104 must be seen in conjunction with other provisions in the Constitution, in order to complete the picture on how children's rights are protected.

4.2 *Children's Right to Respect for Their Human Dignity*

'Children have the right to respect for their human dignity' is the wording of the first sentence in the provision. Human dignity may be characterised as the foundation, the basis, of all other human rights. Being the starting point of the provision, it seems like this statement is rather important. The concept of human dignity is further analysed by Sigurdsen in this book.[28]

The meaning behind the wording is to show that children 'have no less value than adults.'[29] It is emphasised in the preparatory works that the provision should be read in conjunction with the principle of equal treatment, as follows from section 98: 'All people are equal under the law. No human being must be subject to unfair or disproportionate differential treatment.' This is also the reason why there is not included a separate provision in Section 104 on the right of the child not to be discriminated against. To compare, the non-discrimination principle, as set out in CRC, article 2, is very common in European national constitutions.[30]

A question to be discussed in this book is whether the concept of human dignity have any specific value in relation to children's rights.[31] There are no similar provisions on 'human dignity' elsewhere in the Constitution, unlike the EU charter article 1, which reads: 'Human dignity is inviolable. It must be respected and protected.'[32]

4.3 *The Right to Participation*

Children's right of participation, in the form of a right to be heard, is explicitly stated: 'They have the right to be heard in questions that concern them, and

28 Randi Sigurdsen, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

29 Dok. 16 (n 2) 35.5.2.

30 Venice Report (n 5) 21.

31 Randi Sigurdsen, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

32 EU Charter (n 19) article 1.

due weight shall be attached to their views in accordance with their age and development.'[33]

The right is not thematically limited to specific areas, but it is limited to questions relating to the child itself. The case must concern the child directly, it is not sufficient that children may be affected, more or less indirectly. However, in matters relating to the child, the right to be heard is an individual right, which may be invoked in individual cases before the court. The child's opinion shall be given due weight in accordance with the child's age and maturity. There are no specific age-limits in the Constitution in contrast with ordinary legislation, which does prescribe various but specific age limits.

The rule applies to cases where decisions concerning children are made. The formulation is well-known from other legislative provisions concerning children and is a further codification of the principle of children's gradual development, meaning that children gradually will gain more influence over their own lives. Children's democratic right to express themselves in general is covered by the freedom of expression clause in section 100 of the Constitution.

Similarly, other civil and political rights also apply to children, unless there are specific age limits, as is the case for voting rights.[34]

One recognizes the right to be heard from the CRC, article 12. The rights conferred by the CRC are, however, somewhat more extensive than those now contained in the Constitution. Section 104 ss 1 is more similar to CRC article 12 ss 2, than ss 1. During the preparatory work, there were several who urged that there should be a stronger accordance between the CRC and the Constitution. But this was not achieved. The CRC will thus supplement the Constitution in this area. It is notable that the right of the child to be heard is yet not common in European constitutions.[35]

4.4 *The Best Interests of the Child*

In s 104 ss 2 we find the principle 'For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.'

This is one of the most important principles for children. This principle is derived from a number of international and national instruments. CRC, article 3 is the most central provision. The principle is also found in the EU Charter of Fundamental Rights, article 24. It is embodied in Norwegian national

33 Constitution s 104, ss 1. See Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

34 Constitution s 50.

35 Venice Report (n 5) 21.

legislation through the Human Rights Act incorporating the CRC and by the Children's Act, the Child Welfare Act, the Immigration Act, the Adoption Act and certain other acts relating to children, though so far not in the area of social and health matters.[36] Through the CRC, the principle has been universally designed. The intention was to make the principle visible on a general basis also through the Constitution without, thereby, intending to change current law.

Contrary to the right of children to be heard, the principle is not limited to matters relating to the child directly. It is sufficient that the child is 'affected,' and the scope of this principle is beyond the child's right of participation. The wording is reminiscent of CRC, article 3 and the EU Charter and thus practices related to these provisions, including previous Norwegian practice in the field, should be a useful contribution to the interpretation of the constitutional provision.[37]

The words 'a fundamental consideration' signals that the interests of the child are of major importance, however, the child's best interests will not necessarily be decisive in any decision.[38] As further discussed by Sandberg, the weighting of the best interests of the child should vary according to how strongly the child is affected by the relevant act or decision.[39]

The principle of the best interests of the child is surprisingly only explicitly included in the constitutions of two other member states of the Council of Europe.[40]

4.5 *Personal Integrity*

Section 104 ss 3 'Children have the right to protection of their personal integrity.'

The term integrity can be explained in different ways given its associations with privacy, inviolability and human dignity. It is an innovation that children's right to protection of their personal integrity was established in general.[41]

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36 Act Relating to Children and Parents (Children Act) of 8 April 1981 no 7 (Lov om barn og foreldre); Act Relating to Child Welfare Services (Child Welfare Act) of 17 July no 100 (Lov om barneverntjenester); Act Relating to the Admission of Foreign Nationals Into the Realm and Their Stay Here (Immigration Act) of 15 May 2008 no 35 (Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)); Act Relating to Adoption of 16 June 2017 no 48 (Lov om adopsjon).

37 Dok. 16 (n 2) para 32.5.4.

38 Dok. 16 (n 2) para 32.5.4.

39 Sandberg (n 27).

40 Venice Report (n 5) 22. The states are Ireland and Serbia. However, the principle has featured in the constitutional case law of other states and features in legislation in many states.

41 Elisabeth Gording Stang, 'Grunnloven § 104: en styrking av barns rettsvern?' in Geir Kjell Andersland (ed), *De Castbergske barnelover 1915–2015* (Cappelen Damm 2015) 102–139.

Children's right to protection of their personal integrity is not limited to specific situations and applies to all, both to parents, and to other private and public bodies. The right is independent of where the child lives: at home, in public care or incarcerated. The formulation implies that the child has an individual right and differs from the wording of the corresponding general provision in Constitution section 102, subsection 2 which reads 'The state authorities shall ensure protection of personal integrity.' Children's vulnerability, dependence on adults and their special need for protection is not addressed in general human rights, and this is the reason why this section accords children the right to stronger protection than to adults. According to the preparatory works, the right to protection implies that the state is obliged to provide for the regulation and enforcement of this right, which protects the child from exploitation, violence and neglect.[42] In accordance with a natural linguistic understanding, protection of a child's integrity will also include protection against offensive disclosure and certain types of exposure of child information without the consent of the child. Clearly this draws on the CRC, articles 16 and 19.

However, the preparatory works indicate that the Commission considered that the right to protection of integrity, as a right, should have a limited scope and that it would be an exceptional case in which an individual child might launch litigation against the state authorities with a demand for better protection than it has received.[43] As long as the government has a regulatory framework, and as long as this regulatory framework is enforced, the Commission assumed that such litigation normally would not succeed.

Still, in cases where the authorities are aware of the child's circumstances and do not take any measures to protect the child, the child or someone on behalf of the child may rise a claim for better protection. The rule was mainly not intended to give an adult the right to allege liability against the state on the grounds that in childhood they did not get the protection they should have had.[44]

4.6 *Development, Economic, Social and Health Security*

The last subsection of section 104 'The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.'

42 Dok. 16 (n 2) para 32.2.5.
43 Dok. 16 (n 2) para 32.5.5.
44 Dok. 16 (n 2) para 32.5.5.

The duty of the state to create conditions that facilitate the child's development is meant as a political statement, not as a right that can be invoked before the courts.[45] The next part of the sentence, however, is of a different nature. The provision imposes on the state an obligation to ensure that the child receives the necessary financial, social and health security. By imposing an obligation on the state to ensure children such security, this will probably be something that can be invoked before the courts.[46] Here, children are placed in a special position and the state undoubtedly assumes increased responsibility for the framework related to the welfare of children. One could mention that the Committee on the Rights of the Child has emphasised that economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.[47]

There was a discussion in the Parliament before the provision was adopted as to whether 'preferably in their own family' should be included.[48] The purpose was not to strengthen the biological principle, as a family can be based on different relationships, biological, legal and social. The term *family* was deliberately not defined.

Family is mentioned in section 104, however, there is a specific section on privacy, family life and integrity, section 102 that also applies to children.[49]

4.7 *Education; Section 109*

The most widespread provision pertaining to children in the constitutions of the Council of Europe member states is about the right to education.[50] Before the Bill of Rights was adopted, children's right to education was well-secured in the Education Act.[51] Still, including educational rights in the Constitution gives a strong signal as to the importance of education.

45 Dok. 16 (n 2) para 32.5.6.

46 Dok. 16 (n 2) para 32.5.6.

47 UN Committee on the Rights of the Child, *General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child* (*arts 4, 42 and 44, para 6*) (27 November 2003) CRC/GC /2003/5 para 25.

48 Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2013–2014/140513/6/> accessed 16 January 2019.

49 Lena RL Bendiksen, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

50 Venice Report (n 5) 19.

51 Education Act of 17 July 1998 no 61 (Lov om grunnskolen og den vidaregåande opplæringa).

Education is regulated separately in section 109 and, therefore, not mentioned in section 104:

> Everyone has the right to education. Children have the right to receive basic education. The education shall safeguard the individual's abilities and needs, and promote respect for democracy, the rule of law and human rights.
>
> The authorities of the state shall ensure access to upper secondary education and equal opportunities for higher education based on qualifications.

The right to education is stated as an individual legal right for the child, rather than focusing on the rights and duties of the parents and the state.

5 Rights Indirectly Protected

5.1 *Family Life; Section 102*

> Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases.
>
> The authorities of the state shall ensure the protection of personal integrity.

This provision is of general nature, 'everyone' includes children. The provision builds upon the ICCPR article 17, the ECHR article 8 and CRC article 9. This provision will be further explored by Bendiksen.[52]

5.2 *Child Labour*

The Human Rights Commission discussed whether a general ban on child labour should be included in the Constitution, referring to the specific protection against child labour in the CRC. The conclusion of the Commission was that section 104 on participation rights, the best interests of the child and protection of the personal integrity of the child, seen in conjunction with section 93 on slavery and forced labour, and on section 109 securing basic education

52 Bendiksen (n 49).

for children, all together provide children with adequate protection against child labour.[53] Hence, the Commission did not propose to include a section on child labour in the constitution. This shows the importance of remembering that the provisions in the constitution are interconnected and interdependent.

5.3 *Protection from Harm*

In contrast to several European constitutions, the protection of children from economic exploitation, protection from child labour, the right to protection from harm, sexual abuse, specific rights for disabled children, is not explicitly included in the Norwegian Constitution. However, protection from harm is included in the protection of the child's personal integrity and through the principle of the best interests of the child.

The majority of the Standing Committee on Scrutiny and Constitutional Affairs proposed a new section 104 subsection 4 about the duty of the State to implement measures aimed at protecting the child's personal integrity, including protection against violence, maltreatment, sexual abuse and similar circumstances that could harm the child.[54] The Standing Committee referred to the fact that children's vulnerability and dependence of adults make children especially in danger of being subject to this kind of behaviour.[55] One of the counter-arguments during the debate in the Parliament was that the Constitution does not contain any means of sanction and that the rulings on violation of children's rights belong to the penal code.[56] The proposed subsection 4 did not get the sufficient constitutional majority and was not adopted.[57]

6 Limitations of Rights Recognized in s 104?

During the preparatory work, there was a discussion as to whether one should include some kind of limitations either within some of the specific provisions or as a separate and general provision. The Human Rights Commission, knowing that the courts in any case already did, and in the future would have to interpret some of the provisions with some kind of reservations, proposed a

53 Dok. 16 (n 2) para 32.5.7.

54 The members of the Labour Party, the Liberal Party, the Socialist Party and the Environmental Party.

55 Innst. 186 S (n 17) para 2.1.10.

56 Stortingsforhandlingene 13. mai 2014 p. 2508, Michael Tetzschner (The Conservative Party).

57 Fell by 86 to 82 votes.

new section 115 inspired by the ECHR: 'Any restriction of rights recognized in this constitution must be in accordance with the law and respect the core of the rights. The limitation must be proportionate and necessary to protect overriding public interests or the human rights of others.'[58]

The Parliament Standing Committee on Scrutiny and Constitutional Affairs did not reach any agreement on this matter and did not present the proposed section 115 for the Parliament. So far, there are no limitations. It will be a matter for the courts to develop the Constitution in this respect.[59]

7 Children's Constitutional Rights, Implementation and Enforcement

Besides the political and symbolic effect, does recognising children's rights in the Constitution provide a more effective protection of these rights?

If one asks about the direct effect of the Constitution, implementation and enforcement are central issues.[60] One important question is whether there are effective remedies available for the child to redress violations of the Constitution.[61] Violation of children's rights may, of course, be brought before the courts; however, only to a limited degree by the child independently. According to the Dispute Act, all humans have the capacity to sue or be sued.[62] However, minors only have procedural capacity – the capacity to act on behalf of oneself in a lawsuit, or legal standing – if this is provided for by special statutes. Such provisions are stated in a few acts, as in the Child Welfare Act and the Patient Act.[63] For minors who lack procedural capacity, guardians – normally the parents – are the party representative.[64]

58 Dok. 16 (n 2) chapter 13. In Norwegian: 'Enhver begrensning i rettigheter som er anerkjent i denne grunnlov, må være fastsatt ve lov og respektere kjernen i rettighetene. Begrensningen må være forholdsmessig og nødvendig for å ivareta tungtveiende allmenne interesser eller andres menneskerettigheter.' Translated into English by the author.

59 Rt-2014-1105 para 28 and Rt-2015–93 para 60. See also Hans Petter Graver, 'Høyesterett og rettsutviklingen – førti år etter' in Aslak Syse and others (eds), *Liv, lov og lære: Festskrift til Inge Lorange Backer* (Universitetsforlaget 2016) 242–254 (Lovdata.no FEST-2016-ilb-242).

60 See Bårdsen, 'Children's Rights in Norwegian Courts' (n 26); Bårdsen, 'Interpreting the Norwegian Bill of Rights' (n 26); Bårdsen, 'The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms' (n 25).

61 See General comment no. 5 (n 47) para 24 for a discussion on Justicability of the CRC.

62 Dispute Act of 17 June 2005 no 90 (Tvisteloven) s 2-1 and s 2-2.

63 Child Welfare Act, chapter 7 (barnevernloven); Patient Act of 24 June 2011 no 30 s 6–5 (pasient- og brukerrettighetsloven).

64 Dispute Act (n 62) s 2–4.

Children's dependent status is a challenge when it comes to enforcement. The Committee on the Rights of the Child has repeatedly recommended that Norway take measures to ensure independent monitoring of children's rights. One way recommended is to trust the Ombudsman for Children and/or the National Human Rights Institution with the mandate to receive, investigate and address complaints by children, in all areas that concern them in a child-friendly manner.[65] Today, the Ombudsman for Children has the mandate to promote children's interests and supervise how children's living conditions are developed.[66] The Ombudsman must, among other tasks, in particular, take care of children's interests in connection with planning and investigation in all fields or as a consultation body and ensure compliance with legislation for protection of children's interests, including whether Norwegian law and administrative practices are in line with Norway's obligations under the UN Convention on the Rights of the Child. However, the Ombudsman may not make decisions in individual cases.

As there already were several legislative provisions protecting children's rights, the direct effect of the Constitution is not that visible in case law. The child's right to be heard, the principle of the best interests of the child, and the right to respect for family life were, with some exceptions, all well secured in other provisions, and the legal ground for claims will usually be the Children's Act, the Child Welfare Act and so on, not the Constitution. Often the CRC and the Constitution serve as important legal arguments when interpreting and applying statutory law. One could still mention that it seems like the CRC and the Constitution are beginning to influence also the legislation on school, health and social matters.

Since the adoption of Section 104, in 2014, this section has frequently been referred to by the courts and by some administrative bodies.[67] How their decisions in reality are influenced by the Constitution is not obvious. The independent and real meaning of the constitutional provision can be difficult to catch sight of in individual cases. This is because the judgments essentially end up analysing the corresponding provision in the CRC and the legal material associated with the CRC.

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65 UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Norway* (1 June 2018) CRC/C/NOR/CO/5–6 para 8.

66 Children's Ombudsman Act of 5 June 1981 no 5 (barneombudsloven).

67 Search for decisions on law data (Lovdata.no) in July 2018, for the last four years gives over 400 hits. Of these, there are 32 decisions from the Supreme Court, 10 of which are criminal cases and the remaining are civil cases. The vast majority of decisions come from the Courts of Appeal and from the Norwegian County Social Welfare Board, which is an administrative body responsible for child protection cases. The Child Welfare Act chapter 7.

One of the intentions with a constitutional provision for children was that it should have a strong symbolic and political significance. The UN Children's Committee has expressed satisfaction with the adoption of the provision.[68] The Constitution, both as a legal and political tool, serves as a barrier for the legislature. Two examples of such a feature can be mentioned. The first is the work on a proposal for a new child welfare act, which was conducted in light of the Constitution, although in combination with the UN Convention on the Rights of the Child and the ECHR. The second example is a statement from the Civil Ombudsman about the revision of the law and regulations on public registration of residence.[69] He pointed out that the State had not taken into account the best interests of the child when preparing the new act. The problem concerned shared residence for children.

On the other hand, with regard to the lack of Norwegian ratification of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure,[70] it appears strangely enough that the State does not experience Section 104 of the Constitution as a barrier to such a policy.

In a broad historical context children's rights have only been explicitly included in the Norwegian Constitution for a very short period of time. It will be interesting to see how these provisions will develop through case law and through administrative practice at all levels. Of particular interest is whether the Constitution will make any real difference in individual cases regarding the state's duty to ensure that children receive the necessary economic, social and health security. So far, that part of the provision has not been applied by the courts and whether children can get a declaratory judgement on violation of these rights, remains an open question.

8 Finally

In Norway, codifying children's rights in the Constitution was more like a final step than a starting point when it comes to securing children's formal legal rights. Still, quoting Arnfinn Bårdsen, then a Judge of the Supreme Court, since 2019 Judge of the European Court of Human Rights: 'It is through usage that the precise normative implications of the Constitution's general terms,

68 CRC/C (n 65) para 3.

69 SOM-2016–2886.

70 Optional Protocol to the Convention on the Rights of the Child on a communications procedure of 19 December 2011.

notions, and principles are identified and comes to life.'[71] The Constitution will be subject to interpretation and its content will change in light of changes in society over time. An obvious example is that the perception of the best interests of the child has changed over the years and will still change, influenced by how society develops and as new knowledge is achieved.

Even if the Constitution does not reflect a fully comprehensive child law perspective, the importance of recognising children's human rights in the Constitution, securing these rights at the highest formal level, should not be underestimated.

References

Bendiksen LRL, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Bårdsen A, *Children's Rights in Norwegian Courts* (Seminar on Children's Rights, Kathmandu, 25th June 2015) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/childrens-rights-in-norwegian-courts---kathmandu-250615.pdf> accessed 31 March 2019.

Bårdsen A, *Interpreting the Norwegian Bill of Rights* (Annual Seminar on Comparative Constitutionalism, Oslo, November 2016) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/interpreting-the-bill-of-rights-21112016.pdf> accessed 31 March 2019.

Bårdsen A, *The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms* (Centre for European Law, Oslo, 18th September 2017) <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> accessed 31 March 2019.

Charter on Fundamental Rights of the European Union 2012/C326/02 (EU Charter).

UN Committee on the Rights of the Child, *General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child* (*arts 4, 42 and 44, para 6*) (27 November 2003) CRC/GC /2003/5.

UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Norway* (1 June 2018) CRC/C/NOR/CO/5–6.

Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettighetene i Grunnloven (19 December 2011). (Dok. 16).

71 Bårdsen, 'The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms' (n 25) para. 7.

<https://www.stortinget.no/Global/pdf/Dokumentserien/2011–2012/dok16-201112.pdf> accessed 16 January 2019.

Graver, HP, 'Høyesterett og rettsutviklingen – førti år etter' in Aslak Syse, Hans Chr. Bugge, Hilde Indreberg, and Arnulf Tverberg (eds), *Liv, lov og lære – Festskrift til Inge Lorange Backer* (Lovdata.no FEST-2016-ilb-242).

Innst. O. nr. 51 (1998–1999) Innstilling frå Justiskomiteen om lov om styrking av menneskerettane si stilling i norsk rett (menneskerettsloven) (31 Mach 1999).

Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen om grunnlovsforslag fra Per-Kristian Foss, Martin Kolberg, Marit Nybakk, Jette F. Christensen, Anders Anundsen, Hallgeir H. Langeland, Per Olaf Lundteigen, Geir Jørgen Bekkevold og Trine Skei Grande om grunnlovfesting av sivile og politiske menneskerettigheter, med unntak av romertall X og romertall XXIV (7 May 2014).

Nylund A, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Ot.prp. nr. 3 (1998–1999) Om lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) (9 October 1998).

Ot.prp. nr. 45 (2002–2003) Om lov om endring i menneskerettsloven mv. (innarbeiding av barnekonvensjonen i norsk lov) (21 March 2003).

Sandberg K, 'Best interests of the child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Sigurdsen R, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Sivilombudsmannens uttalelse, 'Betydningen av hensynet til barnets beste ved avgjørelse om bostedsregistrering i folkeregisteret' SOM-2016–2886, Lovdata.no.

Stang EG, 'Grunnloven § 104 – en styrking av barns rettsvern?' in Geir Kjell Andersland (ed), *De Castbergske barnelover 1915–2015* (Cappelen Damm 2015) 102–139.

Stortingsforhandlingene 13. mai 2014 p. 2508, Michael Tetzschner (The Conservative Party.)

The Venice Commission/Council of Europe Report on the Protection of Children's Rights published in 2014 (Venice Report) <https://rm.coe.int/168062cf94> accessed 16 January 2019.

CHAPTER 4

Constitutional Protection of Children's Rights in Finland

Suvianna Hakalehto

1 Introduction

The Constitution of Finland[1] entered into force in 2000. One of the features of the new Constitution was the fundamental rights reform. The list of constitutional rights was moved unchanged into the new Constitution, chapter 2. The new Constitution includes a broad catalogue of rights combining liberty rights with provisions on economic, social, and cultural rights. International human rights treaties – especially the European Convention on Human Rights – served as a source of inspiration in formulating constitutional provisions.[2]

In section 22 of the Constitution, there is a reference to international obligations. According to that section, it is a constitutional obligation of all public authorities to guarantee the observance of constitutional rights and international human rights. Thus, it is also a constitutional obligation to safeguard children the rights included in the UN Convention on the Rights of the Child (CRC). There is a duty to choose the option which best promotes constitutional and human rights.[3]

Constitutional rights define the legal position of an individual in relation to the public power, but those rights also have influence on the relations between

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1 Suomen perustuslaki (731/1999).

2 Finland formally incorporates all major human rights treaties into its domestic law (Constitution, section 95). Most of the human rights treaties like the Convention on the Rights of the Child have been incorporated with the hierarchical rank of an Act of parliament (ordinary law).

3 See Statement of the Constitutional Law Committee. PeVL 2/1990 vp. Perustuslakivaliokunnan lausunto Hallituksen esityksestä no 22 ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten soveltamisesta, 3; Report of the Constitutional Law Committee PeVM 25/1994 vp. Perustuslakivaliokunnan mietintö hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (Report of the Constitutional Law Committee on the Government Bill on amending the Constitution), 7. See also Ilkka Saraviita, *Perustuslaki* (Talentum 2011) 294–295.

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individuals. The relevance of the constitutional rights can be summarized as a duty of the state to respect, protect and provide these rights.[4] The government proposal to change the constitutional rights refers to strengthening the constitutional level protection of individual and to increasing the implementation of constitutional rights in courts and in authorities.[5]

The first objective of my paper is to examine *if the legislator has implemented particular children's constitutional rights in child-specific legislation.*[6] Secondly, I will investigate *what kind of challenges is to be found concerning protecting these children's constitutional rights on legislative level*. Attention will be paid to specific provisions which strengthen the realization of the constitutional rights as well as to the possible limitations of children's constitutional rights in legislation.

Legislation, preparatory works of the acts and some legal praxis will be examined paying attention especially to *1*) *right to equality, 2*) *right to life, personal liberty and integrity and 3*) *freedom of religion and conscience*.[7] The child-specific statutes examined are *Act on Child Custody and Right of Access* (361/1983; Custody Act), *Basic Education Act* (628/1998) *Child Welfare Act* (417/2007), and *Early Childhood Education and Care Act* (540/2018).[8]

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4 Heikki Karapuu and Tuomas Ojanen, 'Perusoikeuksien käsite ja luokittelu' in Pekka Hallberg and others (eds), *Perusoikeudet* (Werner Söderström lakitieto WSLT 2011) 63–87. Ilkka Saraviita (n 3) 293.

5 Government proposal HE 309/1993 vp 15. Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta, 125.

6 The Constitutional Law Committee has stated that constitutional rights are especially significant in the legislative work. The legislator has a duty to actively promote the realization of the constitutional rights. PeVM 25/1994 vp (n 3) (Report of the Constitutional Law Committee on the Government Bill on amending the Constitution).

7 I will not examine the right to participation and the right to family life because articles by Hannele Tolonen and Sanna Koulu in this book will cover these rights, see Hannele Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) and Sanna Koulu, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the 'Normal Family'?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019). On contemporary challenges concerning constitutional rights of children see Liisa Nieminen, 'Lasten perus- ja ihmisoikeussuojan ajankohtaisia ongelmia' (2004) 4 Lakimies, 591–621.

8 These acts have been chosen because of the importance of this legislation in the everyday life of minors in Finland as well as because of the limitations of constitutional rights included in these acts. The Custody Act is an example from the time before the CRC while the legislation concerning early childhood education and care is brand new representing a modern approach to children's rights. Unofficial English translations of these acts except the new act on early childhood education and care can be found in online database Finlex: <https://www.finlex.fi/en/>.

In this article, examples of case law are introduced to show what relevance if any these constitutional rights have had in court praxis concerning minors.[9] In addition, some decisions from the Parliamentary Ombudsman are presented.[10]

2 Constitutional Rights of Children in Finland

2.1 *Children in Constitution*

The Government's proposal for the Constitution does not mention the Convention on the Rights of the Child, but there are some references to the CRC in other documents of preparatory works concerning the proposal. In addition, the documents include few references to the protection of children, but for example, the best interests of the child principle was not discussed during the legislative process.

The right to enjoy the protection of constitutional rights is not linked to the age of the person apart from the right to vote.[11] To highlight the fact that the constitutional rights also belong to minors, there is a provision (chapter 2, section 6, subsection 3), according to which 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 degree of development. The latter part of the provision concerning children's participation was introduced to the subsection during the debate in the Parliament. The special subsection on children has been regarded as a basis of the possibility to prioritize children as vulnerable and in need of protection.[12]

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9 The most important court decisions as sources of law are those of the Supreme Court (KKO) and the Supreme Administrative Court (KHO). The decisions of these courts are not legally binding, but they have a great importance in practice because of the task of unifying and guiding court practice.

10 Both the Parliamentary Ombudsman (Eduskunnan oikeusasiamies) and the Chancellor of Justice (Oikeuskansleri) receive complaints from individuals. Both may issue a reprimand, propose legislative action and order criminal charges against any person for unlawful conduct in the exercise of public authority. One of the tasks of the Ombudsman is to supervise that authorities implement children's rights in Finland.

11 HE 309/1993 vp (n 5) 23–24. *Liisa Nieminen* belongs to the pioneers of children's rights research in Finland. Her book on the constitutional rights of children aimed to connect the challenges concerning children's rights to the constitutional law doctrine. See Liisa Nieminen, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990).

12 During the legislative work concerning the Constitution, there was a brief discussion if it was necessary to include a special provision concerning children's rights in the Constitution. The legislator chose not to impose a particular section on children, explaining it was better to deal with each right of a child in a best suitable section of the Constitution. HE 309/1993 vp (n 5) 45.

The specific references to children in the Constitution are all included in chapter 2. In addition to the above-mentioned provisions on equality and participation, section 12, subsection 1, allows limitations to the freedom of expression if it is necessary to protect children from pictorial programs. Section 19, subsection 3 states an obligation to the public authorities to support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children. Section 16, subsection 1 does not mention children in particular but it guarantees the right to basic education free of charge and is usually mentioned in the context of child-specific rights.

The Finnish Constitution includes in some form three of the four general principles of the CRC. Both the right to non-discrimination and the right to participation can be found in above-mentioned section 6, subsection 3. That subsection combined with the section 7, subsection 1 (right to life, personal liberty and integrity) and the section 19, subsection 3 (right to social security) form together the basis for the special protection and care for children. It is only the CRC's obligation to make the best interests of the child a primary consideration in all actions concerning children that is missing from the Constitution.[13]

2.2 *Children as Rights-Holders*

It follows from the Constitution (section 6, subsection 3) that a child is regarded as an independent holder of rights.[14] The preparatory works of the Constitution stated that in practice, the question of the equal status of a child may, however, come back to the question of who speaks for the child in matters relating to fundamental rights.[15] The full legal capacity of the person begins at the age of eighteen.

Family law legislation entitles guardians[16] to exercise the right of decision on behalf of the child.[17] This right should not be interpreted as absolute. The

13 Merike Helander: *Barnombudsmannens berättelse till riksdagen 2018*. Barnombudsmannens byrås publikationer 2018:2, 129–207.

14 See PeVM 25/1994 (n 3) 7, 12. In Supreme Court decision KKO 2008:93 on non-medical circumcision of 4-year-old boy for religious reasons the Supreme Court highlighted the obligation to treat children equally. The Supreme Court noted that a child is an independent subject of rights. Thus, it is not lawful to intervene his personal integrity without legal grounds.

15 HE 309/1993 vp (n 5) 44.

16 In this article, I use the concepts 'guardian' and 'parent' to refer to persons entrusted with the custody of a child.

17 One of the characteristics of child law is that it is the guardians of the child who are usually entitled to use the right on behalf of the child. See Jane Fortin, *Children's rights*

guardians must use their discretion for realizing the rights of the child in best possible way following the guidelines set in the Child Custody Act. It could be said that they must act in the best interest of the child[18] even though that is not very clearly stated in the Child Custody Act.[19] According to section 4, subsection 2, guardians shall discuss with the child before making a decision concerning a child's personal matter, if this is possible in view of the age and stage of development of the child and the nature of the matter. Child's opinion and wishes must be given due consideration when making a decision.[20] The right to be heard and to be taken seriously is a constitutional right and a human right belonging to a child and it should materialize also at child's home.

Because of the status of children as minors lacking full legal competence, special measures and activity can be expected from the state and everyone in position of public duty.[21] The state *must promote* child's constitutional rights and ensure the realization of those rights in all areas of a child's life. The state *must not violate* the constitutional rights of the child and appropriate legal remedies must be in place in case of violation. The state *must protect* child's rights by not interfering without legal reason. The duty to protect child's constitutional right is especially vital because children can't by themselves usually react, or can't be expected to react, in case their rights are not respected or if their rights are violated. Thus, active and efficient measures can be expected also from the legislator. In some sectors of children's life their rights are especially sensitive and in greater risk of violation. Most of the child-related complaints received by the Parliamentary Ombudsman in 2000's have concerned the work of child protection services.

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and developing law (3rd edn, Cambridge University Press 2009) 270. In Supreme Court decision KKO 2018:81 on dissemination of information violating personal privacy the Supreme Court noted that a minor is an independent holder of constitutional rights. According to the Supreme Court, guardians must pay attention to the limitations striving from constitutional rights of a child when using their rights as guardians.

18 Henna Pajulammi, *Lapsi, oikeus ja osallisuus* (Talentum 2014) 76–77.

19 Suvianna Hakalehto, *Lapsioikeuden perusteet* (Talentum 2018).

20 Some minor changes are introduced to this section in the government proposal on amendments for the Child Custody Act to promote the participation rights of children. HE 88/2018 vp. Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi.

21 The leading idea of constitutional rights is to protect an individual from excessive use of power in relation between public authority and individual. See Veli-Pekka Viljanen, *Perusoikeuksien rajoitusedellytykset* (Sanoma Pro Oy 2001). This must be the leading point also concerning minors.

In the case law of the Supreme Administrative Court in 21st century, more than one third of the decisions concerning children considered immigration law and almost as many cases were on child welfare. In immigration issues, the Court refers more often to the human rights conventions than to the Constitution but in child welfare cases situation was vice versa. In the Supreme Court, children's rights are examined mostly in family law context.

3 Constitutional Rights in Child-Related Government Proposals

3.1 *Constitutional Rights in Legislative Work*

In legislative work, constitutional rights have been often used to protect children even though the trend in recent years has been towards emphasizing the participation rights of children. In case of limiting children's constitutional rights, the discussion seems to be more diverse during the drafting process compared to the legislation merely promoting children's rights.

In Finland the tradition of legal interpretation strongly emphasizes the written law and preparatory works even though the importance of court practice has increased. If the law is unclear, the preparatory works of the law, government proposals being the most important source, will be used. The government proposal describes the general goals and the purpose of the new legislation. The detailed grounds for each new section constitute essential material for legal interpretation. The preparatory works are said to express the meaning of the legislator. Printed parliamentary documents include the government proposal, reports of the Parliamentary Committees that have processed the proposal, statements given and possible suggestions accepted during the plenary session of the Parliament.

Under the Finnish constitutional system, the politically arranged Constitutional Law Committee of the Parliament holds the main responsibility for reviewing the constitutionality of legislation in legislative phase. Also, the courts have the duty to interpret ordinary legislation in a manner which conforms with the fundamental rights of the constitution as well as with the domestically applicable international human rights norms.[22] The Finnish

22 The Finnish Constitution provides for a specific provision about the primacy of the constitution. The court of law must give primacy to the provision in the Constitution if the application of an Act would be in a manifest conflict with the Constitution (Constitution, section 106).

Supreme Court cited an international human rights treaty provision for the first time in its case law in 1990. Since then the Finnish courts have referred more often to the human rights provisions as well as to the constitutional rights.[23]

3.2 *Limiting Constitutional Rights*

Constitutional rights may be limited but only in exceptional cases and when there are pressing grounds to do so. The Constitutional Law Committee of the Parliament has devised the general limitation criteria, which must be followed when limiting the constitutional rights. Limitations have to be based on an act enacted by Parliament. The contents of the limitation must be precise and defined sufficiently accurately. Limitation criteria must be acceptable in respect of the constitutional rights regime and necessitated by a pressing social need. Limitations must comply with the principle of proportionality and adequate arrangements for legal security must be taken. Limitations may not be in conflict with Finland's international human rights obligations. Limitations extending to the core of a constitutional right cannot be enacted by an ordinary act.[24]

There is in principle no difference when limiting children's constitutional rights compared to the limitations of the rights of adults. It is a task of the legislator to carefully examine proposals concerning limiting a constitutional right. In case of legislating the Child Welfare Act, a lot of attention was paid to ensure the bill would be in harmony with the Constitution. In the preparatory works there is a long chapter on the relevant constitutional rights. Also, the contents of the CRC was examined article by article. The aim of the new legislation was especially to safeguard the right to safe development, safe environment and special protection, but certain limitations of children's rights were necessary to achieve the objectives.[25]

In the Child Custody Act parents are not given any legal right to restrict the rights of their child. It has been argued that the guardian's relationship with the child enables the guardian to decide for example on the care and whereabouts. Taking care of the well-being of the child and supervising the child

23 See Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505, 520.

24 PeVM 25/1994 (n 2) 5. See also Veli-Pekka Viljanen (n 21).

25 Government proposal HE 252/2006 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi, 30–43, 209–213.

may require limiting the child's rights by for example confiscating dangerous objects or preventing the child to go out.[26]

3.3 *Constitutional Rights in Government Proposals*

In the preparatory works of the *Custody Act* of 1984 there was not much discussion on children's rights, which is understandable given the time. The objective of the Act was to secure the status of the child in relation to his or her parents and to provide parents support and guidance in taking care of the child.[27]

More than three decades later, the government proposal on *amendments to the Custody Act* from 2018 highlights the rights of the child as the foundation of his or her legal status. The overall objective is to strengthen the child's constitutional and human right to participate in decision-making processes affecting the child.[28] In this context, there is a referral to the section 6 of the Constitution (children shall be allowed to influence matters pertaining to themselves). In general, the international human rights obligations in this proposal are given more space compared to the Constitution. The proposal introduces several articles of the CRC (art 3, 9, 12, 18 and 19) as well as the general comments 12 and 14 from the Committee on the Rights of the Child.[29]

The preparatory works of the *Child Welfare Act* represent a human-rights oriented approach to the legal status of a child.[30] This is most probably because the legal relationship between a child and the child welfare service is based in administrative law while the child-parent relationship is about private law. The government proposal presents all relevant constitutional rights and human rights concerning children. The proposal mentions certain constitutional rights as especially important in child protection: Equality, autonomy of the child, right to life, personal liberty and integrity, freedom of movement, right to privacy, protection of property, educational rights and the right to social security.[31]

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26 Sanna Koulu, *Lapsen huolto- ja tapaamissopimukset* (Lakimiesliiton kustannus 2014) 124–130.

27 Government proposal HE 224/1982 vp. Hallituksen esitys eduskunnalle laeiksi lapsen huollosta ja tapaamisoikeudesta ja holhouslain muuttamisesta sekä niihin liittyvien lakien muuttamisesta.

28 HE 88/2018 vp (n 21) 17.

29 HE 88/2018 vp (n 21) 6.

30 Children's rights were examined already in the government proposal on the earlier child welfare act. Government Proposal HE 13/1983 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi, 4. In the proposal, there is even a referral to the UN Declaration of Human Rights and the Declaration of Children's Rights.

31 Government proposal HE 252/2006 vp (n 26). More on constitutional rights and human rights in child protection see Mirjam Araneva, *Lapsen suojelu. Toteuttaminen ja*

When the *Basic Education Act* was being prepared in late 1990s, the CRC had already been a part of the Finnish legal system for several years. It wasn't yet time for rights- oriented approach to child-related legislation. There are no traces of the CRC to be found in the preparatory works of the act. Some constitutional rights (right to basic education free of charge, right to own language and culture, non-discrimination and freedom of speech) are mentioned in the government proposal but without any detailed examination.[32] Instead of children's rights, the act highlights the duties of pupils.[33]

In recent 15 years, some amendments have been made to the Basic Education Act. While the government proposals from 2002 and 2009 mention constitutional rights relevant to the legal changes, the more recent proposal from 2013 also lists relevant provisions of the CRC.[34]

The *Early Childhood Education and Care Act* entered into force in September 2018. The constitutional and human rights are well established in the preparatory works of this act. Equality, social and educational rights, legal protection and safeguarding constitutional rights are referred to as well as the right to privacy, the right to one's language and the right to adequate social services.[35] This piece of legislation represents a new trend, which is largely a result of the human-rights oriented approach to children's rights in recent child policy and the influence of NGOs (non-governmental organisations) working with well-being rights of children and families.

After Finland ratified the CRC in 1990, there was no attempt to harmonize the legislation according to its obligations. For example, no mapping of existing

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päätöksenteko (TalentumPro 2016) 1–35. See also Janne Aer, *Lastensuojeluoikeus: lapsi- ja perhekohtaisen lastensuojelutyön oikeudelliset perusteet* (Sanoma Pro Oy 2012).

32 Government proposal HE 86/1997 vp. Hallituksen esitys eduskunnalle koulutusta koskevaksi lainsäädännöksi, 14. In the proposal, no attention was paid to children's rights even though the CRC is mentioned once when listing human rights treaties, see HE 86/1997 vp 13.

33 The Finnish Basic Education Act sets three duties for the pupils: the duty to attend classes, the duty to behave correctly and the duty to complete the tasks diligently (section 35). The same goes with The Act of General Secondary Education (629/1998; *lukiolaki*) and the Vocational Education and Training Act (531/2017; *laki ammatillisesta koulutuksesta*). The school has not traditionally been regarded as a place for highlighting rights. On rights and duties of children at school see Suvianna Hakalehto-Wainio, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012).

34 See HE 66/2013 Hallituksen esitys eduskunnalle laeiksi perusopetuslain, lukiolain, ammatillisesta koulutuksesta annetun lain, ammatillisesta aikuiskoulutuksesta annetun lain ja kunnan peruspalvelujen valtionosuudesta annetun lain 41 ja 45 §:n muuttamisesta.

35 Government proposal HE 40/2018 vp. Hallituksen esitys eduskunnalle varhaiskasvatuslaiksi ja siihen liittyväksi lainsäädännöksi. Articles 3, 12, 18, 23 and 28 of the CRC are noted in the proposal.

legislation was carried out to find if the relevant statutes were in conformity with the Convention. In the 2000s there has been a growing academic interest in the CRC which has been likely to have been reflected to the legislative work.[36] The connection can be established between considering the constitutional and human rights in children in preparatory works and establishing the Children's Ombudsman – institution in Finland in 2005. The Ombudsman gives a written opinion on all legislative proposals having any connection to the legal status of children. This means that since 2005 children's rights have been present in the parliamentary committees with a different intensity than previously.

4 Right to Equality

4.1 *Right to Equality in the Constitution*

The right to equality and non-discrimination are fundamental human rights. Regarding children, it is not only the right to be equal in respect to other children but in respect to adults as well. Compared to adults, minors are at higher risk of being discriminated against. It follows that there is an obligation to pay special attention to the equal treatment of children both in legislation and in administrative practices.

Chapter 2, section 6 of Finnish Constitution provides everyone equality before the law:

> Everyone is equal before the law.
>
> No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.
>
> Children shall be treated equally as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.
>
> Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.

36 The CRC has been used as the basis of systematizing issues concerning children's rights in recent legal research. See Hakalehto-Wainio (n 33), Henna Pajulammi (n. 18), Virve-Maria Toivonen, *Lapsen oikeudet ja oikeusturva* (Alma Talent 2017).

It is to be noted that children's right to participate has been placed in the section titled 'Equality'. It seems that the legislator has perceived the right to participate as a precondition of a child's right to be treated equally. To be equal with adults there is a need for children to participate in matters concerning them according to their developing capacities.

It follows from the obligation of equality that legislation must not allow discrimination of any kind. In addition, it is a duty of the legislator also to actively promote equality. The recent legislation on same-sex marriage and the Maternity Act (253/2018) are examples of acts promoting equality between children.

In the CRC, there is a strong emphasis on protecting the rights of children belonging to the vulnerable groups. This should be the objective also in Finnish legislation and there are a few examples from recent years demonstrating adoption of a more systematic approach towards this aim. The Committee on the Rights of the Child has recommended Finland to pay more attention to children belonging to minorities (e.g. Sami children, Roma children and migrant children), disabled children, children in foster care and minors in prisons.[37]

4.2 *Equality and Non-Discrimination in Child-Specific Legislation*

There is not much substantive legislation concerning equality except for the Non-discrimination Act (1325/2014), which doesn't include child-specific regulations. In issues concerning possible inequality, the question is often discussed on the level of constitutional and human rights partly because of the lack of provisions in the substantive law. Even though the right to equality is protected by the Constitution and several human rights conventions, the legislator has seldom established specific legal duties to intervene discrimination. However, to make equality reality for children there should be a requirement to take certain measures when discrimination is recognized for example at school or in health care.

4.2.1 Health Care

The right to equality requires proactive measures to ensure effectively equal opportunities. Positive measures might be needed for example to redress a situation of inequality. Such measures have been taken in legislation concerning health care and education. In the Child Welfare Act the health services needed by children in connection with the investigation of suspected sexual abuse or assault must be provided urgently (section 15). In the

37 UN Committee on the Rights of the Child, *Concluding Observations: Finland* (20 June 2011) CRC/C/FIN/CO/4.

National Health Service Act (90/2010) persons under the age of 23 are provided the shorter set period of time concerning their access to mental health care (section 53).[38]

One of the main challenges concerning equality of children in health care is the absence of access to health services for children staying in Finland without legal permission. According to the National Health Service Act, section 50, this group has only the right to emergency health care. In this respect the legislation can be considered to be discriminatory.

4.2.2 Education

According to the Constitution, section 16, everyone has the right to basic education free of charge. The Basic Education Act, section 2, subsection 3 sets the aims of education among which is the goal of securing adequate equity in education throughout the country.[39] In Finland, the municipalities are in charge of arranging education. They have a wide discretion to decide on the details.[40] In addition, principals of schools have a remarkable impact on the practical arrangements of education. This causes differences between the municipalities and schools. From the equality perspective, it is problematic that education can be of different quality in different parts of the country.[41] There have been several complaints to the Parliamentary Ombudsman concerning the inequality of children at school. The Ombudsman has stated that in all decisions concerning arranging the teaching of an individual child the best interests of the child must be a primary consideration.[42]

The Non-discrimination Act includes the duty to promote equality also in schools. When assessing if the requirements are met, attention can be paid for example to the grounds of choosing the students, the contents of the studying material and measures preventing bullying. The Government proposal states that promoting equality requires giving special attention to the needs

38 In general, the needs of minors are not prioritized in health care. Equality in health care requires that people get treatment based on their health-related needs and the urgency. On children's rights in health care see Suvianna Hakalehto and Irma Pahlman (eds), *Lapsen oikeudet terveydenhuollossa* (Helsingin Kamari 2018).

39 Government proposal HE 86/1997 vp (n 33).

40 Pentti Arajärvi, *Sivistykselliset oikeudet ja velvollisuudet* (Joensuu 2006).

41 In some municipalities, many small schools have been closed causing pupils to travel longer distances to school. Also for example the way, how a municipality respond to the problems of indoor air or lack of competent personnel have impact on how the right to education is realized in practice.

42 See for example decision 1633/4/14 on the right of the child to get special support for learning.

of pupils in danger of being discriminated as well as preventing or recognizing discrimination.[43]

Sections 16, 16a and 17 of the Basic Education Act provide a pupil having difficulties in learning special-need education and other support according to the pupil's level of development and individual needs. The support is divided into general, intensified and special support.[44] The free basic education includes the right of a disabled child or a child with special educational needs to get interpretation and assistance services he or she needs to participate in education (section 31). There have been several complaints concerning the right to a personal school assistant based on this regulation.[45]

4.2.3 Early Childhood Education and Care

The legislator's decision to limit the weekly time of early childhood education and care to 20 hours a week few years ago received lots of attention in public discussion. According to section 12, subsection 1 of the Early Childhood Education and Care Act all children under school-age have a right to early childhood education and care of 20 hours weekly. To have a right for the full-time education and care the parents of a child must be working or studying full-time (subsection 2).[46] The child has a right to full-time care also if it is necessary for the development of the child, because of the circumstances of the family or for the best interests of the child (subsection 4).

Trade unions representing early childhood education and care personnel and several non-governmental child and family organizations have argued that the legislation discriminates against children in families where a parent is home taking care of a younger sibling or because of unemployment. They

43 HE 19/2014 vp. Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi, 62–63. The Non-Discrimination Ombudsman has recommended that in school the definition of discrimination would include cases where the school does not take action when a pupil or a student is being harassed. See *Yhdenvertaisuusvaltuutetun kertomus eduskunnalle 2018*. K 6/2018 vp 56.

44 According to the Early Childhood Education and Care Act, section 23, the need for support and the means for support will be included in the individual early childhood education plan of the child. It has been criticized for example by the Children's Ombudsman that the Act does not include a legal obligation to make a formal decision if the provider of education refuses to provide the child with the special needs support. Thus, the guardian of the child can't complain about the lack of the support.

45 See for example Supreme Administrative Court decision KHO 2006:79.

46 The right to wider than 20 hours a week care is also provided for a child if it is necessary because of the temporary work of the parent or because of some other reason (subsec 3).

consider the threshold for full-time education and care to be stigmatizing for families[47] and refer to the best interests of the child.

5 Right to Life, Personal Liberty and Integrity

5.1 *Right in Constitution*

For a minor, safety is one of the most important rights in everyday life.[48] The child has a right to live in a safe environment both at home and outside the home for example at school and while taking part in different activities. It is a serious risk to a child's development to live in conditions where either physical or mental health is in danger.

The Finnish Constitution includes a provision on right to security in chapter 2, section 7:

> Everyone has the right to life, personal liberty, integrity and security.
>
> No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity.
>
> The personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed by an Act. A penalty involving deprivation of liberty may be imposed only by a court of law. The lawfulness of other cases of deprivation of liberty may be submitted for review by a court of law. The rights of individuals deprived of their liberty shall be guaranteed by an Act.

The CRC presents several obligations aiming at comprehensive protection of children from violence and harmful treatment. A systematic and holistic approach of protecting children from all kind of harm is not well enough recognized in Finnish legislation. The provider of education has a duty to take some preventive measures concerning the safety and well-being of children at school.

47 On the other hand, the early childhood education and care is, nevertheless considered an essential form of preventive child welfare. See Suvianna Hakalehto and Toomas Kotkas, 'Subjektiivinen päivähoito-oikeus- sosiaalioikeutta, lapsioikeutta vai molempia?' (2015) 7–8 Lakimies 1040–1063.

48 Security is not mentioned on the title of the section, but it is present in the text of the provision: 'Everyone has the right to life, personal liberty, integrity and security' (section 7, subsection 1).

5.2 *The Right in Child-Specific Legislation*

5.2.1 Child Custody

The Custody Act already includes a provision prohibiting domination, corporal punishment and abuse (section 1, subsection 3). The proposed amendments to the Custody Act present the duty of guardians to protect the child from all physical or mental violence, bad treatment and abuse. In preparatory works the new provision has been connected to the CRC, article 19. In the government's proposal it is noted that the child must be protected also from violence between the parents.[49]

It is a duty of the State to effectively protect the constitutional rights of children in legislation and to take care of the realization of these rights in everyday life of children. This is more challenging in the family context compared to the public sphere where there are several means of legal protection in use. When a parent has violated a child's constitutional right, the child has to refer to the legal provisions where consequences of violating that right has been defined (for example criminal law or tort law).[50] Because of the private and intimate nature of the family, most of the violence and other bad treatment never comes to the knowledge of authorities.

5.2.2 Child Protection

Both in school and in child protection it is possible to limit some constitutional rights of minors to secure their well-being and safety or the safety of people working with them. Regulation concerning restrictive measures in child protection was justified by the aim of strengthening the legal protection of children and personnel in child welfare. One reason behind the new rules was the need to harmonize legislation with constitutional and human rights obligations.[51]

According to the Child Welfare Act restrictions in substitute care include restrictions on contact (section 62), confiscation of substances and objects (section 65), bodily search and physical examination (section 66), inspection of possessions and deliveries and leaving deliveries unforwarded (section 67), restraining a child physically (section 68), restrictions on freedom of movement (section 69), isolation (section 70) and special care (section 71).

Restrictive measures may be used only during substitute care arranged in the form of institutional care. According to the Child Welfare Act, section 64

49 Government proposal HE 88/2018 (n 21).

50 See Nieminen (n 11) 103.

51 HE 225/2004 vp. Hallituksen esitys eduskunnalle laiksi lastensuojelulain muuttamisesta, 62. See also Liisa Nieminen, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013) 361–372.

restrictive measures may only be applied to a child to the extent that it is necessary for the purpose of the decision on taking child into care, the child's own or another person's health or safety or safeguarding some other interests laid down in the above mentioned provisions. Such measures must be implemented in the safest possible manner and respect the child's human dignity.

The Parliamentary Ombudsman has noted that the central aim of restrictive measures in substitute care is to secure the objective of taking a child into care and thus protecting the child from him- or herself or from another person. It must be ensured that restrictive measures are used only on the occasions defined in Child Welfare Act. The measures must not be used for a group of children or as a punishment.[52]

The Supreme Administrative Court has given judgements regarding restrictive methods. See for example decision KHO 15.6.2018 / 2902 concerning restriction of contact. In that case the decision of social service included restriction of contact concerning child's mother if the child didn't arrive back to the institution after holiday in home on the right day. The Supreme Administrative Court stated that it is forbidden to use restriction of contact as a sanction. The decision was limiting constitutional rights of the child and was annulled.

There are several decisions from the Parliamentary Ombudsman concerning restrictive methods in substitutive care. In many cases the methods used as an established practice of the institution have been regarded as illegal and violating the right to privacy and freedom of movement without being based in law. In one decision the practice of the institution when using special care included monitoring the child in his or her room 24 hours a day up to 30 days. The child was not allowed to move from the room freely.[53]

5.2.3 Education

School is not an environment where there would be a pressing social need to limit constitutional rights of pupils.[54] Every limitation of constitutional rights must be justified.[55] In the Basic Education Act regulations concerning

52 See decision AOA 1001/3/12.

53 AOA 4138/2/09. There seems to be a tension between the profession of social work and profession of jurisprudence concerning some of the issues in child protection. See Nieminen (n 50) 363–364.

54 See Hakalehto-Wainio (n 33) 277–278. On children's rights at school Suvianna Hakalehto (ed), *Lapsen oikeudet koulussa* (Kauppakamari 2015).

55 See Liisa Nieminen, 'Koulu lasten perus- ja ihmisoikeuksien turvaajana – vai rajoittajana' (2004) Oikeus 277–297.

restrictive methods were introduced in 2014. Restrictive methods were justified by the aim to improve the safety of a learning environment.[56] Interestingly enough in the government proposal it is noted that there have been no essential changes regarding the safety of a learning environment at school in the last ten years.[57] One of the main motivations seemed to be the emergence of mobile phones in the classroom.

According to the Basic Education Act, section 36e, a teacher or a headmaster has a right to inspect the possessions of a pupil.[58] They have also a right to confiscate a forbidden object or substance, or an object or substance used for disturbing teaching or learning (section 36d). The requirements for using these methods are stricter compared to the Child Welfare Act. Confiscation requires that it is obvious that the pupil is holding the object or substance in question. Before confiscation, a teacher or a headmaster must ask the pupil voluntarily to give the things to him or her.

Bullying at school is one of the most severe risks for safety at school. According to the Finnish Basic Education Act, section 29, subsection 1, a pupil participating in education shall be entitled to a safe learning environment. The methods for creating a safe environment are to be found in the Pupil and Student Welfare Act (1287/2013). According to the section 13, the education provider is obliged to draw up a plan for education welfare. The plan shall include among other things a plan for protecting pupils from violence, bullying and harassment. The Finnish National Agency of Education gives orders for making the plan. In the level of legislation, the means of tackling bullying are nevertheless missing which is problematic from the perspective of children's rights and legal protection.[59]

It can be argued that ensuring the safe learning environment and efficient intervention in case of bullying has not been successfully imposed. When the interest at stake is the safety of a minor who has a duty to attend school, more specific obligations should be created in legislation. Now too much has been left to depend on the municipalities, schools and people working there.

56 HE 66/2013 vp (n 35) 31.

57 HE 66/2013 vp (n 35) 27.

58 The right includes searching for example contents of a bag or closet belonging to the pupil and also touching the clothes the pupil is wearing.

59 See Niina Mäntylä, 'Effective Legislation Regarding School Bullying? The Need for and Possibility of Law Reform in Finland' (2018) 18 Education Law Journal 186.

6 Right to Religion and Conscience

6.1 *Right in the Constitution*

A child's freedom of religion is an interesting phenomenon. The starting point is clear: children have freedom of religion equal to adults. This right is protected by many human rights treaties as well as in the Constitution of Finland, chapter 2, section 11:

> Everyone has the freedom of religion and conscience.
>
> Freedom of religion and conscience entails the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion.

What makes this right different from others is how strongly it is actually in the hands of parents. Unlike any other human rights belonging to children, the Convention on the Rights of the Child even addresses this right in relation to the parents. According to the CRC, article 14, a child's freedom of religion includes a parent's right to 'provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'.[60]

The Finnish Constitution does not explicitly take a position on whether a child should follow his or her parents' conviction or culture.[61] In relation to religious or ethical teaching, the Government proposal refers to the guardian's responsibility for the child's development. The guardian's right should in general be respected in teaching and education along with the rights of the child and the conviction of the individual. Protocol 1, article 2 of the European Convention on Human Rights provides the right for parents to

60 On the other hand, CRC article 14 allows limiting child's freedom of religion only when 'limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'.

61 See HE 309/1993 vp (n 5) 56. There are some decisions from the Parliamentary Ombudsman concerning the freedom of religion in foster care. In decisions AOA 3050/4/14 and AOA 3119/4/14 the negative aspect of freedom of religion was highlighted. The Ombudsman noted that it is never the right of social service to decide on the religious upbringing of the child. In another decision, the Ombudsman stated that the conflicting views on religion between the guardians and the foster family can be a reason to reassess the choice of the foster care (AOA 4300/2017).

have their children educated in accordance with religious and other views of parents.[62]

6.2 *A Child's Religious Status*

The right of a guardian to decide on the religious status of the child is included in the Act on Freedom of Religion (453/2003), where the premise is that the parents shall jointly decide on their child's religious status (section 3).[63] From the age of twelve, a status change requires the child's consent in addition to the guardians' expression of their will. The imposition of age limits was reasoned by arguing that the decision on religious status is deemed to require particularly great consideration and maturity from an individual.[64] A child who has turned 15 may, however, on a written consent from his or her guardians join himself or herself a religious community or leave it. A twelve-year-old child can be incorporated into a religious community or reported as having left it only at his or her written consent.[65]

A young person cannot decide on his or her religious status independently until he or she reaches majority. This can be considered a violation of child's freedom of religion. The CRC doesn't support the approach that a child should follow the religion of his or her parents until reaching majority. Also the decisions concerning religion should be taken in way that the best interests of the child are given the primary consideration. The views of the child regarding religion has to be given due weight.[66] After reaching sufficient stage of development a child should be given a right to decide if he or she wants to be a member of a religious community or not.[67]

62 In judgements concerning freedom of religion at school, European Court of Human Right has examined mainly the human rights of guardians and the possible violation of their – not child's – rights. Protecting guardians' freedom of religion is considered to protect freedom of religion of their children. See Fortin (n 17) 412–413.

63 In addition to the Act on Freedom of Religion, the membership of a religious community is governed by the rules of each community.

64 On discussion on the freedom of religion of a child in 1980's see Nieminen (n 11) 73–77.

65 Government proposal HE 170/2002 vp. Hallituksen esitys eduskunnalle uskonnonvapauslaiksi ja eräiksi siihen liittyviksi laeiksi, 25. The Constitutional Law Committee of the Parliament considered appropriateness of the age limits in deciding on the Act on Freedom of Religion. It was estimated possible to lower the age limit to 16. Report of the Constitutional Law Committee. PeVM 10/2002 vp. Perustuslakivaliokunnan mietintö hallituksen esityksestä uskonnonvapauslaiksi ja eräiksi siihen liittyviksi laeiksi, 5.

66 See Hakalehto-Wainio (n 33) 296–297.

67 See Suvianna Hakalehto and Merike Helander, 'Poikien ei-lääketieteellinen ympärileikkaus lapsen oikeuksien näkökulmasta' (2017) Defensor Legis, 942–961.

6.3 *Child's Religious Education*

According to the Basic Education Act, section 13 the provider of basic education shall provide religious education in accordance with the religion of the majority of pupils. In this case, religious education is arranged in conformity with the religious community to which the majority of pupils belong. Pupils not belonging to any religious group can choose between religious education or ethics. On the other hand, the pupil belonging to the major religious community is not able to attend ethics classes even if he or she wishes to do so instead of studying religion.

In Finland 71 % of the population are members of the Evangelical Lutheran Church. Non-confessional religious education is a compulsory subject both in comprehensive schools and in upper secondary schools. The Evangelical-Lutheran religious education is open to all pupils. Education in other religions is organized when there is a minimum of three pupils who belong to that specific denomination.[68]

The legislator's decisions support the strong position of guardians in relation to the child's religious education. The multicultural society and religious pluralism require updating of school curriculum regarding religious education. A developing trend is to arrange religious education as a common subject for all pupils regardless of their religion.[69]

The Parliamentary Ombudsman has delivered several decisions concerning freedom of religion in school. Often the claimants have been dissatisfied as to the practices in school concerning attending religious events like religious beginnings of the day or religious services. According to the Parliamentary Ombudsman the provider of education must take care of the freedom of religion. This means for example that a pupil has a right to stay out of this kind of event even if he or she is a member of a religious community.[70] A school also has a duty to ensure that a pupil doesn't have to reveal his or her conviction. It is essential that the pupil and his or her guardian have a genuine freedom to choose if a pupil attends.[71]

In Finland, it is the membership in a religious community – not the conscience of the pupil – that is decisive when directing the duty to attend religious

68 Most pupils take part in Evangelical-Lutheran religious education. The second largest religious group at school is Islam and the third is Orthodox. 5 % of pupil are studying secular ethics.

69 On freedom of religion in multicultural school see doctoral dissertation Pete Hokkanen, 'Uskonnonvapaus monikulttuuristuvassa koulussa' (Acta Wasaensia 307, 2014).

70 For example, decisions AOA 2685/2017, AOA 3994/4/13 and AOA 2488/4/13.

71 Decision AOA 6540/2017.

education. The obligation to attend education because of the membership in religious education can be regarded as a violation of the constitutional right of freedom of religion.

6.4 *Supreme Court Cases on Non-Medical Male Circumcision*

The Constitution does not explicitly limit the practice of a religion or culture on statute level. However, under the constitutional doctrine, one significant limitation consists of the principle according to which the enjoyment of fundamental rights may not violate the fundamental rights of another person. In case of a conflict, the realization of the rights of both parties should be guaranteed as far as possible.[72] This also applies to the relationship between a child and a parent.

In decision KKO 2008:93, the Supreme Court stated that the quality of a violation is essential in assessing if it is illegal. A serious violation of integrity is not acceptable (para. 23). The Supreme Court decided to consider circumcision of a boy as a 'relatively minor violation' of the child's physical integrity, provided that the operation is performed in an appropriate manner in hygienic conditions and using pain relief required by the operation. The Court further noted that male circumcision is not associated with any aspects that would stigmatise the child or the adult into which he will develop and that the operation does not cause any health-related or other permanent harm (para 25).[73]

In decision KKO 2016:24 the Supreme Court noted that a child's freedom of religion and parents' right to raise a child according to their religion doesn't justify a guardian's right to decide on non-medical circumcision in cases where the boy is not able to present his view because of his young age (para 31). In this case, the circumcision was not deemed illegal because it was considered to be in the best interest of the child.[74]

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72 See Viljanen (n 21) 12. See also Constitutional Law Committee Report No. 25/1994, 5. Conflicts between fundamental rights need to be resolved both when laws are enacted and when they are applied to practice.

73 'Since the operation had been performed for reasons which were acceptable from B's perspective and related to his and his guardian's religion and since it had been performed in a medically appropriate manner without causing any unnecessary pain to B, it can be deemed that in this case the operation, when assessed as a whole, violated B's physical integrity only to a minor extent and it must not be regarded as contrary to his interests. For these reasons, A's conduct of arranging a circumcision for her son shall not be deemed illegal and consequently not punishable.'

74 On non-medical circumcision of boys from the perspective of children's rights see Hakalehto and Helander (n 67).

7 The Relevance of the Constitution and the CRC in Promoting Children's Rights

Legislation is a fundamental tool to ensure the realization of children's rights in all decisions and actions concerning minors.[75] There is not yet a tradition to apply constitutional rights and human rights without a support of clear legislation in the decision-making of public authorities in Finland. To ensure the enforcement of the constitutional rights in children's everyday life, those rights should be clearly embedded in material legislation, which is implemented by decision-makers and professionals working with children. Children's constitutional rights will only become real when parents, teachers, social workers, doctors and other people interacting with children respect them, actively promote them and intervene when the rights are at risk of being violated.

In Finland, the modern perspective on child law has emerged along with the increase of the relevance given to human rights in legislation, court praxis and legal discourse. The new approach to the legal status of a child has been based on constitutional and human rights.[76] Many rights provided by the CRC fall also in the scope of the Finnish Constitution (for example freedom of religion, right to privacy, right to one's own language). Nevertheless, the Finnish Constitution is not in all respects in harmony with the CRC.

Some of the most prominent rights in the CRC are not secured for children as constitutional rights in Finland. This applies firstly to the right of the child to have his or her best interests taken as a primary consideration in all actions and decisions concerning the child. The special provision on this central element of child law would highlight the importance of children's rights and would create a profound duty to pay active attention to the best interests of the child in legislation, in courts and in authorities. Several researchers in Finland have proposed that the best interests of the child should be included in the Constitution.[77]

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75 UN Committee on the Rights of the Child, *General comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (*arts. 4, 42 and 44, para. 6*) (27 November 2003) CRC/GC/2003/5 para 18–23.

76 Liisa Nieminen has noted that legislative bodies have often taken the rights of the marginal groups like children into account only after the international human rights treaties have made that an obligation. See Nieminen (n 11) 5.

77 Suvianna Hakalehto-Wainio, 'Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton kustannus 2013); Milka Sormunen, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24 International Journal of Children's Rights 155–184. See also Merike Helander (n 13).

There is no special constitutional provision on special protection of children against all forms of violence and harmful treatment nor is there a provision highlighting the need to pay special attention to vulnerable groups of minors. Equivalents to these rights are above mentioned provisions concerning right to equality and right to life, personal liberty and integrity. These constitutional rules can be given a more child-centered interpretation using the CRC and the general comments of the Committee on the Rights of the Child. Human rights law principles are integrating the normative content of the law also concerning the legal status of children.[78]

Finnish legal scholars in constitutional law have been worried about the scarce use of the constitutional rights especially in Finnish court praxis but also in legislative work. This is considered to be the result of the dominance of human rights conventions on the legal field. This concerns also legal research.[79] On the other hand it can be argued that the full potential of some human rights conventions like the CRC is not yet used. It is time to begin examining more closely the provisions of the CRC in the legislative work instead of brief references which don't connect the whole contents of the provision to the topics of the legal proposal.

The future challenge in promoting children's rights is to actively place the interests of a minor in the centre of legislative work. The special legal position of the child as the vulnerable rights-holder and at the same time as an active participant calls for interpreting the constitutional provisions in a human rights friendly way emphasizing the interests of the child. This could bring a more systematic rights-based approach in substantive legislation concerning children and hopefully in the end in the everyday life of children.

References

Aer J, *Lastensuojeluoikeus: lapsi- ja perhekohtaisen lastensuojelutyön oikeudelliset perusteet* (Sanoma Pro Oy 2012).

Arajärvi P, *Sivistykselliset oikeudet ja velvollisuudet* (Joensuu 2006).

Araneva M, *Lapsen suojelu. Toteuttaminen ja päätöksenteko* (TalentumPro 2016).

Fortin J, *Children's rights and developing law* (3rd edn, Cambridge University Press 2009).

78 It has been noted that human rights are integrating the different spheres of the legal system influencing the legal culture and the deep structure of the law. See Kaarlo Tuori, Kriittinen oikeuspositivismi (WSLT 2000) 221–223.

79 Juha Lavapuro, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010).

Hakalehto-Wainio S, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012).

Hakalehto-Wainio S, 'Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton kustannus 2013).

Hakalehto S (ed), *Lapsen oikeudet koulussa* (Kauppakamari 2015).

Hakalehto S, *Lapsioikeuden perusteet* (Talentum 2018).

Hakalehto S and Helander M, 'Poikien ei-lääketieteellinen ympärileikkaus lapsen oikeuksien näkökulmasta' (2017) Defensor Legis 942.

Hakalehto S and Kotkas T, 'Subjektiivinen päivähoito-oikeus- sosiaalioikeutta, lapsioikeutta vai molempia?' (2015) 7–8 Lakimies 1040.

Hakalehto S and Pahlman I (eds), *Lapsen oikeudet terveydenhuollossa* (Helsingin Kamari 2018).

HE 224/1982 vp. Hallituksen esitys eduskunnalle laeiksi lapsen huollosta ja tapaamisoikeudesta ja holhouslain muuttamisesta sekä niihin liittyvien lakien muuttamisesta.

HE 13/1983 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi.

HE 309/1993 vp. Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta.

HE 86/1997 vp. Hallituksen esitys eduskunnalle koulutusta koskevaksi lainsäädännöksi.

HE 170/2002 vp. Hallituksen esitys eduskunnalle uskonnonvapauslaiksi ja eräiksi siihen liittyviksi laeiksi.

HE 225/2004 vp. Hallituksen esitys eduskunnalle laiksi lastensuojelulain muuttamisesta.

HE 252/2006 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi.

HE 66/2013 vp. Hallituksen esitys eduskunnalle laeiksi perusopetuslain, lukiolain, ammatillisesta koulutuksesta annetun lain, ammatillisesta aikuiskoulutuksesta annetun lain ja kunnan peruspalvelujen valtionosuudesta annetun lain 41 ja 45 §:n muuttamisesta.

HE 19/2014 vp. Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi.

HE 40/2018 vp. Hallituksen esitys eduskunnalle varhaiskasvatuslaiksi ja siihen liittyväksi lainsäädännöksi.

HE 88/2018 vp. Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi.

Helander M, *Barnombudsmannens berättelse till riksdagen 2018*. Barnombudsmannens byrås publikationer 2018:2.

Hokkanen P, 'Uskonnonvapaus monikulttuuristuvassa koulussa' (Acta Wasaensia 2014) 307.

Karapuu H and Ojanen T, 'Perusoikeuksien käsite ja luokittelu' in Pekka Hallberg and others (eds), *Perusoikeudet* (Werner Söderström lakitieto WSLT 2011).

Koulu S, *Lapsen huolto- ja tapaamissopimukset* (Lakimiesliiton kustannus 2014).

Lavapuro J, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010).

Lavapuro J, Ojanen T and Scheinin M, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505.

Mäntylä N, 'Effective Legislation Regarding School Bullying? The Need for and Possibility of Law Reform in Finland' 18 Education Law Journal (2018) 186.

Nieminen L, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990).

Nieminen L, 'Lasten perus- ja ihmisoikeussuojan ajankohtaisia ongelmia' (2004) 4 Lakimies 591.

Nieminen L, 'Koulu lasten perus- ja ihmisoikeuksien turvaajana – vai rajoittajana' (2004) Oikeus 277.

Nieminen L, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013).

Pajulammi H, *Lapsi, oikeus ja osallisuus* (Talentum 2014).

PeVL 2/1990 vp. Perustuslakivaliokunnan lausunto hallituksen esityksestä no 22 ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten soveltamisesta.

PeVM 25/1994 vp. Perustuslakivaliokunnan mietintö hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta.

PeVM 10/2002 vp. Perustuslakivaliokunnan mietintö hallituksen esityksestä uskonnonvapauslaiksi ja eräiksi siihen liittyviksi laeiksi.

Saraviita I, *Perustuslaki* (Talentum 2011).

Sormunen M, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24 International Journal of Children's Rights 155.

Toivonen VM, *Lapsen oikeudet ja oikeusturva* (Alma Talent 2017).

Tuori K, *Kriittinen oikeuspositivismi* (WSLT 2000).

Viljanen VP, *Perusoikeuksien rajoitusedellytykset* (Sanoma Pro Oy 2001).

CHAPTER 5

Protection of Children's Rights in the Icelandic Constitution

Hrefna Friðriksdóttir

1 Introduction

Iceland's current Constitution dates back to 1944 when Iceland became a separate republic. Since then, Iceland has been actively working towards acknowledging and safeguarding human rights on international, regional and domestic levels. An important step in this direction was the incorporation of the European Convention on Human Rights (ECHR) into domestic law in 1994. In 1995, the Constitution's chapter on human rights was revised with the aim of ensuring conformity with established international obligations. The Constitutional Act No 97/1995 added a range of new provisions, among them, a special substantive provision on children, section 76 subsection 3, obligating the legislator to guarantee children the protection and care necessary for their well-being. The preparatory works made a special reference to the UN Convention on the Rights of the Child (CRC) among other human rights instruments. The CRC had been ratified in 1992 and was then incorporated into domestic law in 2013.

The aim of this chapter is to give an overview of how and to what extent children's rights are protected in Icelandic constitutional law. It will take a closer look at the origin and expansion of the current Constitution and the developments of constitutional norms and theories of interpretation. The main focus will be on some key provisions important to children's rights and, in this respect, particular weight will be given to an analysis of section 76, subsection 3. The analysis is based on a critical child-law perspective identifying some of the tensions existing between constitutional law, policies and practice.[1] The

1 The critical perspective has been defined as an 'on-going exercise of questioning assumptions, knowledge and acts as well as the associated norms and values that shape the social, educational or legal practices that rely on the children's rights framework', Didier Reynaert and others, 'Introduction: A critical approach to children's rights' in Wouter Vandenhole and others (eds), *Routledge International Handbook on Children's Rights Studies* (Routledge 2015) 10.

chapter will remark on proposed amendments to the Constitution and finally provide a brief conclusion.

2 The Icelandic Constitution

2.1 *Historical Overview*

The decades surrounding the turn of the twentieth century are marked by Iceland's campaign for independence from Denmark. Iceland refused to acknowledge the Danish Constitution adopted in 1849 and, in 1874, Denmark presented Iceland with a separate Constitution concerning the special affairs of Iceland. From 1874 Iceland was a constitutional monarchy under the King of Denmark.[2] The Constitution was amended in 1904, establishing home rule and an Icelandic government. In 1918, Iceland was granted sovereignty and, in 1944, Iceland finally broke off the union with Denmark and established a separate republic. At the same time, Iceland adopted The Constitution of the Republic of Iceland, which is still in force with later amendments.[3]

Although this was a new Constitution, only minimal amendments were made to the older constitution at this time with the prospects of conducting a more comprehensive revision at a later date. Some parts of the Icelandic constitution have remained more or less unchanged from the time that Iceland was under Danish rule. This has allowed for the recognition of certain constitutional customs and norms or fundamental principles outside the constitutional text.[4]

Some important amendments have been made, most important is the extended revision of the chapter on human rights from 1995, by Constitutional Act No 97/1995. At that time a number of new human rights provisions were adopted, among them a substantive provision for children. The declared intention of the constitutional reform in 1995 was to adapt to international instruments, such as the European Convention on Human Rights and many of the

2 Markku Suksi, 'Common Roots of Nordic Constitutional Law? Some Observations on Legal-Historical Development and Relations between the Constitutional Systems of Five Nordic Countries' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Studies in Comparative Public Law 2018), 30–31.

3 Stjórnarskrá lýðveldsins Íslands, No 33/1944. Available in english at <https://www.government.is/constitution/≥ accessed 01 October 2018.

4 Ragnhildur Helgadóttir, 'Þróun stjórnarskrárinnar: Stjórnarskrárbreytingar, venjuréttur og framkvæmd frá 1874 [Changes to the Constitution: Constitutuinal amendmendt, norms and practice since 1874]' in Björg Thorarensen and others (eds), *Afmælisrit Páll Sigurðsson* (Codex 2014) 482.

UN treaties. According to the preparatory works, the main focus was on civil and political rights. The aim was to incorporate certain important fundamental rights but not to explicitly add and define all constitutional norms.[5] It is important to note that it has been argued that the constitutional norm of judicial review has since expanded first and foremost because of the intent to take into consideration the interpretation of well established human rights treaties.[6]

2.2 *International Instruments*

Iceland has actively promoted the protection of human rights on international and European levels. Iceland thus signed and ratified most human rights treaties adopted by the United Nations and the Council of Europe, with no or limited reservations. When it comes to incorporation Iceland adheres to the dualistic approach and only two human rights conventions are part of domestic legislation. The ECHR was directly incorportated into domestic law with Act on the European Convention on Human Rights,[7] The CRC was ratified in 1992 and incorporated into domestic law in 2013 with Act on the Convention on the Rights of the Child.[8] Neither of these Acts have constitutional status in Icelandic law.

2.3 *Interpreting the Constitution*

Developments within international human rights jurisprudence have generated a growing interest in the theories of constitutional interpretation.[9] Constitutional theorists propose different methods of interpretation of constitutional law. It is widely recognised that the written text of the Constitution does not fully represent the extent and depth of constitutional law. The written text is thus supplemented by interpretation and recognition of unwritten constitutional principles.[10] A more predominant question is to what extent societal

5 Parliamentary Assembly 1994–95, Document 389 – case 297.

6 Björg Thorarensen, 'People's contribution to constitutional changes' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017) 106.

7 No 62/1994 (*Lög um mannréttindasáttmála Evrópu*).

8 No 19/2013 (Lög um samning Sameinuðu þjóðanna um réttindi barnsins).

9 Dóra Guðmundsdóttir, 'Um lögtöku mannréttindasáttmála Evrópu og beitingu í íslenskum rétti [Incorporating and applying the ECHR in Icelandic law]' (1994) *Tímarit lögfræðinga* vol 44(3) 154; Guðrún Gauksdóttir, 'The effects of ECHR on the Legal and Political Systems of Member States – Iceland' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe; The European Convention on Human Rights and its Member States 1950–2000* (OUP 2000).

10 Ragnhildur Helgadóttir (n 4) 483.

developments should influence this development or expansion of constitutional law. Icelandic constitutional scholars generally place an emphasis on the Constitution as a living document, giving due weight to changes in circumstance, knowledge and values in the society.[11]

Different actors are active in promoting constitutional law in Iceland. The Parliamentary Ombudsman has the objective of monitoring shortcomings in legislation to ensure that the fundamental rights and freedoms of the citizens are not violated in the course of public administration.[12] The goal of the Ombudsman for Children is to ensure that different stakeholders give full consideration to the interests, needs and rights of children.[13]

Interpretation of the Constitution is also intrinsically linked to the extent to which we recognise the constitutional norm of judicial review of laws and administrative acts.[14] It is accepted that the democratic, legislative process in a Nordic welfare state actively aims to balance social and individual justice. The preparation and processes rely on open dialogue and collaboration between political and professional stakeholders and the public, actively converging values, social norms and formal laws. The pursuit of individual freedoms is broadly accepted as an organised, institutionalised, consensual activity rooted in the rule of law. It has been argued that in Iceland, as in most of the other Nordic countries, courts favour legislative supremacy and rely to a large extend on the legislative intent and preparatory legislative materials.[15]

In recent decades the classic doctrine of judicial self-restraint has come under challenge. Most significant has been the growing impact of international and regional legislation in strengthening the judicial branch and its role

11 Björg Thorarensen, *Stjórnskipunarréttur: Mannréttindi* [*Constitutional Law: Human Rights*] (Codex 2008) 99, 108.

12 The Office of Iceland's Parliamentary Ombudsman was established in 1988 and is today governed by law No 85/1997.

13 The Office of the Ombudsman for Children was established in 1995 and is governed by law No 83/1994. In the Concluding Observations from 2011 the The Committee on the Rights of the Child urged Iceland to consider giving the Ombudsman for Children the competence to handle individual complaints to ensure this mechanism would be effective and accessible to all children, especially to children in vulnerable situations, as well as to ensure this complaints mechanism would be provided with the necessary human, technical and financial resources to ensure its independence and efficacy, see UN Committee on the Rights of the Child, *Concluding observations: Iceland* (23 January 2012) CRC/C/ISL/CO/3–4.

14 Ragnhildur Helgadóttir (n 4) 483.

15 Thomas Bull, 'Institutions and Division of Powers' in *The Nordic Constitutions: A Comparative and Contextual Study* (n 2) 64.

in interpreting the boundaries of the Constitution.[16] Constitutional jurisprudence in Iceland can be traced back to the early decades of independence. For many years there were clear signs of judicial restraint. Signs of judicial activism have been more frequent after the amendments to the Constitution in 1995 and in most cases constitutional provisions are applied in conjunction with provisions in the ECHR. It has been argued that Iceland is now one of the Nordic states where judicial review of legislation has been most active.[17] This development is notable in comparing two cases concerning children. In a case from 1979 the Supreme Court of Iceland on one hand refused to acknowledge contact rights between a child and its father after the breakup of the parents unmarried cohabitation. The court referred to explicit laws and the role of the legislator in changing policy in family matters.[18] In 2000 the Supreme Court on the other hand relied on the Constitution in acknowledging the standing of a man in a paternity case, contrary to a section in the Children Act explicitly limiting standing to the mother and the child.[19]

Judicial review in Iceland does not address the constitutionality of the legislation itself but instead focuses on the question to what extent constitutional provisions are upheld when a relevant piece of legislation is applied in individual cases. Such cases can only be brought by legal persons with a sufficient interest related to the relevant case.[20]

3 Children's Rights in Icelandic Constitutional Law

3.1 *Children's Rights*

Children's rights are most often understood as fundamental claims for the realisation of social justice and human dignity for children. Children are human beings that are thus entitled to all human rights.[21] The realization of children's

16 Björg Thorarensen, 'Mechanisms for Parliamentary Control of the Executive' in *The Nordic Constitutions: A Comparative and Contextual Study* (n 2) 68–69.

17 Eivind Smith, 'Judicial Review of Legislation' in *The Nordic Constitutions: A Comparative and Contextual Study* (n 2) 113.

18 Supreme Court of Iceland, H. 1979:1157.

19 Supreme Court of Iceland, H. 2000:4394. In Supreme Court of Iceland, H. 1999:4723 the court recognised the rights of a woman to contest her maternity as analogous to the right to contest paternity. The decision referred to the right to know one's identity but without mentioning the Constitution.

20 Smith (n 17).

21 Eugeen Verhellen, 'The Convention of the Rights of the Child: Reflections from a historical, social policy and educational perspective' in Wouter Vandenhole and others (eds), *Routledge International Handbook on Children's Rights Studies* (Routledge 2015) 45–46.

rights requires the promotion of children as active citizens ensuring them to the maximum extent status, dignity, equality, autonomy, participation, protection and care. Children do not enjoy full political power as sections 34 and 35 of the Constitution sets 18 years as the minimum age for standing and voting in parliamentary elections. Apart from this a child perspective in general demands that children are entitled to the progressive exercise of their rights in accordance with their evolving capacities.

The CRC was the first human rights convention to explicitly emphasise the indivisibility of all human rights, both civil and political and economic, social and cultural rights. The comprehensiveness of the CRC reflects an interdependence of rights that presents a challenge in integrating policies and practices to ensure meaningful implementation.

It has to be noted that the amendments to the Icelandic Constitution in 1995 do not reflect a comprehensive child perspective. Before analysing the Constitution's special provision for children it is nonetheless important to note other substantive constitutional provisions relating to rights for children and mention some strengths and weaknesses.

3.2 *Some General Constitutional Provisions Important for Children*

The principle of equality evolved through the years in Iceland as one of the more important constitutional norms.[22] The principle of equality and non-discrimination is now enshrined in section 65 of the Icelandic Constitution with amendments from 1995. The section states that 'everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status'. The principle requires a careful analysis of legitimate differentiation between children and adults in ensuring rights and their enforcement in different contexts. The equality principle is also important to ensure the rights of children in vulnerable positions, for example, young children, adolescents, girls, children with disabilities and children of racial, ethnic or religious minorities.[23] It has been

22 Parliamentary Assembly 1994–95, Document 389 – case 297.

23 Rachel Hodges and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef 2007). The Committee on the Rights of the Child has voiced concerns about the high dropout rate of immigrant children from school and that children of immigrants may not be covered by child health-care services, see *Concluding observations: Iceland* CRC/C/ISL/CO/3–4. The Ombudsman for children has expressed concerns for the vulnerability and potential discrimination of the growing number of children seeking international protection in Iceland, Ombudsman for Children, *Helstu áhyggjuefni 2017* [*Main Concerns 2017*], (2017) 32.

argued that codifying the provision in the Constitution has served to strengthen the protection of vulnerable groups, most often in conjunction with other fundamental rights.[24] In the concluding observations from 2011 the Committee on the Rights of the Child found it necessary to reiterate earlier observations that had not yet been implemented or sufficiently implemented, most pointedly the lack of a data collection system that is a prerequisite for introducing and applying strategies to address inequalities. The committee voiced concerns that systems of data collection did not cover all areas of the Convention and that there were insufficient mechanisms for the processing, evaluation and assessment of such data. The committee encouraged Iceland to develop a comprehensive system for collecting, processing and analysing data as a basis for assessing progress achieved in the realisation of child rights, disaggregated by age, sex, geographic location, ethnicity and socioeconomic background to facilitate analysis of the situation of different groups of children.[25] The Ombudsman for Children has especially expressed concerns about geographical inequities and urged the state to research differences in services and ensure all children living in Iceland equal opportunities.[26] The Government has duly recognised these concerns.[27]

Section 67 of the Constitution protects persons from the deprivation of liberty and can apply to children in certain circumstances.[28] Cases concerning child protection interventions are though usually scrutinised under section 71.[29]

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24 Thorarensen (n 11) 593. As an example in 1999 the Supreme Court of Iceland found that the University of Iceland had failed to provide a blind student with the necessary support to enable her studies, Supreme Court of Iceland H.1999: 390.

25 *Concluding observations: Iceland* CRC/ C/ISL/CO/3–4. This is still a legitimate concern, see Iceland's 5th and 6th periodic report to the Committee on the Rights of the child, November 2018, 11–13, <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=576bca31-3130-11e9-9431-005056bc4d74> accessed 21 August 2019. A bill proposing changes to the Act on the Ombudsman for children was introduced in Parliament on september 2018, obligating the Ombudsman to collect and disseminate necessary disaggregated information on children, Parliamentary Assembly 2018–2019, Document 156 – case 156.

26 Ombudsman for Children, *Helstu áhyggjuefni 2017* [*Main Concerns 2017*] (n 23) 23. See also European Agency for Special Needs and Inclusive Education, *Education for All in Iceland – External Audit of the Icelandic System for Inclusive Education* (European Agency for Special Needs and Inclusive Education 2017) 17.

27 Iceland's 5th and 6th periodic report (n 25) 18.

28 District Court of North-East Iceland, 31 December 2009, (case No E-228/2009), where a 14-year-old girl was arrested as a passenger in a stolen vehicle and detained for twelve hours at the police station, considered a violation of section 67 of the Constitution.

29 Thorarensen (n 11) 134–135.

Section 68 of the Constitution protects persons from torture or any other inhuman or degrading treatment or punishment.[30] This provision has special importance to children in public care but also refers to positive obligations on the state to ensure adequate protection within the family and in other settings.[31] In spite of this the Supreme Court of Iceland in 2009 acquitted a stepfather accused on spanking his two stepsons as punishment for alleged bad behaviour.[32] The judgement was heavily criticised and amendments to legislation ensued.[33] In the concluding observations from 2011 the Committee on the Rights of the Child expressed concerns regarding different types of violence and recommended that Iceland ensures, through adequate legal provisions and regulations, that all children victims and or witnesses of crimes, e.g. children victims of abuse, domestic violence, sexual and economic exploitation, abduction, and trafficking and witnesses of such crimes, including those perpetrated by State and non-State actors, are provided with the protection required by the CRC.[34]

Section 71 of the Constitution ensures freedom from interference with privacy, home and family life.[35] The right to respect for private and family life has come to encompass a wide range of areas. The right to privacy, home and family thus encompasses, for example, the right to data protection, a person's identity, intimacy and moral and physical integrity, home and familial relationships.[36] The Supreme Court of Iceland, in 2014, iterated the right to know one's identity as an integral part of the right to privacy and family life in a paternity suit challenging mandatory DNA testing.[37] To name another example of the different contexts the Supreme Court in 2017 found the refusal to acknowledge non-biological intended parents as legal parents persuant to a surrogacy arrangement not a violation of section 71.[38]

30 This right to protection was recognised as a constitutional norm before the amendments in 1995.

31 Thorarensen (n 11) 174; 177; Parliamentary Assembly 1994–95, Document 389 – case 297.

32 Supreme Court of Iceland, 22 January 2009, (case No 506/2008).

33 Hrefna Friðriksdóttir, 'Að nota samning SÞ um réttindi barnsins með hendi og vendi að hingað til brúkanlegum siðvana [Using the CRC with force as hitherto was customary]' in Rannsóknir í félagsvísindum X (Félagsvísindastofnun Háskóla Íslands 2009).

34 Concluding observations: Iceland, CRC/ C/ISL/CO/3–4.

35 The right to privacy was recognised as a constitutional norm before the amendments in 1995. It is worth noting that the right to life and to dignity are not explicitly protected in the Constitution but are recognised as constitutional norms.

36 Thorarensen (n 11) 286, 288, 309, 313.

37 Supreme Court of Iceland, 28 January 2014 (case No 800/2013).

38 Supreme Court of Iceland, 30 March 2017 (case No 367/2016).

Section 71, subsection 3 recognises lawful interference with privacy, home and family life if this is urgently necessary for the protection of the rights of others. Most cases involving the claims of child protection authorities for depriving parents of custody rely on the balancing of the rights of parents and children according to section 71, arguing how the right of the child to stability, harmonious development and protection from harm, aided by a general reference to section 76, subsection 3 justifies interference with the rights of the parents to the protection of family life.[39]

4 Special Provision for Children in the Icelandic Constitution

4.1 *Section 76 of the Constitution*

The amendments to the Constitution from 1995 introduced a new provision specifically tailored to children. Children are the only specific group of people guaranteed special constitutional protection. The provision is situated as a subsection of section 76 on economic and social rights and it is therefore appropriate to look at that section as a whole.

4.2 *Economic and Social Rights*

Section 76, subsection 1 states that the law shall guarantee for everyone the necessary assistance in case of sickness, invalidity, infirmity by reason of old age, unemployment and similar circumstances. Article 11 of the UN Convention on Economic, Social and Cultural Rights (ICESCR) formulates the right to an adequate standard of living, including adequate food, clothing and housing. It has also been argued that adequate standard of living includes the right to care and health.[40] The committee on the ICESCR has emphasised three levels of obligations on State parties: the obligation to respect, to protect and to fulfil, the latest incorporating both an obligation to facilitate and to provide.[41]

39 Eg Supreme Court of Iceland, 25 January 2018, (case No 35/2017); Supreme Court of Iceland, 3 November 2016, (case No 466/2016).

40 Kári Hólmar Ragnarsson, 'Dómstólar geta ekki vikið sér undan því að taka afstöðu: Um vernd efnahagslegra, félagslegra og menningarlegra réttinda fyrir dómstólum' [Courts cannot avoid taking a stand: On the protection of economic, social and cultural rights before the courts]' (2009) 62(4) Úlfljótur tímarit laganema 495, 504.

41 UN Committee on Economic, social and cultural rights, *General Comment No 12: The right to adequate food,* 1999. UN Doc. HRI/GEN/1/Rev.7(2004).

Section 76 is formulated differently from previously mentioned human rights provision as it refers to obligations by the legislator.[42] For most of the twentieth century constitutional theorists formulated economic and social rights first and foremost as political policy statements and not as individual rights, and before the constitutional amendments in 1995, the Supreme Court of Iceland had never directly applied similar provisions.[43] This changed gradually and the year 2000 saw a landmark case on the question of justiciability of social rights.[44] The case involved an administrative regulation that reduced a person's disability pension in relation to spousal income. The court stated that section 76, subsection 1 obliges the state to ensure a minimum level of support structured on objective grounds. While acknowledging the legislator's margin of appreciation, the court stated that it could not avoid providing judgement on whether the system provided by law respected the minimum rights included in section 76 subsection 1, with a special reference to section 65 on equality.[45] It is interesting to note that while the court refers to positive obligations of the state, the link to the equality principle *de facto* only required the court to evaluate to what extent restrictions on benefits to certain persons was discriminatory. It is still debated to what extent courts will feel competent to formulate substantive economic and social rights, or the necessary minimum assistance in different contexts.[46] It has been argued that later judgements of the

42 Thorarensen (n 11) 536. Other provisions in the human rights chapter address rights and place limitations on interference.

43 Björg Thorarensen, 'Beiting ákvæða um efnahagsleg og félagsleg mannréttindi í stjórnarskrá og alþjóðasamningum [Applying provisions on economic and social rights in the Constitution and international conventions]' (2001) 51(2) Tímarit lögfræðinga 78; Thorarensen (n 11) 538.

44 Supreme Court of Iceland, H. 2000:4480.

45 See further eg Brynhildur Flóvens, 'The Implementation of the UN Convention and the Development of Economical and Social Rights as Human Rights' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff Publishers 2009) 275. Similar arguments were used by the District Court of Reykjavík, 4 July 2018 (case E-2174/2017) in a case concerning special care benefits for children, which found it unlawful to only pay benefits to parents providing special care if the child had been diagnoced after the date of implementation of the rules. The judgement was later set aside by the Supreme Court on procedural grounds, see Supreme Court of Iceland, 12 March 2019 (case No 12/2019).

46 See, eg, Ragnar Aðalsteinsson, 'Stefnumið eða dómhæf réttindi? [Policy or justicability?]' in Ragnheiður Bragadóttir (ed), *Afmælisrit: Jónatan Þórmundsson* (Codex 2007) 409–441; Thorarensen, 'Beiting ákvæða um efnahagsleg og félagsleg mannréttindi' (n 43) 99–101; Ragnhildur Helgadóttir, 'Afstaða dómstóla til hlutverks síns við mat á stjórnskipulegu gildi laga – þróun síðustu ára [Court's position on constitutional judicial review – recent developments]' (2002) 55(1) Úlfljótur 97–110; Ragnarsson (n 40) 495–593. Ragnarsson points

Supreme Court on economic and social rights have been much more restrictive and have not lived up to the promises of the landmark case from 2000.[47]

4.3 *The Right to Education*

Section 76, subsection 2 states that the law shall guarantee for everyone suitable general education and tuition. The principle requires the state to actively implement policies that promote equal opportunities and the potential of all children. Children with special needs are a highly vulnerable group in this respect. In a Supreme Court judgment from 2005 the court refused a mother's claim for costs derived from her daughter having to attend a special school outside her home community.[48] According to the court, such costs were not considered sufficiently related to providing education but were instead part of the parents' duty to support the child. The judgment has been criticised for not requiring the state to fulfil the duty to ensure suitable education for the child.[49] The circumstances underlying a Supreme Court judgment from 2015 reveal deficiencies in providing sufficient learning materials in Icelandic sign language in elementary schools.[50] Concerns have also consistently been raised in general on the implementation of the policy on education for all, or inclusive education. While legislation and policies seem to support the goals and aims of inclusive education, there seems to be a lack of clarity around the concept and how it should be put into practice, evaluated and monitored. The majority of stakeholders across all systems levels believe that current funding mechanisms and the resource allocation framework are not equitable or efficient in any school phase.[51]

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out that section 76 subsection 1 would benefit from more clarity as to what rights are protected and how the state should ensure such rights.

47 See, eg, Supreme Court of Iceland, 2017 (case No 464/2017) and Supreme Court of Iceland, 1 December 2016 (case No 80/2016). See Kári Hólmar Ragnarsson, 'Falsvonir Öryrkjabandalagsdómsins? – nýleg dómaframkvæmd um félagsleg réttindi [False hopes from the Social Security Case? recent judgments on social rights]' (2017)70(1) Úlfljótur 41–86; Kári Hólmar Ragnarsson, 'Mannréttindasamningar og túlkun laga: nýlegir dómar í andstæðar áttir [Human Rights Treaties and the interpretation of law: recent judgments in opposite directions]' <https://ulfljotur.com/2018/05/17/mannrettindasamningar-og-tulkun-laga-nylegir-domar-i-andstaedar-attir/> accessed 12 October 2018.

48 Supreme Court of Iceland, H 2005:3380.

49 Ragnarson (n 40) 522; Thorarensen (n 11) 556.

50 Supreme Court of Iceland, 12 August 2015, (case No 394/2015). The District Court generally acknowledged the right to inclusive education, but the case was dismissed on procedural grounds.

51 European Agency for Special Needs and Inclusive Education (n 26) 15.

4.4 *Children's Right to Protection and Care*

Finally, section 76 subsection 3, states that for children, the law shall guarantee the protection and care that is necessary for their well-being.

According to the preparatory works, this new provision acknowledged international trends in the area of child rights and was inspired by article 3 of the CRC and to a degree by article 24 of the UN Convention on civil and political rights (ICCPR). The preparatory works refer to the provision to some extent as a statement of policy or intent placing the burden on the legislator to pass laws guaranteeing children protection and care. More importantly, the provision was considered providing a material basis for the limitations of other constitutionally protected rights, when necessary in order to protect children. The preparatory works specifically name as an example that section 76, subsection 3 may be used as an argument to limit freedom of expression in the form of restricting children's access to harmful material. The provision is also considered to provide arguments for limiting freedom from interference with privacy, home and family life. In this respect, the preparatory works emphasise that the welfare of children may demand limits to the rights of parents crucial in the implementation of child protection legislation.[52]

The provision raises several important questions. As mentioned before the provision was inspired by article 3 of the CRC. The preparatory works do not distinguish between the different subsections of article 3. Article 3(1) entails that stakeholders must ascertain the impact on children of their actions in order to ensure that the best interests of children are a primary consideration.[53] Article 3(2) is more in line with section 76, subsection 3 of the Icelandic Constitution as it obliges states to ensure the child such protection and care as is necessary for his or her wellbeing. Article 3(2) of the CRC has been described as an umbrella provision constituting a comprehensive reference in interpreting the general and overall obligations enshrined in the convention. The terms protection and care must thus be read expansively and the duty to ensure encompasses both passive and active obligations.[54]

The preparatory works do not explain why the special provision for children is part of the section on economic and social rights. As previously mentioned, the preparatory works refer to article 24 of the ICCPR. Article 24 of the ICCPR emphasises the rights of the child to protection and entails the adoption of

52 Parliamentary Assembly 1994–95, Document 389 – case 297.

53 Hodges and Newell (n 23) 35. The Government recognises criticism that has been levelled on the general lack of applying child rights impact assessments, see Iceland's 5th and 6th periodic report (n 25).

54 Hodges and Newell (n 23) 40–41.

special measures to protect children, primarily to ensure that all children fully enjoy the other rights enunciated in the ICCPR.[55] It should be clear that the rights to protection and care, even *prima facie*, cannot be defined solely as economic and social rights. The right to protection thus includes, for instance, the right to life (ICCPR, article 6), to protection from violence (e.g. ICCPR, article 7) and to liberty (ICCPR, article 9). The preparatory works make no references to the ICESCR in connection with section 76, subsection 3, which might have been more appropriate if the idea was only to require progressive realisation of economic, social and cultural rights. The problem with this, albeit indirect, link between children's rights and economic and social rights is mainly twofold. Firstly, it may in practice divert attention away from the necessary holistic analysis on what protection and care, or wellbeing of a child, actually entails. Secondly, economic and social rights are often considered ambiguous or as idealistic manifestos or political policy statements that are less enforceable or suitable for judicial review.[56]

Yet another question largely left unanswered in the preparatory works is what protection and care actually entail and how laws shall ensure the extent necessary for the well-being of children. The preparatory works make little attempt to describe what section 76, subsection 3 adds to the protection and care that children enjoy according to other sections of the Constitution previously mentioned. It is generally accepted that children have specific vulnerabilities and needs that demand particular responses. The important role of the CRC is to respond to this and the CRC can as a whole serve as an important guideline in enhancing specific rights for children or interpretation of rights from a child rights perspective.[57] As an example, article 19 of the CRC demands special considerations when ensuring children protection from abuse and neglect.[58] Another example is article 27 of the CRC, which has a broader scope

55 It is recognised that such measures may also be economic, social and cultural, see UN Committee on Civil and Political Rights, *General Comment No 17: Article 24* (*Rights of the Child*), 1 April 1989.

56 Eg Thorarensen, 'Beiting ákvæða um efnahagsleg og félagsleg mannréttindi' (n 43) 87–88; Jane Fortin, 'Children as Right Holders' in Antonela Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage Publications 2008) 57.

57 Nigel Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Sharon Detrick and others (eds), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers 1992) 29.

58 UN Committee on the Rights of the Child, *General Comment No 8: The rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (*arts. 19; 28, para.2; and 37, inter alia*) (2 March 2007) CRC/C/GC/8, 6: 'The distinct nature of children, their initial dependent and developmental state, their unique human

than comparable articles in ICESCR in recognising the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 28 on education places special obligations on states to provide and protect children during compulsory schooling, and article 31 of the CRC on play, leisure and rest describes conditions necessary to protect the unique and evolving nature of childhood.[59]

Section 76, subsection 3 does not mention the important right of children to participation. It can be argued that participation is included as a necessary element in the interpretation of protection, care and wellbeing.[60] It can also be argued that participation has acquired the status of a constitutional norm, as a general principle of the CRC, widely accepted in domestic legislation and court practice and with integral ties to the explicit constitutional provision.[61]

Courts have added very little to the analysis of section 76, subsection 3. The provision is regularly cited alongside section 71 in child protection cases without offering specific interpretations. In an interesting case from 2013 a mother's disability pension was reduced in relation to the number of years she had lived in Iceland. According to the claimant, the reduction was unlawful as section 76, subsection 1 obliged the state to secure her the same minimum assistance as other citizens. The claimant also contended that the reduction of her disability pension directly affected her daughter's welfare and was therefore in violation of section 76, subsection 3. Her claims were denied.[62] As mentioned before, the Supreme Court has formulated that as a general principle the state has to ensure minimum social security. It remains to be seen if, how and to what extent the court would balance or reconcile the principle of the best interests of the child with applying minimum standards in securing care and protection.[63]

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potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.'

59 UN Committee on the Rights of the Child, *General Comment No 17: The rights of the child to rest, leisure, play, recreational activities, cultural life and the arts* (*ars. 31*) (17 April 2013) CRC/C/GC/17, 4.

60 See Elisabet Gísladóttir 'A Child's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019). See also Hodges and Newell (n 23) 40–41.

61 Eg Dóra Guðmundsdóttir, 'Stjórnarskrárbundnar meginreglur og stjórnarskrárvarin réttindi [Constitutional norms and constitutional rights]' in Pétur Kr. Hafstein and others (eds), *Afmælisrit Guðrúnar Erlendsdóttur* (Hið íslenska bókmenntafélag 2006) 141.

62 Supreme Court of Iceland, 13 June 2013 (case No 61/2013).

63 The case adjudicated by the District Court of Reykjavík 2017 (n 45) did not require the judge to rule on the minimum or necessary amount of benefits to ensure the wellbeing of the child, only on who was eligible to receive benefits already established in legislation.

It has been argued that the indeterminateness of section 76, subsection 3 particularly minimises the possibility of active judicial review and that courts would be most likely to react in cases of gross negligence of the state to uphold laws or provide adequate protection in certain contexts.[64] In contrast the Committee on the Rights of the Child specifically encourages states to ensure that domestic adjudicating bodies are able to give full justiciability to economic, social and cultural rights of children, to ensure the full realization of these rights.[65]

It can be argued that the lack of analysis and guidance in the preparatory works with the amendments to the Constitution is reflected in the volume of criticism on children's economic and social rights in practice. While significant progress may be traced in the passing and reviewing of legislation the allocation of resources for implementation in an effective and sustainable manner seems to be lacking. Of particular concern is the question of reversing extensive budget cuts implemented in the wake of the financial crises in 2008. Iceland does not seem to have responded to the challenge of consistently increasing its investment in social security and on special protection in a substained manner.[66] Another continuous and growing concern is the difficulties in responding to complex multi-faceted challenges facing children that require co-ordinated action across different sectors.[67]

The criticism was neatly summed up by the Ombudsman for children in 2017 in expressing grave concerns over the lack of services to children:

> The Ombudsman is getting used to lofty promises in laws and policies not being reflected in lived realities of children at stake. Many examples can be mentioned where children do not receive the services they are entitled to by law. The Ombudsman for children has grave concerns for the uncertainty and instability that for so long has dominated the field of support and services to children. The Ombudsman has often celebrated plans for better services that have never or only partially been

64 Thorarensen (n 11) 560.

65 UN Committee on the Rights of the Child, *Day of General Discussion on 'Resources for the rights of the child – Responsibility of states'* (21 September 2007).

66 Iceland's 5th and 6th periodic report (n 25) 33 –34.

67 Ombudsman for Children, *Helstu áhyggjuefni 2017* [*Main Concerns 2017*] (n 23) 25–26; Draft of Iceland's 5th and 6th periodic report (n 22) 42–43. See also Árni Páll Árnason, 'Knowledge that works in practice: Strengthening Nordic co-operation in the social field' (Nordic Council of Ministers 2018) 9.

> implemented … Work is abundant when it comes to eradicating the economic and social disparities that children in Iceland face.[68]

5 Proposed Amendments to the Constitution

It is generally accepted that the Icelandic Constitution is outdated in many respects, but for decades not much effort was made to introduce a comprehensive overall review. The collapse of the banks and the economic crisis in 2008 fuelled a public demand for constitutional reform. A new coalition government came into power in 2009, which prioritised the revision of the Constitution and set in motion an elaborate constitutional project inspired by the idea of direct input from the people having the constituent power. The Parliament passed Act No 90/2010 establishing a consultative Constitutional Assembly that had the task of revising the Constitution. The Assembly was later replaced by a Constitutional Council with the same role. Its proposals were submitted to the Parliament as a bill for a new Constitution of Iceland in 2011. Since then there have been heated debates on almost all aspects of the project, the legitimacy of the Council, priorities, internal cohesion of the draft and the quality and wording of many of the provisions.

The Constitutional Council's proposals included a new human rights chapter drawing inspiration from various international human rights instruments. Among the notable features is a provision strengthening the rights of children. The draft article 12, Rights of Children, reads as follows:

> All children shall be assured by law of the protection and care that their welfare demands.
>
> The best interest of the child shall always have priority in decisions regarding their affairs.
>
> A child shall be guaranteed the right to express its opinions in all instances concerning it and due recognition shall be accorded to the child's opinions in concert with its age and maturity.[69]

68 Ombudsman for Children, *Helstu áhyggjuefni 2017* [*Main Concerns 2017*] (n 23). See also the Governments recognition of the issues in Iceland's 5th and 6th periodic report (n 25) 35–37, 42, 43, 45, 52, 54, 57–58 and 61.

69 See Stjórnlagaráð, a Constitutional Council, *A Proposal for a new Constitution for the Republic of Iceland* <http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf≥ accessed 1 October 2018.

6 Conclusion

The amendments to the Icelandic Constitution in 1995 certainly had the aim to serve as tools of change. The references to international instruments and the acceptance of the Constitution as a living instrument alongside constitutional norms invites the interpretation of constitutional law from a child perspective and should offer the possibilities to ensure progressive holistic implementation.

The special provision on children incorporated in 1995 does symbolise at least a basic recognition of the rights of children. In describing section 76, subsection 3 mainly as a policy statement placing obligations on the legislator the provision leans more to a protective or welfarist perspective than a child rights perspective.[70] The preparatory works' lack of a comprehensive analysis and the ambiguous placement of the subsection within section 76 on economic and social rights may account for the fact that the provision seems to have failed to serve as a substantive reference for furthering children's rights.

On one hand, the general wording and lack of further substantive analysis in the preparatory works naturally leads to difficulties in practical application and may be responsible for the fact that the provision does not seem to have had much direct impact on laws, policies or practice. On the other hand, such indeterminate references can offer considerable scope for interpretation. Here, the CRC and the General Comments of the UN Committee on the Rights of the Child can provide important interpretive guidance.

The Government of Iceland has recognised that there has been a consistent lack of a comprehensive holistic official policy on matters concerning children. Such a policy could utilise the special provision in the Constitution as an umbrella encompassing and incorporating the rights of the CRC.[71]

The CRC seems to be the most relevant guiding light in furthering children's rights in Iceland. The incorporation of the CRC has given much more visibility to the rights of the child and helped in developing a stronger child-oriented approach within both public and private sectors. Despite this, the concluding observations of the Committee on the Rights of the Child and numerous domestic reports demonstrate a number of shortcomings when it comes to the realisation of the rights of the child under the CRC. The Government has acknowledged that incorporation in itself is insufficient and that ongoing transformation and adaptation is needed.[72] It must also be iterated that the

70 See further Philip Alston, John Tobin and Mac Darrow, 'Laying the Foundation for Children's Rights' in *Innocenti Insight no 10* (UNICEF Innocenti Research Centre 2005) 21.

71 Iceland's 5th and 6th periodic report (n 25).

72 Iceland's 5th and 6th periodic report (n 25).

CRC does not have constitutional status in Icelandic law and questions have arisen as to what extent the convention's provisions have direct applicability for individuals.

It is important to carefully consider changing the Constitution in order to strengthen and clarify the rights of children. The rights of children should be framed in a separate section that should as a minimum unequivocally contain all the general principles of the CRC. Directly including article 3(1) of the CRC would underline the standard of the best interests of the child and the need for child rights impact assessments in different contexts. Explicit inclusion of article 12 on the right to participation would further symbolise the status of children as rights-holders.

References

Aðalsteinsson R, 'Stefnumið eða dómhæf réttindi?' in Ragnheiður Bragadóttir (ed), *Afmælisrit: Jónatan Þórmundsson* (Codex 2007).

Árnason ÁP, 'Knowledge that works in practice: Strengthening Nordic co-operation in the social field' (Nordic Council of Ministers 2018).

Alston P, Tobin J and Darrow M, 'Laying the Foundation for Children's Rights' in *Innocenti Insight no 10* (UNICEF Innocenti Research Centre 2005).

Bull T, 'Institutions and Division of Powers' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Studies in Comparative Public Law 2018).

Cantwell N, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Sharon Detrick and others (eds), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers 1992).

European Agency for Special Needs and Inclusive Education, *Education for All in Iceland – External Audit of the Icelandic System for Inclusive Education* (European Agency for Special Needs and Inclusive Education 2017).

Flóvens B, 'The Implementation of the UN Convention and the Development of Economical and Social Rights as Human Rights' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff Publishers 2009).

Fortin J, 'Children as Right Holders' in Antonela Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage Publications 2008).

Friðriksdóttir H, 'Að nota samning SÞ um réttindi barnsins með hendi og vendi að hingað til brúkanlegum siðvana' in Rannsóknir í félagsvísindum X (Félagsvísindastofnun Háskóla Íslands 2009).

Gauksdóttir G, 'The effects of ECHR on the Legal and Political Systems of Member States – Iceland' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe; The European Convention on Human Rights and its Member States 1950–2000* (OUP 2000).

Gísladóttir E, 'A Child's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Guðmundsdóttir D, 'Um lögtöku mannréttindasáttmála Evrópu og beitingu í íslenskum rétti' (1994) 44(3) *Tímarit lögfræðinga*.

Guðmundsdóttir D, 'Stjórnarskrárbundnar meginreglur og stjórnarskrárvarin réttindi' in Pétur Kr. Hafstein and others (eds), *Afmælisrit Guðrúnar Erlendsdóttur* (Hið íslenska bókmenntafélag 2006).

Helgadóttir R, 'Afstaða dómstóla til hlutverks síns við mat á stjórnskipulegu gildi laga – þróun síðustu ára' (2002) 55(1) Úlfljótur.

Helgadóttir R, 'Þróun stjórnarskrárinnar: Stjórnarskrárbreytingar, venjuréttur og framkvæmd frá 1874' in Björg Thorarensen and others (eds), *Afmælisrit Páll Sigurðsson* (Codex 2014).

Hodges R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef 2007).

Iceland's 5th and 6th periodic report to the Committee on the Rights of the child, November 2018 <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=576bca31-3130-11e9-9431-005056bc4d74> accessed 21 August 2019.

Ombudsman for Children, *Helstu áhyggjuefni 2017* [*Main Concerns 2017*], (2017).

Parliamentary Assembly 1994–95, Document 389 – case 297.

Parliamentary Assembly 2018–2019, Document 156 – case 156.

Ragnarsson KH, 'Dómstólar geta ekki vikið sér undan því að taka afstöðu: Um vernd efnahagslegra, félagslegra og menningarlegra réttinda fyrir dómstólum' (2009) 62(4) Úlfljótur tímarit laganema.

Ragnarsson KH, 'Falsvonir Öryrkjabandalagsdómsins? – nýleg dómaframkvæmd um félagsleg réttindi' (2017) 70(1) Úlfljótur.

Ragnarsson KH, 'Mannréttindasamningar og túlkun laga: nýlegir dómar í andstæðar áttir' <https://ulfljotur.com/2018/05/17/mannrettindasamningar-og-tulkun-laga-nylegir-domar-i-andstaedar-attir/> accessed 12 October 2018.

Reynaert D and others, 'Introduction: A critical approach to children's rights' in Wouter Vandenhole and others (eds), *Routledge International Handbook on Children's Rights Studies* (Routledge 2015).

Smith E, 'Judicial Review of Legislation' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Studies in Comparative Public Law 2018).

Stjórnarskrá lýðveldsins Íslands, No 33/1944. Available in english at <https://www.government.is/constitution/> accessed 01 October 2018.

Stjórnlagaráð, a Constitutional Council, *A Proposal for a new Constitution for the Republic of Iceland* <http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarpenska.pdf> accessed 1 October 2018.

Suksi M, 'Common Roots of Nordic Constitutional Law? Some Observations on Legal-Historical Development and Relations between the Constitutional Systems of Five Nordic Countries' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Studies in Comparative Public Law 2018).

Thorarensen B, 'Mechanisms for Parliamentary Control of the Executive' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Studies in Comparative Public Law 2018).

Thorarensen B, 'Beiting ákvæða um efnahagsleg og félagsleg mannréttindi í stjórnarskrá og alþjóðasamningum' (2001) 51(2) Tímarit lögfræðinga.

Thorarensen B, *Stjórnskipunarréttur: Mannréttindi* (Codex 2008).

Thorarensen B, 'People's contribution to constitutional changes' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

UN Committee on the Rights of the Child, *Concluding observations: Iceland* (23 January 2012) CRC/C/ISL/CO/3–4.

UN Committee on Civil and Political Rights, *General Comment No 17: Article 24* (*Rights of the Child*) (1 April 1989).

UN Committee on Economic, social and cultural rights, *General Comment No 12: The right to adequate food*, 1999. UN Doc. HRI/GEN/1/Rev.7(2004).

UN Committee on the Rights of the Child, *Day of General Discussion on 'Resources for the rights of the child – Responsibility of states'* (21 September 2007).

UN Committee on the Rights of the Child, *General Comment No 8: The rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (*arts. 19; 28, para.2; and 37, inter alia*) (2 March 2007) CRC/C/GC/8.

UN Committee on the Rights of the Child, *General Comment No 17: The rights of the child to rest, leisure, play, recreational activities, cultural life and the arts* (*ars. 31*) (17 April 2013) CRC/C/GC/17.

Verhellen E, 'The Convention of the Rights of the Child: Reflections from a historical, social policy and educational perspective' Wouter Vandenhole, and others (eds), *Routledge International Handbook on Children's Rights Studies* (Routledge 2015).

CHAPTER 6

Constitutional Rights for Children in Sweden

Titti Mattsson

1 Introduction

Since the beginning of the twenty-first century, children's rights have been increasingly seen as a central public concern in many parts of the welfare sector in Sweden, such as healthcare, schools, social services, police, courts, etc. No longer are children's rights regarded – as they often were in the late twentieth century – as something of concern mainly to the central government and national legislature. In this regard, children's rights seem gradually to be gaining wider acceptance and understanding. Today, pretty much all persons who work with children in one way or another in the municipalities, county councils, and private sector are aware of such issues in connection with their own area of responsibility.

The Convention on the Rights of the Child (CRC) has been central for this increasing concern for children's rights at the national level in Sweden. No other international document has had such an impact in terms of increasing public awareness of these issues. However, the CRC is not the only international document that has contributed to the development of a children's rights discourse in Sweden. The general 'internationalisation trend' in law – thanks in large part to the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in 1995, of the Convention on the Rights of Persons with Disabilities (CRPD), in 2008, and of other human rights conventions[1] – has been an eye-opener for many (legal and other) practitioners. Increasingly, therefore, the practitioners have focused on issues of human rights, including children's rights. For example, the rights to family life and to decisions in accordance with the best interests of the child have been rigorously tested at the European Court of Human Rights.[2]

1 At this point, Sweden has ratified most of the human rights conventions that have been prepared within the United Nations and the Council of Europe.

2 See further Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Part of the trend towards stronger rights for children involves demands that they be accorded constitutional rights. Sweden is still in the beginning stages of this project, and there is a potential for further deliberation and debate on the pros and cons of specifying children's rights at that level. This chapter aims to advance this discussion.

My objective in this chapter is to introduce and discuss the issue of constitutional rights for children in Sweden. This is an aspect of children's law in Sweden that appears to have been overlooked. I proceed in the following way. First, I describe the extent to which children's rights are enumerated in the country's fundamental laws, and I examine the standing of those rights. Sweden seems to be a country with few constitutional rights for children. An interesting follow-up question is why the Swedish Constitution enumerates so few rights specifically for children. On the other hand, the weight given to children's rights in quasi-constitutional documents – CRC, ECHR, and EU Charter – must be noted. With quasi-constitutional legislation, I mean regulation that is given a certain precedence compared to ordinary regulation without having the formal status of constitutional regulation. Particularly this takes the expression that ordinary laws are interpreted in accordance with the aim and goals of the quasi-constitutional legislation. Some rights are implemented through case law and some through national law; in other words, in specific acts such as the Parental Code and the Social Services Act. Thus, some rights are enforceable – in case law, practice, and statutory law. In my concluding discussion, I ask whether constitutional rights for children really matter in light of the current implementation of the CRC as Swedish law, and I offer a conclusion as well.

2 The Swedish Constitutional Framework: the General Picture

2.1 *The Relationship between National and International Law*

Constitutional legislation regularly contains provisions for the protection of democracy, human rights, and the rule of law.[3] There is thus a connection between human-rights issues and constitutional issues. Human rights are developed and realised nationally through some degree of constitutional protection. In order to ensure compliance with these rights, for example, the state must determine which obligations and restrictions apply to different actors in

3 Mattias Derlén, Johan Lindholm and Markus Naarttijärvi, *Konstitutionell rätt* (Wolters Kluwer 2016) 28.

society, and, of course, what consequences follow if one violates such rights. In part, therefore, a country's protection of the rights of its citizens resides specifically in its regulations, laws, and constitutional statutes. EU law, moreover, contains special protections for democracy, human rights, and the rule of law. So do conventions such as the ECHR and CRC. Thus, there is a web of international regulation that interacts with national legislation and complements it. As noted in the introduction to this volume, the ECHR has been particularly influential in this respect in Sweden. Together with EU law, it enjoys greater and greater influence as to how individual rights are claimed in the courts.

At the same time, the method in question here – claiming individual rights in courts – has certain limits when it comes to creating improvements for the many.[4] From a policy-making perspective, namely, the cases that come to court are not necessarily the most urgent ones from the standpoint of a given group. Instead, a certain issue is brought to court by an individual with his or her particular legal interest in mind. As a consequence, the trial of individual cases risks producing *ad hoc* outcomes for the legal system as a whole. In the case of children, moreover, we have the additional problem that they generally have only a very limited legal capacity to bring cases to court by themselves. In some cases, a legal issue involving a child without legal standing in the courts may be tried anyway – by guardians, municipalities, or other relevant persons and agencies. A further problem with a system that relies heavily on vindicating individual rights in court is that it often takes a long time. Childhood is a relatively brief period in life, and it may take several years to get a case to the highest legal level.[5] However, the possibility of vindicating a right in a court is often the only available option (adults as well as children). The question of children's participation is therefore of central importance for the exercise and fulfilment of children's rights and is discussed further in a separate chapter.[6]

There is a close relationship between international law, on the one hand, and national legislation and legal practice, on the other. International law is based on notions of sovereignty and the consent of states. Thus, international law is only binding on an individual state to the extent that said state has agreed to be bound. It is ultimately the state in question – meaning mainly the

4 See further discussion in Titti Mattsson, 'National Ombudsman for the Elderly: A solution for a more responsive welfare state?' (2013) 3 Retfaerd 9–24.

5 Comp Pernilla Leviner, 'Barnkonventionen som svensk lag: en diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter' (2018) 2 Förvaltningsrättslig tidskrift 287.

6 See Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

country's government and its agencies – which is responsible in the end for respecting the rights set out in international legal documents.[7] Thus, constitutional law, together with other national legislation, is of utmost importance for the realisation of international conventions and other legal treaties. Within the nation, moreover, responsibility for ensuring that rights are respected often rests with local and regional authorities. In practice, many of the obligations connected with children's rights and other human rights devolve upon the entire public administration, including the municipalities, county councils, and the courts. All of these organs are bound to ensure that the rights enumerated in the nation's Constitution, as well as those set out in other types of legislation governing their areas of responsibility, are respected.

2.2 *The Four Constitutions in Sweden*

There are four constitutional laws in Sweden. This is a rather unusual constitutional feature.[8] They are the Instrument of Government (*Regeringsformen*) from 1974, the Act of Succession (*Successionsordningen*) from 1810, the Freedom of the Press Act (*Tryckfrihetsförordningen*) from 1949, and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*) from 1991.

The Instrument of Government – the central constitutional document – sets out the overall organisation of the Swedish state and furnishes the fundamental protections for democracy, human rights, and the rule of law. The previous Instrument of Government was enacted in 1809, and was replaced in 1974 by the current Instrument of Government. Since then, several amendments have been made, among other things, owing to the Swedish membership in the European Union. I review the content of this constitutional document further – especially in relation to children's rights – in the next section of this chapter.

The Freedom of the Press Act concerns freedom of the press for all. Its aim is to secure the free exchange of opinion and the availability of comprehensive information. According to this Act, Swedish citizens – including children – are generally free to publish official documents, express their thoughts and opinions in print and communicate information to others in other ways (Chapter 1, Article 1). This includes the right to disseminate whatever information a person likes in printed form, as long as the text does not contravene an express provision of law. The Act also protects against defamation and insulting

7 Maria Green and Titti Mattsson, 'Health, Rights and the State' (2017) 62 Scandinavian Studies in Law 178, 180.

8 Joakim Nergelius, 'Constitutional Law' in Michael Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 39.

language and behaviour. For example, incitement against a population group (such as racist comments) may be regarded as a violation of the Act. The first incarnation of the Act dates back to 1766.

The early enactment of the Freedom of the Press Act was an interesting exception in the Swedish context. In most areas, constitutional protections came much later to Sweden than to other countries. Some scholars argue, however, that the very late passage of constitutional protections in Sweden did not mean that certain rights were not protected in practice or in other regulations.[9] There has also been a continuous discussion of individual rights in Sweden over a long period, showing the importance the country places on legal protection for fundamental rights.[10]

The Fundamental Law on Freedom of Expression, from 1991, is the most recent of Sweden's constitutional laws. Enacted in response to the development of new media, it protects against violations of free expression in connection with radio, TV, films, videos, websites, blogs, sound and picture recordings, and so on. It thus complements the Freedom of the Press Act.[11]

The focus of this chapter is first and foremost on the Instrument of Government.

2.3 *International Law*

Turning now to international law, both the ECHR and the EU's basic legal provisions (including the Social Charter) are central ingredients in the international panoply for the protection of constitutional rights, including human rights. In this sense, constitutional provisions for the protection of human rights encompass more nowadays than just the four constitutional laws mentioned above – a development that some scholars deem the most significant in Swedish constitutional law in modern times.[12] One consequence of this regulatory broadening is that some rights are protected in more than a single legal source.

The ECHR was incorporated into Swedish law in 1995. To underline the special role of this Convention, a provision was added to the Instrument of Government in 2010 (see the new wording in chapter 2, article 19), to the effect that no legal provision may contravene Sweden's commitments under

9 Derlén, Lindholm and Naarttijärvi (n 3) 45.

10 Derlén, Lindholm and Naarttijärvi (n 3) 47.

11 The fourth Constitution, the Act of Succession lays down the rules governing succession to the Swedish throne. This document has little bearing on protection for children's rights in Sweden.

12 Derlén, Lindholm and Naarttijärvi (n 3).

the Convention. EU legislation – including regulations, directives, and decisions – has force within Sweden as well, and thus qualifies as a source of law. In this regard, the Swedish Constitution underwent basic change when the country became an EU member. This means that many constitutional changes are not reflected in national documents.[13] A recent example is the General Data Protection Regulation (GDPR). This regulation concerns children's right to information, and protects them from processing of their personal data. Likewise, the incorporation of the ECHR into Swedish national law has had a major impact on constitutional issues relating to human rights. The protection of children's rights is also a basic objective of the EU. This is clear from article 3(3), second subparagraph of the Treaty on European Union, and from article 24 of the EU Charter of Fundamental Rights. The latter reads as follows:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

All Member States are bound by the Charter when implementing EU laws and measures. The potential of the Charter to promote children's rights and best interests has been discussed over the years,[14] and the Charter has gradually become more and more widely cited in European case law.[15]

2.4 *The Child Convention and Its Incorporation into National Law*

Sweden has ratified the CRC without any reservations, save for the last of three optional protocols, which Sweden has yet to sign. (This protocol protects the right of children to complain.) When Sweden ratified the CRC, it

13 Thomas Bull and Fredrik Sterzel, *Regeringsformen: en kommentar* (Studentlitteratur 2015).

14 See, for example, Clare McGlynn, 'Rights for Children?: The potential impact of the European Union Charter of Fundamental Rights' (2002) 8 European Public Law 387–400.

15 See further Johanna Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

committed itself – in accordance with international law – to comply with its provisions. Some of the Convention's articles have been incorporated into national legislation, so that Swedish law will better reflect the CRC. The government has focused on articles 3 and 12, in particular. The principle of the best interests of the child figures in many laws regulating government work nowadays.[16] The right to participation as well has been secured in several regulations.[17]

Over the years since the ratification of the Convention, various research reports and government studies have called attention to deficiencies in how the CRC is interpreted and followed by Swedish authorities – for example, with regard to children's participation. However, there may also be interpretation problems in relation to national law.[18]

In 2016, the government proposed that the CRC be incorporated into national legislation.[19] Two years later, in June 2018, the parliament decided that the law will enter into force in January 2020. The new parliamentary act incorporates articles 1 through 42 of the Convention into Swedish law, using the wording of the original text.[20] This enables Swedish agencies to cite the CRC directly as a basis for their decisions.

Following this general mapping of Swedish constitutional provisions, as well as of certain international documents that are relevant in this context, let us now take a look at the Instrument of Government, and specifically at those parts of it which address children's rights. As we shall see, Sweden has a rather ambivalent attitude towards furnishing children with a specific constitutional standing. An entire chapter in the Instrument of Government, for example, is devoted to human-rights issues, however, without any age-related distinctions. The basic idea is rather that children and adults enjoy the same fundamental rights and freedoms (at any rate in theory), and that they should therefore be treated together.

16 See further Schiratzki, 'The Elusive Best Interest'(n 15) in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

17 See Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

18 For a description, as well as an analysis of this development, see Leviner (n 5).

19 Swedish Government Official Report SOU 2016:19 Proposal for an act on incorporating the UN Convention on the Rights of the Child (SOU 2016:19 Barnkonventionen blir svensk lag).

20 Act (2018:1197) on the Convention on the Rights of the Child [Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter].

3 Constitutional Protection of Children's Rights in the Instrument of Government

3.1 *A Soft Law Clause on Children's Rights That Affords Limited Protection*

The Swedish constitutional tradition is old, dating back to 1634. At the same time, it has been claimed that the country's constitutional framework long had much less impact than did ordinary acts of parliament on the everyday life of the Swedish population, or on the general development of Swedish law.[21] It is mostly in modern times that the Swedish Constitution has truly become part of the legal system in practice, and been recognised and cited by the government and the courts. This background is also relevant for a discussion of the legal basis for children's rights in Sweden.

In 2011, the Instrument of Government was amended to include a specific provision for children.[22] With this reform, the constitutional standing of children was finally addressed in chapter 1 of the Instrument (the introductory chapter, which sets out the basic elements for the country's governance).[23] According to the final paragraph of chapter 1 (section 2, subsection 4) the specific rights of children shall be secured by public institutions:

> The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of the individual. The 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*. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstances affecting the individual. [Emphasis added.]

This section in the Instrument of Government has some clear limitations when it comes to protecting the rights of Swedish children in general. More precisely, the first section of the chapter is not a 'hard-core' regulation. Instead, it sets out certain goals. In other words, the section is general and non-enforceable. As a consequence, it cannot by itself furnish grounds for any complaint that the rights of a child have been violated. The preparatory works state that the regulation is instead goal-oriented – that it articulates certain general aims

21 Joakim Nergelius, *Constitutional Law in Sweden* (Wolters Kluwer 2010) 39.

22 Legislative Bill 2009/10:80 (En reformerad grundlag).

23 It may be noted that the Instrument of Government is organized in 15 chapters.

and ambitions in connection with the human rights of children (and others).[24] However, this goal-oriented paragraph constitute an interpretation aid for more other legal Swedish provisions and may, as such, have a certain indirect implication for children's rights in the future.

When the section cited above was introduced in 2011, the weak position of children's rights in this goal-oriented provision in chapter 1 was met with criticism. Some argued that the section on rights in chapter 2 should be supplemented by a specific provision on children's rights.[25] However, the government did not share this view. It averred that Sweden had already acknowledged its special obligation to ensure the protection of children's rights. After all, the individual rights of children were already protected – in the same way as those of adults – under the current constitutional wording. Against this background, the argument went, there was no need to extend the protection of rights afforded in chapter 2 to children specifically; the proposed goal-oriented provision in chapter 1 was enough.[26]

Goal-oriented regulation of this type has some clear drawbacks in a Constitution. First, it runs the risk of signalling a rather sly attitude towards constitutional protection in general, which may, in turn, undermine the enforceability of the regulatory framework over the long run. Second, as already mentioned, the Instrument of Government has generally played a quite limited role in the practice of law in Sweden historically. In most other countries, by contrast, the constitutional framework has usually had a significant impact on the course of legal development. Until the 1970s, for example, Sweden lacked any extensive constitutional provisions on human rights. It was only in the Instrument of Government adopted in 1974 (the current version) that a specific chapter, chapter 2, was devoted solely to questions of human rights. This chapter concerns the relationship between the individual and the state, and it guarantees each and every person freedom of speech, freedom of information, freedom of assembly, freedom of religion, and other human rights. Scholars have explained the limited role played by the Constitution in Swedish history by reference to several factors: the far-reaching welfare provisions; the strong trust in the state displayed by the population; the ethnic homogeneity that long characterised Swedish society; and the history of harmonious social and political development.[27] The slow and gradual development of the Swedish

24 Legislative Bill 1975/76:209 om ändring i regeringsformen 32.

25 Legislative Bill 2009/10:80 (n 21) 187–188.

26 Legislative Bill 2009/10:80 (n 21) 187.

27 Thomas Bull, 'Constitutional identity: A view from Sweden' (2014) 37(4) Retfaerd 22–23; Kaarlo Tuori, 'Introduction to the Theme: Constitutional Identity' (2014) 37(4) Retfaerd 3.

constitutional framework over a long period seems to have reduced the need for strong constitutional rules.[28] Moreover, other kinds of national regulation have compensated, in part, for the weakness of such rules. Finally, the increasing importance of European law in recent decades has also had a major impact in this area, among other things, through the option it has afforded of taking cases to the European Court of Human Rights and the Court of Justice of the European Union.

3.2 *The Right to Non-Discrimination*

Chapter 1 of the Instrument, then, provides only soft regulation. By contrast chapter 2, entitled *Fundamental Rights and Freedoms*, features enforceable rights. This chapter guarantees fundamental rights such as freedom of expression, freedom of information, freedom of assembly, and freedom of worship. The provisions in this chapter apply regardless of age.[29]

The Constitution also has a provision banning discrimination. Section 12 of chapter 2 states as follows: 'No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation'.

Age is not mentioned in this provision. Instead, age figures in the soft clause in chapter 1, section 2 discussed above. As noted, that clause bans discrimination on grounds of age. The preamble to the clause underlines the equal worth of all and the liberty and dignity of the individual. And with its specific mention of 'age', the clause makes clear that these pertain to children as well. It furthermore states the obligation of all public institutions to 'promote the opportunity for all to attain participation and equality in society'.[30]

Turning now to ordinary national legislation, we find that the Discrimination Act (2008:567) does contain a ban on age discrimination that is enforceable and mentions children. This Act aims 'to combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age' (chapter 1, section 1). Several types of discrimination are proscribed. Section 4 of chapter 1 defines 'direct discrimination' as being treated less favourably than another person due to 'sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age'. Indirect discrimination is also addressed. This occurs when 'someone is

28 Derlén, Lindholm and Naarttijärvi (n 3) 60.
29 Legislative Bill 2009/10:80 (n 21) 187.
30 Legislative Bill 2001/02:72 50.

disadvantaged by the application of a provision, a criterion or a procedure that appears neutral' but which may be particularly disadvantageous to 'people of a certain sex, a certain …, or a certain *age* …, unless the provision, criterion or procedure has a legitimate purpose and the means used are appropriate and necessary to achieve that purpose' [emphasis added].

3.3 *The Right to Education*

In the area of education, the Instrument of Government affords special protection to children. According to chapter 2, article 18: 'All children covered by compulsory schooling shall be entitled to a free basic education in the public education system'. The article also enjoins the state to provide higher education. The stipulations of the Instrument in this area represent an exception to its main approach, according to which children are not to be distinguished from adults.

This right is further realised in the Education Act (2010:800), which lays down the goals and guidelines for schools and preschools. The principal organisers in the school system are the municipalities and the independent charter schools. Their charge is to allocate resources and to organise activities so that the nation's goals are realised and pupils are assured their constitutional right to education. The Swedish National Agency for Education supervises, supports, and evaluates the schools with an eye to enhancing quality, improving outcomes, and safeguarding pupils' right to an equivalent education. The Act also empowers children to lodge legal complaints on certain issues concerning their education (Education Act, chapter 29, section 12). Children who have reached the age of 16 are entitled – without the involvement of their guardian – to appeal all decisions in areas specified by the Act. Younger children too may appeal certain decisions, such as those concerning their application to attend upper secondary school (*gymnasieskolan*).

3.4 *The Right to Citizenship*

Due to the reform of 2010, moreover, the section on rights in the Instrument of Government now has a wider application. Citizens from countries other than Sweden are now protected as well for the most part. The new expression used in several sections of Chapter 2 for who is covered by this protection – 'each and every one' – goes further than the language that had earlier applied. Now all children and adults residing in Sweden – irrespective of citizenship or residence permit – are included.[31] In view of the large-scale immigration into

31 Rebecca Thorburn-Stern, 'Vem får del av kakan? Om migranter, rättigheter och solidaritet' in Thomas Erhag, Pernilla Leviner and Anna-Sara Lind (eds), *Socialrätt under*

Sweden since 2015, this is relevant for large numbers of immigrant and refugee children.

The right of children to freedom of movement and to protection from expulsion is slightly more limited than that accorded to adults. According to chapter 2, article 7, no Swedish citizen may be deported from the country or refused entry into it. This includes children as well as adults. Furthermore, a Swedish citizen who is or has been a resident of Sweden may not be deprived of his or her citizenship. This too includes children. But there is a limitation on this right, in that '[i]t may … be prescribed that children under the age of eighteen shall have the same nationality as their parents or as one parent'. Thus, children's right to citizenship may depend on their parents.[32]

4 Children's Rights Discourse in Constitutional Law: a Concluding Discussion

The issue of constitutional rights for children is an overlooked field in Swedish children's law. As we have seen, the Constitution enumerates few rights specifically for children. Instead, the constitutional framework depicts most human rights as belonging to everybody, irrespective of age. Thus, in Sweden, the basic constitutional method for handling children is to integrate them with everyone else. Otherwise put, children and adults are seen as enjoying the same fundamental rights and freedoms (at any rate in theory), and therefore as best treated together. Thus, even if children are not mentioned in most parts of the chapter in the Instrument of Government dealing with human rights, they are understood to be included anyway. One of the very few places in the Constitution where children are given special treatment, and thus are mentioned as a specific group, is in the goal-oriented clause in chapter 1. This placement within the Instrument raises the overarching question of how enforceable the rights of children (and of others) really are.

The Swedish model in this area highlights some fundamental issues in children's law. In general, defenders of children's rights either cite the general discourse on human rights, and so demand the equal treatment thereby entailed; or they stress the particular vulnerability of children, and the need

omvandling: om solidaritet och välfärdsstatens gränser (Liber 2018) 169. See also Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

32 See further Schiratzki, 'The Elusive Best Interest' (n 15).

for special treatment that follows from this.[33] The first argument is based on the assumption that the persons in question have the legal (and practical) capacity to claim their rights. The Instrument's approach to the matter – whereby the rights of children are included within the rights of all – reflects this assumption.

However, this equal-treatment argument is problematic. One concern that needs to be addressed is the legal capacity of people under 18 years of age. Children are seldom assigned legal capacity themselves, the assumption being rather that their rights are defended by adults over the course of their upbringing. Furthermore, the dependence of children on the support of their guardian on almost all issues regarding their rights and living conditions creates highly variable conditions for children. In the case of children without adult support at home (e.g., children without guardians, children in households riven by family conflict, or children in foster care or institutional care), the responsibility may even devolve upon a public authority. The mandate to act on a child's behalf may be assigned for a time to a court, social-service agency, or other such institution. This means ensuring the child's right to care, security, education, equality of living conditions, equal treatment and non-discrimination, and decisions in his or her best interests.

Children must accordingly rely in various ways on adults to defend their rights. The idea of equal treatment – which underlies large parts of the Swedish Constitution – is difficult to realise for persons who lack the legal tools to claim their rights. In order, therefore, to compensate for children's vulnerability and dependence on others, specific provisions to protect their rights are often thought to be necessary.

To some extent, the lack of specifically enumerated rights for children in the Swedish Constitution may be justified by the fact that children are accorded several rights on a quasi-constitutional level – through the CRC, ECHR, and EU Charter. Moreover, many of the children's rights that the Constitution fails to mention are implemented through ordinary national law and through case law. Thus, some children's rights are enforceable – in statutory law, in case law, and in practice – even though the Constitution does not enumerate them. On the other hand, their enforceability often depends on what legal capacity is assigned to children to lodge legal complaints or to what extent an adult is willing to claim the right of a child in a court.

33 Robyn Fitzgerald and others, 'Children's participation as a struggle over recognition: exploring the promise of dialogue', in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation* (London Routledge 2010) 298ff.

Criticism of the equal-treatment argument needs to be balanced, however, and the argument for special treatment owing to children's vulnerability ought not necessarily to be embraced. A critique of 'childism' forms the basis for this type of argument. This term refers to stereotypes about children, potential discrimination against them, and prejudiced attitudes towards them and towards childhood. The term first used in 2012, in the book *Childism: Confronting Prejudice Against Children*.[34] The author called attention to the legal disabilities suffered by children, and the many unfavourable social policies directed at them. Overall, it seems fair to say, legal age limits can have both positive and negative consequences. They have the virtue of simplicity. It is easy on such a basis to determine who shall have access to legal standing, social service or to a constitutional right. But they have the vice of simplicity as well: assessing people's social and other needs on the basis of the biological clock is plainly inadequate sometimes. Other solutions – which have other problems – include testing the maturity of would-be recipients (of a given benefit or service), attempting to ascertain their need for it on objective grounds, or simply allocating it to them in accordance with their own assessment of their need for it.[35]

The question of what specific protections for children's rights may be needed in different areas of law is an often-debated issue in Sweden. The need to strengthen children's rights has been a recurrent theme in debates over reform in recent years. It is seldom, however, that further constitutional protections for children's rights are discussed. The matter was last highlighted in the revision ten years ago of the Instrument of Government. Some referral bodies, including the Swedish Law Society (*Advokatsamfundet*) and the Legal Commission, argued that the protections in chapter 2 of the Instrument ought to be supplemented by a specific provision on children's rights. Up to this point, however, the government has taken a different view. It contends that such a provision is not needed, because the Constitution as currently worded protects the individual rights of children already in essentially the same way as it protects those of adults.[36] Thus, the equal-treatment argument discussed above is deployed in defence of the status quo.

One change that will rearrange the legal map of children's rights in Sweden is the upcoming incorporation, in January 2020, of the CRC into Swedish law.

34 Elisabeth Young-Bruehl, *Childism: Confronting Prejudice against Children* (Yale University Press 2012).

35 Titti Mattsson, 'Ålderns betydelse i socialrätten' in Thomas Erhag, Anna-Sara Lind and Pernilla Leviner (eds), *Socialrätt under omvandling: om solidaritetens och välfärdsstatens gränse*r (Gleerups 2017).

36 Legislative Bill 2009/10:80 (n 21), 187–188.

Views clearly vary among experts and politicians about the pros and cons of this reform, and about its prospects in practice for strengthening children's rights in Sweden. The Council on Legislation (*Lagrådet*), which scrutinised the original draft of the planned legislation, was very critical of the proposal. Its main critique was that incorporating the CRC is particularly ill-suited to remedying current shortcomings in the promotion of children's rights in Sweden. Among other things, most of its articles are formulated in a general fashion, and so are not fit for direct application to individual cases. Another argument was that difficult questions will arise as to how the provisions of the CRC relate to those of national legislation.[37] From a constitutional perspective, it is worth noting that the CRC – unlike the ECHR – will not be granted a more quasi-constitutional status than the status of the ratified international legal document. Instead, it will be incorporated into ordinary Swedish national legislation. Thus, while children's rights will attain a stronger legal standing than they previously had, they will not be written into the Constitution. However, the standing ratification of CRC and the special situation of CRC as an international document incorporated into Swedish law ought to maintain its quasi-constitutional status in the sense that other Swedish legislation is still to be interpreted according to CRC.

Over the last few decades, the role of young people as subjects and active participants in their own life has been increasingly emphasised in Swedish regulation and law enforcement at a general level. Specific legislative requirements for children to be treated as adults in certain respects, and to be protected from being treated as adults in certain other respects, derive mainly from the international documents discussed above, namely, the CRC, ECHR, and EU Social Charter. The object is to render the fundamental rights of children and young people visible and to ensure that the relevant authorities defend these rights and meet these needs. Sweden's efforts to fulfil its international commitments are still ongoing, not least as the CRC becomes national law. During coming years, moreover, the development of children's rights in national legislation will likely benefit if a broadly encompassing approach is taken and relevant legislation at all levels is reviewed. Therefore, the process of harmonising national legislation with the CRC ought to include a review both of the constitutional framework and other national law.

37 The Council of Legislation, <https://www.lagradet.se/yttranden/Inkorporering%20av%20FNs%20konvention%20om%20barnets%20rattigheter.pdf≥ accessed 30 January 2019.

References

Bull T and Sterzel F, *Regeringsformen: en kommentar* (Studentlitteratur 2015).

Bull T, 'Constitutional identity: A view from Sweden' (2014) 37(4) Retfaerd 22–23.

The Council of Legislation, <https://www.lagradet.se/yttranden/Inkorporering%20av%20FNs%20konvention%20om%20barnets%20rattigheter.pdf> accessed 30 January 2019.

Derlén M, Lindholm J and Naarttijärvi M, *Konstitutionell rätt* (Wolters Kluwer 2016).

Fitzgerald R and others, 'Children's participation as a struggle over recognition: exploring the promise of dialogue', in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation* (London Routledge 2010).

Green M and Mattsson T, 'Health, Rights and the State' (2017) 62 Scandinavian Studies in Law 178.

Tuori K, 'Introduction to the Theme: Constitutional Identity' (2014) 37(4) Retfaerd 3.

Legislative Bill 1975/76:209 om ändring i regeringsformen.

Legislative Bill 2001/02: 72 (Ändringar i regeringsformen – samarbetet i EU m.m.).

Legislative Bill 2009/10:80 (En reformerad grundlag).

Leviner P, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Leviner P, 'Barnkonventionen som svensk lag – en diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter' (2018) 2 Förvaltningsrättslig tidskrift 287.

Mattsson T, 'National Ombudsman for the Elderly: A solution for a more responsive welfare state?' (2013) 3 Retfaerd 9–24.

Mattsson T, 'Ålderns betydelse i socialrätten' in Thomas Erhag, Anna-Sara Lind and Pernilla Leviner (eds), *Socialrätt under omvandling: om solidaritetens och välfärdsstatens gränse*r (Gleerups 2017).

McGlynn C, 'Rights for Children?: The potential impact of the European Union Charter of Fundamental Rights' (2002) 8 European Public Law 387–400.

Nergelius J, *Constitutional Law in Sweden* (Wolters Kluwer 2010) 39–65.

Schiratzki J, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Schiratzki J, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Swedish Government Official Report SOU 2016:19 Barnkonventionen blir svensk lag.

Thorburn-Stern R, 'Vem får del av kakan? Om migranter, rättigheter och solidaritet' in Thomas Erhag, Pernilla Leviner and Anna-Sara Lind (eds), *Socialrätt under omvandling: om solidaritet och välfärdsstatens gränser* (Liber 2018) 169.

Young-Bruehl E, *Childism: Confronting Prejudice against Children* (Yale University Press 2012).

CHAPTER 7

Constitutional Rights for Danish Children

Caroline Adolphsen

1 Introduction to the Human Rights Framework in Denmark

1.1 *Constitutional Rights*

The Danish Constitution entails a number of human rights – known as 'liberty rights' – that provide an obligation for the State not to interfere in the constitutional right, but offers no positive obligations for the State to ensure the fulfilment of the rights for the individual. The Constitution, therefore, offers a more limited protection than the international human rights framework. Furthermore, it does not entail specific rules about children's rights except the right to receive primary education as mentioned below.

Today, everyone would agree that children enjoy the same freedom from intervention in their constitutional rights from the State as adults,[1] unless specifically exempted from these rights. The core question is not if children are protected, but how they are protected. Are children entitled to exercise their rights independently or are the rights exercised by their parents? This chapter will provide an analysis of the most interesting rights from a child's right perspective. The analysis will draw upon the underlying legislation where the rights are more specifically detailed.

As Denmark has a dualistic approach to international human rights, as well as European Union law, I will start by explaining how international human rights are implemented into Danish legislation and what this means for the Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR).

1.2 *International Human Rights in Denmark*

Danish liberty rights, as we know them today, were put in the Constitution in a constitutional amendment in 1953 and do not take the CRC or ECHR (or any other international human rights for that matter) into account. Though the

1 Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Statsret* (2nd edn, Jurist-og Økonomforbundets Forlag 2016) 279. The authors underscore that child's rights can, however, be subject to other limitations apart from adult rightsholder due to the child's lack of maturity.

Constitution has been changed since, and incorporating the international human rights into the Constitution has been part of the political debate, this has not happened and no constitutional amendments are currently underway.[2]

Without following the procedure for constitutional amendments,[3] the legislators cannot transfer sovereignty to foreign authorities such as the Council of Europe or the United Nations. Implementing international human rights into the Constitution cannot, therefore, be done in ordinary legislation or by interpreting the Constitution dynamically in light of present-day conditions.[4]

This question has been tried before the Danish Supreme Court on several occasions where the court has specifically rejected to interpret the Constitution in light of the international human rights framework.[5] When interpreting the Constitution in Denmark, it is not relevant to draw upon the CRC, ECHR or case law from the European Court of Human Rights (ECtHR).

When looking at 'ordinary law' the picture is different. Here the above-mentioned dualistic approach means that Denmark is free to implement international human rights into the legislation, but that the individual conventions have to be actively incorporated or ratified into Danish law in order for them to be part of the legislation unless the legislative body states that this is not necessary as Danish law already fulfils the convention at hand.[6]

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2 The amendment is from 2009 and only covered the Act of Succession for the Danish Royal Family, while the rest of the Act – Lov nr. 169 af 5. juni 1953 – still stands. The Danish Constitution was passed in 1849 and has been amended in 1855, 1866 1915, 1920, 1953 and 2009.

3 Since 1915, there has been a very comprehensive amending procedure in place. A bill must be passed by two consecutive parliaments and then is put to a popular vote. More than 40 per cent (up until 45 per cent) of the voters must participate and vote in favour of the bill. Constitutional amendments must be, therefore, widely accepted and likely require political compromises. This explains why the change in 2009 did not involve putting international human rights into the Constitution. There simply was not a political majority to do so.

4 See Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Grundloven med kommentarer* (Jurist- og Økonomforbundets Forlag 2015) 45, where the authors argue that the Constitution must not be interpreted with a wider margin of appreciation or in light of the general legislation. See also Christensen, Jensen and Jensen, *Statsret* (n 1) 42 and 282 and, differently, Jonas Christoffersen 'Folkeretskonform grundlovsfortolkning' in Henning Koch (ed), *Festskrift til Ole Espersen* (Thomson 2004) 142. The latter was written before the above-mentioned case law and should be read in that light.

5 See U.2010.1547 H (20 March 2010), where the Supreme Court specifically states that international law does not have the same legal power as the Constitution ('*folkeretten ikke har grundlovskraft*') and Jens Peter Christensen, 'Internationale konventioners betydning for Højesterets grundlovsfortolkning' (2013) Ugeskrift for Retsvæsen 15. In case no. 159/2017 (18 January 2018) the Supreme Court stated that regardless of Denmark's international human rights obligations, the Constitution could not be interpreted in a way that adults without legal capacity should have a right to vote for parliament.

6 Ole Terkelsen, *Folkeret og Dansk Ret* (Karnov Group 2017) 16–17.

The same goes for European treaty law, where the Danish Supreme Court in the Ajos case has specifically stated that the European Union principle about equal treatment could not set aside Danish legislation, as it was not a part of the European treaty law that had been incorporated into national legislation.[7] Once incorporated the rules have the same legal value as other laws, but do not take precedence over the nationally decided legislation. The ECHR has been incorporated into national law and thus has the same legal status as other laws.

The CRC, on the other hand, has only been ratified, which means that Denmark considers itself bound by the *principles* of the convention. Thus, the legislator takes the convention into consideration when making child-related legislation, but individuals cannot make a claim against an authority based solely on the convention.[8] Danish authorities and courts will, therefore, interpret national law in light of the convention and, when the interpretation can lead to different results, choose the interpretation most in line with the convention. But the Supreme Court does not consider itself to be bound by the non-incorporated conventions, nor do Danish legislators. While Denmark will typically not legislate against the ratified conventions, this does not mean that they cannot, only that they choose not to.

2 The Child and the Constitution

It is safe to say that the debate before the amendment in 1953 to the Constitution focused more on protection from State intervention than on positive rights and that children as individual human rights-holders were not on the agenda at that time. This might explain why children are not mentioned anywhere else than in the child-specific section 76, which covers the right of children to receive free primary education.

The debate among parliament members (as part of the constituent body) before the bill, regarded the freedom rights as such and not their applicability on children. It was mentioned that placement of children in involuntary care (*tvangsfjernelse*) was indeed an intervention in the right to personal liberty

7 U.2017.824 H (6 December 2016). The Supreme Court pointed out that the principle is not a part of European treaty law that has been, in fact, adopted into Danish law. To interpret Danish law *contra legem* in order to fulfil the principle would be to act outside the boundaries of the division of power under section 3 of the Constitution.

8 See Hanne Hartoft, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

(section 71) but the focus was on the intervention in the parental rights over the child more than the child's individual right to personal liberty.[9] Children's individual rights to personal freedom, freedom of speech, etc. were not mentioned anywhere.

3 The Child's Right to Invoke His/Her Rights

As a main rule, a child below the age of 18 cannot bring a case before a court in Denmark and cases have to be taken to court by the parent on the child's behalf.[10] The same goes for administrative cases where the parent with custody over the child, who is also the child's legal guardian,[11] carries out the child's rights.

This means that, in general, children cannot enforce their own rights if the parents are not willing to put the case before a competent body. Even if the child is granted an individual right to complain, he or she will not be able to carry out his or her adherent rights in lack of specific rules establishing such rights, i.e. legal standing. Neither the right or access to act on behalf of the child nor the parental duty to care for the child oblige the parent to start a case on behalf of the child, be that an administrative case or a court case.[12] In order to ensure the child's rights in cases where there is a risk of conflicting interest between the child and the parent with custody, specific rules allow for independent rights for children or require administrative or judicial procedures where the authorities play an active part to safeguard the child. A child aged 12 and above will, for instance, have a right to his or her own lawyer in cases regarding interventions (against the parents will) in the child's family life[13] and

9 Helle Bødker Madsen, '§ 71' in Henrik Zahle (ed), *Danmarks Riges Grundlov med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2006) 446; Christensen, Jensen og Jensen, *Grundloven med kommentarer* (n 4) 423.

10 In order to bring a case before the court, the plaintiff has to be above the age of 18 (and not under financial guardianship) and have a specific legal interest in the case (*retlig interesse*). See Ulrik Rammeskov Bang-Pedersen, Lasse Højlund Christensen and Clement Salung Petersen, *Den Civile Retspleje* (Pejus 2017) 54.

11 Section 1 of The Parental Responsibility Act (lovbekendtgørelse nr. 1417 af 1. december 2017, Forældreansvarsloven); section 1 of The Guardianship Act (lovbekendtgørelse nr. 1015 af 20. august 2007, Værgemålsloven).

12 Access to act on behalf of and duty to care for the child are detailed in The Parental Responsibility Act section 2, subsection 1.

13 Social Services Act (lovbekendtgørelse nr. 102 af 29. januar 2018) section 72, subsection 1.

in all social welfare procedures the authorities must speak directly with the child to get the child's perspective – and the parent cannot oppose this.[14]

In the latter years different age limits have been introduced in different areas of the law allowing children an independent right to bring a case before an administrative complaint board. This is, for instance, the case regarding both voluntary measures and involuntary measures from the Social Welfare authorities where a child can complain from the time he/she turns 12 years old,[15] even though his/her consent is not required in order to deem the measure voluntary.

4 Constitutional Rights of Special Relevance for Children

4.1 *Introduction*

As mentioned above, the right to receive primary education and the right to personal liberty are specifically stated in the Constitution. Alongside these are other classic liberty rights such as the freedom of expression[16] and the right to privacy in one's home,[17] which, in my opinion, are especially relevant to discuss when the individual is a child.[18] The chosen rights are regulated in different ways in the legislation with different types of remedies, showing different ways of ensuring children's rights.

Whereas the question about deprivation of liberty or access to one's home is a matter of consent/not consent, where the legislation must grant either the child, the parent or both (joint consent) access to invoke the right, freedom of speech is not an exhaustible right or a right that is connected to binding legal decisions. The different types of rights for children therefore has to be addressed individually.

The chapter will look at the development of the national rules regarding the child's independent right to privacy and physical integrity, understood as the individual right to consent to interventions in the right to personal freedom and the right to privacy in one's home. The chapter will also look at the right to

14 Social Services Act section 48, section 50, subsection 3, and section 155 a, subsection 2.

15 Social Services Act section 167, subsection 1 and section 168, subsection 2.

16 Section 77. I will not elaborate on the freedom of assembly and freedom of association, as these rights have no specific child-related aspects that are not also discussed when addressing the freedom of expression.

17 Section 72.

18 Other rights are those connected to religion (s 67–70), the right to freedom of assembly and association (s 78–79), the protection of property (s 73), the right to equal access to work (s 74) and the right to public relief (s 75).

primary education and whether or not this is a right that the child can invoke him/herself.

The chapter will be concluded with some remarks on whether or not it makes a difference, in practice, the rights are folded out in the legislation and not in the Constitution as such.

4.2 *The Child's Right to Psychical Integrity and Privacy*

4.2.1 Introduction

The right to physical integrity and the right to privacy are considered core values in the Danish Constitution, and interventions in the right can only happen in accordance with the law.[19]

As mentioned above, it is a common understanding in Danish legislation that deprivation of a child's liberty is indeed protected by the Constitution,[20] and the same goes for interventions in the child's home and correspondence. What is interesting from a legal perspective is not to establish this fact but to consider from which point the child can invoke the right to physical integrity and privacy. Or, put differently, when is parental consent to an intervention sufficient to put the situation outside the scope of the Constitution and consider the intervention voluntary?

While the question about the child's independent right to privacy has not been subject to case law or debate[21] there is a long tradition in Danish legislation about regulating the child's right to physical integrity under section 71, which covers both sentencing for criminal offences and deprivation of liberty

19 Section 71, subsection 1 of the Danish Constitution states that personal freedom is inviolable. Subsection 2 states that deprivations of liberty can only happen in accordance with the law. Section 72 states that one's home is inviolable and, as a main rule, searches of the home or of correspondence require a warrant. The section does not specifically state that interventions in the rights require a clear legal basis, but this is the common understanding in the legal literature. See Christensen, Jensen and Jensen, *Grundloven med kommentarer* (n 4) 439.

20 Madsen, '§ 71' (n 9) 446; Christensen, Jensen and Jensen, *Grundloven med kommentarer* (n 4) 423.

21 In Danish legislation, however, the child has no individual right to privacy unless living in a care facility. This can, for instance, be seen in the Social Services Act, section 64, subsection 3, which presupposes that consent for social services to enter the family home can be given solely by the parent. This can be seen by the fact that the act only deals with setting aside the parents' objections if it is necessary to enter the family home as part of a child welfare case. The rule does not deal with the child's right to his/her home. The same applies in relation to house searches in cases where the parent is suspected of a criminal offence. In these cases, the warrant covers the entire house unless parts of it are explicitly inaccessible by the parent.

for other reasons, for instance, involuntary placement of children and involuntary admissions to a psychiatric ward.[22] In lieu of a common regulation or understanding of the question in the Constitution, however, the matter has traditionally been handled differently in social welfare legislation and mental healthcare legislation. Remarkably, from a children's rights perspective, the tendency in the legislation is actually to move away from assessment-based legislation and towards fixed age-limits.

4.2.2 Age or Maturity—Fixed Limit or Individual Assessment?

Both the Psychiatry Act[23] and the Social Services Act[24] consider parental consent to be sufficient to consider the treatment or placement voluntary if the child is below the age of 15, which places the child without the rights of an individual deprived of his/her liberty. The child has no individual right to invoke his/her right to physical integrity.

This has, however, not always been the case regarding psychiatric treatment, and all the way back to the 1930s, children were believed to be independent right-holders in this area if they opposed the treatment and had the sufficient age and maturity to understand the situation.[25] That is, if the child was considered insane and therefore covered by the judicial protection of the Psychiatry Act at the time. The child did not have the same individual right to oppose institutionalisation in other situations, which can be seen by the ECtHR case of *Nielsen v Denmark*.[26] In the case, the Court found that the parental consent given by the child's mother to his admission in a psychiatric ward put the admission outside the scope of section 5 of the ECHR, as it could not be considered involuntary. The essence of the case was that the parental consent on behalf of the child meant that he could not on his own exercise his fundamental right to personal liberty as no specific national legislation awarded him a right to do so.

22 Criminal offences are governed by the Penal Code (Lov nr. 977 af 9. august 2017) and the Administrative Justice Act. A child above the age of criminal responsibility is largely given the same rights as an adult offender. I will not touch upon the matter any further.

23 Lov nr. 1160 af 29. september 2015 section 1, subsection 4. Up until 2015, no age-limit was written into the law and the change in 2015 was made with surprisingly little focus on the shift in view of child's rights. The law now states that treatment is not considered involuntary in the sense of the law if the patient is below the age of 15 and the custody holder has given an informed consent.

24 Section 52, subsection 1.

25 Betænkning nr. 1068/1986 'Principbetænkning om tvang i psykiatrien' 386; Betænkning nr. 1109/1987 'Afsluttende udtalelse vedrørende udformningen af en ny lov om frihedsberøvelse og anden tvang i psykiatrien' 51.

26 App no 10929/84 (ECtHR, 28 November 1988) para 73.

Though there has been a rapid development in the duty to involve the perspectives of children in their decision-making[27] the right to act on behalf of the child in Denmark still lies with the parent and the case would therefore – in my opinion – still have the same result if it was brought before a Danish court today.[28]

The changes in the rules regarding psychiatric treatment have led to a debate among legal scholars[29] on whether or not the current legislation regarding psychiatric treatment provides a sufficient legal basis for interventions that the child resists. Is the parental consent sufficient to consider the treatment voluntary or is it necessary with a clear legal basis as generally required in Danish administrative law for interventions in the rights of the individual.[30] Whereas everyone agrees that there is no clear legal basis for the interventions, there is no such common ground on whether or not this is in fact necessary with the consequence that children below the age-limits must be granted constitutional protection, if they have the sufficient maturity, even if the legislation does not provide these rights.

As the Constitution is written and construed, it cannot, in my opinion, in itself be considered unconstitutional to have (or to introduce) an age-limit in the legislation, deciding from which age children can invoke their right to physical integrity themselves.

The rationale behind the Constitution was never to give specific rights to the child independent of his or her parents.[31] The question is not whether the child has rights or not – of course he/she do – but whether or not these rights are carried out by the child or the custody-holder. It is not only the legislation but also the parental consent that puts the situation outside the scope of constitutional protection.

27 As shown by Hartoft (n 8).

28 See contrary Helle Bødker Madsen, 'Mindreåriges retsstilling efter psykiatriloven' (2015) 36 Ugeskrift for Retsvæsen 283–289.

29 Madsen, 'Mindreåriges retsstilling efter psykiatriloven' (n 28) 284; Helle Bødker Madsen, *Psykiatriret* (2. edn, Jurist- og Økonomforbundets Forlag 2017) 48–51; Caroline Adolphsen, 'Børns ret til personlig frihed i velfærdsretten: – fra et dansk perspektiv' in Bjørn Henning Østenstad (ed), *Selvbestemmelse og tvang i helse- og omsorgstjenesten* (Fagbokforlaget 2018) 84.

30 Karsten Revsbech and others, *Forvaltningsret: Almindelige Emner* (6th edn, Jurist- og Økonomforbundets Forlag 2016) 180–188.

31 Madsen, 'Mindreåriges retsstilling efter psykiatriloven' (n 28) 284; Madsen, *Psykiatriret* (n 29) 48–51.

4.3 *The Right to Free Primary Education*

4.3.1 Introduction

Section 76 of the Constitution states that all children in compulsory school age have a right to receive free education in the public school system unless the parents themselves provide a private alternative of the same standard as the public education. Though expressed as a right, the rule imposes a duty upon the child, which can be seen by the fact that the section presupposes that there is a compulsory school age[32] where the child must attend school. The section also puts a duty upon the parents to make sure that the child receives primary education.

However, the Constitution does not elaborate further on the amount of education or the length of the compulsory school age and these matters are handled in the Public School Act.[33] What the Constitution does ensure is some level of primary education, and, importantly, that all compulsory education in public schools is without cost. This is specified in the Public School Act[34] stating that all expenses related to teaching equipment are paid by the local authorities.[35]

4.3.2 The Parent's Duty to Ensure the Child Receives Primary Education

As mentioned above, the parent is obliged to ensure that the child receives primary education in the public school system or at a private alternative of the same quality.

Though the child has a duty and right to receive primary education, it is a *parental responsibility* to make sure that the child actually attends school,[36] whether it is a public school, a private school or home-schooling. The parent

32 Christensen, Jensen and Jensen, *Grundloven med kommentarer* (n 4) 487. The duty for the child to receive primary education is clearly stated in the Public-school Act (Lovbekendtgørelse nr. 1510 af 14. december 2017, Folkeskoleloven) section 32.

33 Not all subjects taught in school are mandatory pursuant to the Public School Act. Parents can apply for the child to be exempted from religious education if the parents declare that they will provide for the child's religious education. This is due to the fact that the religious education in public schools is primarily focused on Christianity. See section 6 of the Public School Act.

34 Section 49.

35 This, however, does not include clothes for gym class and writing equipment, which the parents have to cover themselves. If computers are used in class and the pupils either do not have computers or do not want to bring their own computer to school, the local authority has to provide computers for the pupils. See the Danish Ombudsman in FOB 2010.1808. See also Christensen, Jensen og Jensen, *Grundloven med kommentarer* (n 4) 487–488.

36 See section 35 of the Public School Act.

decides which type of school the child attends and the child itself cannot decide to change school without parental consent.

The child cannot complain to the school or the local authority in charge of providing public schools about the parent's choice of school or inability or unwillingness to make sure that the child goes to school,[37] and the school-related legislation does not provide a solution for the child in these cases. However, the school staff at both public and private schools have a duty to report to the social services if they have knowledge of or reason to assume that a child is in need of social support due to (amongst other things) illegal absence from school.[38] If the absence is due to the fact that the parent is not willing (but is capable) of ensuring the child's education, social services can – in coherence with the system for interventions in the life of the family[39] – issue an administrative order demanding that the parent makes sure that the child attends school.[40] If the parent does not fulfil the order, the family can lose the right to child-related and housing-related benefits until the child receives education again.[41] The enforcement of the right to primary education is thus secured by financial restrictions. A parent's unwillingness to ensure the child's school-attendance can, depending on the circumstances, also be seen as a more general social problem and can be part of the reasoning for other interventions in the family.

5 Concluding Remarks

As shown above, there is no common legal understanding of children's rights in Denmark. This means that although the child in principle has the same constitutional protection as an adult, he/she does not necessarily have *independent* rights that he/she can invoke, as the rights are typically invoked by the parents.

37 See Inger Dübeck, '§ 76' in Henrik Zahle (ed), *Danmarks Riges Grundlov med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2006) 525.

38 Pursuant to the Social Services Act section 153, subsection 1, no. 3 and Administrative Act (nr. 1466 af 16. december 2010) section 1, subsection 1 no. 2. The Administrative Act, which entails the duty to report for privately employed school staff, has not been updated since 2010 and, therefore, does not specifically refer to absence from school as an event that triggers a duty to report. However, the school staff do have a general duty to report if the child needs social support regardless of the cause of the child's needs and, therefore, also if the needs arise or become clear in a school-related setting.

39 See Caroline Adolphsen, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

40 Under the Social Services Act section 57 a, subsection 1, 2 no. 1 and 3 no. 1.

41 Social Services Act section 57 a, subsection 6.

The independent rights that the child does have are only stated in the ordinary legislation and can be thus changed or removed under an ordinary legislative procedure just as is the case regarding psychiatric treatment, as shown above. By amending specific rights for the child into the Constitution or even by making a joint set of children's rights in the legislation, Denmark could certainly strengthen the child's individual rights. As the legislation is constructed now, the primary legal protection of the child is provided by the parent. Therefore, it is the parents' rights on behalf of the family/child and not the child's rights that has been the main focus in the newer Danish legal history. There is thus a tendency that children's rights in Denmark are rights to be involved/heard/participate together with the parent instead of a right to act instead of the parent.

References

Adolphsen C, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Adolphsen C, 'Børns ret til personlig frihed i velfærdsretten: fra et dansk perspektiv' in Bjørn Henning Østenstad (ed), *Selvbestemmelse og tvang i helse- og omsorgstjenesten* (Fagbokforlaget 2018).

Christensen JP, 'Internationale konventioners betydning for Højesterets grundlovsfortolkning' (2013) Ugeskrift for Retsvæsen.

Bang-Pedersen UR, Christensen LH and Petersen CS, *Den Civile Retspleje* (Pejus 2017).

Christensen JP, Jensen JA and Jensen MH, *Grundloven med kommentarer* (Jurist- og Økonomforbundets Forlag 2015).

Christensen JP, Jensen JA and Jensen MH, *Statsret* (2nd edn, Jurist- og Økonomforbundets Forlag 2016).

Christoffersen J, 'Folkeretskonform grundlovsfortolkning' in Henning Koch (ed), *Festskrift til Ole Espersen* (Thomson 2004).

Hartoft H, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Madsen HB, *Psykiatriret* (2nd edn, Jurist- og Økonomforbundets Forlag 2017).

Madsen HB, 'Mindreåriges retsstilling efter psykiatriloven' (2015) Ugeskrift for Retsvæsen 36.

Revsbech K and others, *Forvaltningsret: Almindelige Emner* (6th edn, Jurist- og Økonomforbundets Forlag 2016).

Terkelsen O, *Folkeret og Dansk Ret* (Karnov Group 2017).

Zahle H (ed), *Danmarks Riges Grundlov med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2006).

PART 3

Best Interests of the Child in Nordic Law

CHAPTER 8

Best Interests of the Child in the Norwegian Constitution

Kirsten Sandberg

1 Introduction

The best interests of the child have been a guiding principle in the laws on children and parents and on child welfare in Norway since the 1950s and have also been included in a few other areas of the law. Since the incorporation, in 2003, of the United Nations Convention on the Rights of the Child (CRC) into Norwegian legislation through the Human Rights Act,[1] the convention has the status of statutory law ranking above ordinary legislation. The topic of this chapter is whether including the best interests of the child in the Constitution, in 2014, has made a difference.

The second subsection of section 104 on children's rights states as follows:

> In actions and decisions affecting children, the best interests of the child shall be a primary consideration.[2]

The Law Commission preparing the human rights provisions in the Norwegian Constitution deliberately chose a wording that would in a simple and easily understandable way express the state of the law at that time. It added that the wording resembles the formulations used in article 3 of the CRC and the EU Charter of Fundamental Rights, thus making it possible to use jurisprudence related to those provisions in the interpretation.[3] The provision remained the same throughout the further preparation of the human rights chapter in the Constitution, with the exception of the term 'actions' being added, see 2.1

1 Act relating to the strengthening of the status of human rights in Norwegian law (Human Rights Act) of 21 May 1999 No. 30 (*menneskerettsloven*) <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990521-030-eng.pdf> accessed 2 April 2019.

2 Author's translation.

3 Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (9 December 2011) 32.5.4, 192.

below. It seems to be generally accepted that the intention of the parliament is relevant to the interpreation of the Constitution.[4]

For the sake of comparison, I include the two provisions that served as models:

> **CRC article 3(1):**
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> **EU charter article 24(2):**
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

While referring specifically to best interests in the 1981 Children and Parents Act section 48, the Law Commission added that the principle reaches beyond decisions on parental responsibility, residence and contact. The aim of including it in the constitution was to make it generally visible.[5]

In the following, I will first present the constitutional provision on best interests with reference to the reasoning given in the preparatory works in more depth. Subsequently, I discuss the interpretation of the provision through a couple of central Supreme Court judgments. The following subchapters consider the possible impact of the constitutionalisation of best interests on case law and preparation of legislation. Finally, in the concluding remarks, I will comment on the development so far, the importance of section 104(2) for other actions than case law and legislation, and the prospects of an increased impact of children's best interests through their constitutionalisation.

2 Certain Issues in the Text and Its Preparatory Works

2.1 *Introduction*

This section will focus on certain issues that arise from the text of section 104(2) or the explanation given in the preparatory works. The main document

4 Arnfinn Bårdsen, 'Norges Høyesterett og «barnets beste» som konvensjonsforpliktelse og grunnlovsnorm' in Magnus Matningsdal, Jens Edvin A Skoghøy and Toril Marie Øie (eds), *Rettsavklaring og rettsutvikling: Festskrift til Tore Schei* (Universitetsforlaget 2016) 243–268, 251.

5 Dokument 16 (n 3) 32.5.4, 192.

in preparation of the new chapter is the Law Commission's report mentioned above. Additionally, I will refer to the report of the Parliament Standing Committee on Scrutiny and Constitutional Affairs which is the internal body preparing the case for the debate in Parliament. The preparatory works are relevant to the interpretation and normally given some weight. The issues dealt with below are the scope of the provision, the link between best interests and the right of the child to be heard, the weight of the child's best interests, and finally the significance of section 104(2) as envisaged by the Law Commission.

2.2 *Scope of the Provision*

While the two model provisions only mention 'actions', the Norwegian one adds 'decisions'. In the Norwegian legal context where (physical) actions are often discussed as being contrary to decisions it may be useful for pedagogical purposes that decisions are specifically mentioned to avoid any misunderstanding.

Like CRC article 3, the constitutional provision uses 'children' in the plural in the first part of the sentence and 'the child' in the second part. In its rather sparse comments the Commission seems to have individual decisions in mind, but does not explicitly comment on whether the provision is meant for groups of children as well. The question is relevant to legislative processes and other general decisionmaking, such as local decisions on where to place a school or on public transportation, or the environment for that matter. It is generally acknowledged that, under CRC article 3, the best interests of children or a group of children shall be taken into account as a primary consideration in legislation and other general actions concerning them.[6] The wording of section 104(2) does not indicate that it is limited to individual decisions, and when nothing to the contrary is explicitly said in the preparatory works, it should be understood to include general decisions. This is important for all kinds of general decisions at the local, regional or central level. For most decisionmaking the obligation already follows from the CRC being incorporated in the Human Rights Act. Including it in the Constitution, however, makes it an obligation which is binding even on Parliament. So for all laws affecting children their best interests need to be considered in developing and adopting formally enacted legislation.

The required relationship between the action in question and the child is somewhat complicated due to different terms used in English and Norwegian

6 UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para. 1*) (29 May 2013) CRC/C/GC/14, paras 19, 23 and 99.

in different contexts. Irrespective of this, the Law Commission explains that the Norwegian term used in section 104(2) on best interests (*berører*) is a wider term than the one used in section 104(1) on children's right to be heard (*gjelder*). Their explanation is that children do not have the right to participate in all cases affecting them. Consequently, under the Constitution the decision-maker may not have to hear the child in all instances where he or she has to undertake a best interests assessment. In a way this makes sense. For example, Norwegian judges are gradually realising that they should take the best interests of a child into consideration when sentencing its parents for a crime, at least if the child resides with that parent and imprisonment is a possible outcome.[7] In that context judges have questioned whether they should actually hear the child in the criminal case, indicating that this does not seem natural, which is in my view understandable. On the other hand, according to the CRC, the child has the right to be heard whenever a decision 'affects' them, which sentencing a parent to prison would certainly do. This question of interpretation is more closely linked with the right of the child to be heard than with best interests, but it certainly has a bearing both on the willingness of decisionmakers to take the child's best interests into account and on the contents of those interests.

The Norwegian Constitution does not indicate whose decisions or other actions are covered by this obligation, as opposed to its models. The preparatory works just briefly mention that the provision covers decisions made by public authorities and private persons, including legal persons.[8] In the EU charter, the reference is quite simply made to public authorities and private institutions, whereas the CRC has a longer list but covering more or less the same actors. Probably the reason for omitting a reference to the actors in the text itself is that the Consitutional provisions were supposed to state the universal human rights principles without too many specificities.[9]

Since the Constitution does not specify any duty-bearers, the obligation must be understood to rest on anyone dealing with children. This would include parents and other individuals who are not covered by the international provisions. It remains to be seen whether this will make any difference in practice, particularly for parents and other individuals. To place criminal liability on anyone for an action that is not in a child's best interests, based on the Constitution alone, is out of the question. It would need a specific provision in statute, due to the requirement of legality (Constitution section 96). As for civil

7 Discussions at training courses for lawyers where the author has been present.

8 The Norwegian term used is 'private', which includes legal persons such as organisations, institutions and companies.

9 Mandate of the Human Rights Commission, see Dokument 16 (n 3) 2.2.

cases between individuals, parental conflicts are the most practical ones, and the best interests of the child are already the guiding principle for these under the Children and Parents Act. Should a conflict arise between, for example, a mother and a grandmother regarding residence of or contact with a child the grandmother does not have standing before the courts under the Children and Parents Act today, unless one of the parents is dead, see sections 46 and 63. Being an overarching rule, the constitutional provision might possibly lead to a different approach to the grandmother's claim. The court, being bound by the Constitution, may perhaps have to deviate from the Act and consider what solution is all in all in the child's best interests. Vis-à-vis the mother in this case it may play a role that the Constitution does not limit the obligation to respect the child's best interests to certain actors. The issue is closely related to the potential right of the child and the grandparent to respect for their family life with each other under section 102, which is not up for discussion here.

The CRC has an additional provision on best interests in relation to parents. Recognising the primary responsibility of parents for the upbringing and development of the child, article 18(1) adds: '[t]he best interests of the child will be their basic concern'. While thus stating what is expected of parents, the Convention cannot place direct obligations on them. Like all human rights conventions, it can only commit states through their ratification, whereas the Constitution is binding on everybody.

2.3 *Link with the Child's Right to Be Heard*

In line with CRC article 3(1) the Constitution, section 104(2), does not specify the contents of the child's best interests, nor do the preparatory works attempt to do so. Still the Law Commission mentions that it is a natural extension of the right of the child to be heard with weight attached to the child's views. At the same time, the best interests of the child shall be taken into account, whether they concur with the child's views or not.[10]

From this statement a few points may be deducted. First, the views of the child form an element in the best interests assessment. Under section 104(1), children have a right to be heard in issues concerning them, and their views are to be given weight in accordance with their age and development.[11] Consequently, they have a constitutional right to be heard in relation to most[12] best interests assessments, and their views are to be considered in assessing the

10 Dokument 16 (n 3) 32.5.4.

11 See Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

12 See this chapter, section 2.2. above.

child's best interests. This also follows from CRC articles 12 and 3 and General Comments No. 12 and 14.[13] There is a slight difference as the Constitution only says that the views of the child should be given 'weight', not 'due weight'. Although the formulation in the Constitution thus appears to be weaker, it may not make a difference in practice as long as both provisions add 'in accordance with age and maturity'. One may argue that the requirement of 'due' is implicit.

Secondly, it follows from what has just been said that the views of the child are not necessarily decisive. Depending on the circumstances, the child's best interests may all in all indicate a different solution than the one the child would have liked to see.[14] This is in line with the CRC and its interpretation, where the child's views form one of the elements in the best interests assessment, albeit an important one.[15]

Thirdly, the previous point implies that the responsibility for determining the child's best interests does not rest with the child. It lies with the adult decisionmaker, who cannot leave the decision to the child. Following the child's views should never be an easy way out for the adult decisionmaker who has to assess and determine the best interests of the child in a holistic way as mentioned above.[16]

All of these points imply that the best interests assessment has to be based on the specific circumstances of the individual child.[17] This is perhaps the most essential aspect of the concept of best interests and follows from the wording itself, 'the best interests of the child'. The preparatory works of the Constitution do not say this explicitly, but it seems to be taken for granted. As the purpose of including human rights in the Norwegian Constitution was to ensure the universal principles, not the details,[18] section 104(2) does not list the elements in the best interests assessment, nor do the preparatory works.

What I have said here is directly about individual decisions, but it is also relevant to decisions or actions of a general nature. Then it is the views of children in general or the group of children concerned that have to be considered in determining their best interests.[19]

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13 UN Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard* (20 July 2009) CRC/C/GC/12, General Comment No. 14 (n 6).

14 Dokument 16 (n 3) 32.5.4.

15 Art 12(1) 'due weight', General Comment No. 14 paras (n 6) 52–53, 83.

16 Kristin Skjørten and Kirsten Sandberg, 'Children's Participation in Family Law Proceedings' in Malcolm Langford, Marit Skivenes and Karl Harald Søvig (eds), *Children's Rights in Norway: An implementation Paradox?* (Universitetsforlaget 2019), eg 4.2.2 at n 40, referring to LG-2006–62064 (Court of Appeal).

17 General Comment No. 14 (n 6) paras 24, 32.

18 Dokument 15 (n 3) 2.2 (the Commission's mandate).

19 General Comment No. 12 (n 13) paras 73, 87; General Comment No. 14 (n 6) para 52 'child or children'.

2.4 *Weight of Best Interests*

A decision or other action may not only concern children, but other individuals, groups or interests as well. Once the best interests of the child or children have been assessed and determined, they must be balanced with those other rights or interests. According to the Commission, the weight of the child's best interests in a decision will vary according to how strongly the child is affected and how serious the decision is for the child. In cases concerning parental responsibility, residence and contact, the child's interests should carry great weight. In other cases, where the child is less affected, other factors may be given weight as well. Consequently, the Commission says, the best interests of the child principle will imply a proportionality consideration.[20] The Parliament Standing Committee in its subsequent report repeated that the weight of the child's best interests must be viewed in relation to how strongly the child is affected and how serious the decision is for the child.

General Comment no. 14 does not describe article 3(1) as a proportionality principle, but it does state the following:

> [S]ince article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application.[21]

It adds that the word 'primary' requires the following:

> [A] willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[22]

Thus, the Committee on the Rights of the Child acknowledges that the weight is to a certain extent relative. There does not seem to be any intended difference between this and the Law Commission's comment on proportionality.

The Law Commission also states that the child's best interests shall be taken into consideration, but not necessarily be decisive.[23] This statement was related to two possible wordings that they discussed. The one they chose contained the words 'primary consideration', whereas the other one only said that the best interests of the child should be considered. Certainly the word 'primary' distinguishes the two options from one another and makes the wording of the

20 Dokument 16 (n 3) 32.5.4.
21 General Comment No. 14 (n 6) para 39.
22 General Comment No. 14 (n 6) para 40.
23 Dokument 16 (n 3) 32.5.4.

present text stronger, meaning that the best interests are not just one out of a number of considerations, even if the Law Commission did not comment explicitly on this.

2.5 *Significance of the Provision*

While emphasising the strong political and symbolic significance of a constitutional provision on children's rights, the Law Commission added that it could also have a legal impact, depending on the areas covered by a constitutional provision and how they would be delimitated. First and foremost it would be a factor in the interpretation of other pieces of legislation, implying in many instances that legislation be interpreted so as to give the 'best solution' for children. The constitutional provision might also be used as a barrier against adopting legislation that disregards children's need of favourable conditions for their upbringing and protection against abuse.[24]

As a factor in the interpretation of laws, seeking the best solution for the child must be understood as a reference to the child's best interests. As Stang points out, this obligation already followed from the CRC article 3(1), as incorporated in Norwegian legislation through the Human Rights Act, with priority over ordinary legislation.[25] Best interests as a barrier for the legislator may arguably have followed already from the ratification of the CRC, see Stang.[26] However, in guiding the interpretation of other Acts a constitutional provision is stronger than a convention incoporated through ordinary statute. It also forms by far a stronger barrier than a Convention, whether incorporated or only ratified. Should any piece of legislation not take children's best interests into account, it would undoubtedly be easier for the courts to set it aside based on the Constitution than on the CRC.

As expressed by Sinding Aasen, even if the provision does not really change Norwegian law, constitutionalisation has added a particular weight to best interests.[27] She adds that section 104 clearly expresses that children's needs and interests shall enjoy a strong legal protection in Norway.

The Law Commission mentioned that the best interests principle was already included in several pieces of specific legislation in addition to the

24 Dokument 16 (n 3) 32.5.1.

25 Elisabeth Gording Stang, 'Grunnloven § 104: En styrking av barns rettsvern?' in Geir Kjell Andersland (ed), *De Castbergske barnelover 1915–2015* (Universitetsforlaget 2015) 104–105.

26 Stang (n 25) 105.

27 Henriette Sinding Aasen, 'Grunnloven § 104 og barnets beste: Høyesterett viser vei' (2015) 3 Tidsskrift for familierett, arverett og barnevernrettslige spørsmål 197–201, 197.

Children Act, such as the Child Protection Act, the Immigration Act and in its universal form in the CRC article 3(1). Interestingly, the Commission added that including the principle in the Constitution would make it generally visible, without altering the legal situation.[28] The latter seems to be in contrast to what is cited from the Commission's report above, about the possible legal impact of a provision. That statement, however, concerned a provision on children's rights in general, whereas the limitation to visibility is directed specifically at the part on best interests and thus is more relevant in this context.

An interesting issue before Norwegian courts has been whether article 3 is justiciable in and of itself, without being connected to some other claim, for compensation, for an administrative act to be set aside, etc. The Supreme Court of Norway, in 2012, decided that article 3 is not justiciable as such, because it does not give the child a legal claim.[29] The majority did not distinguish between the substantive and procedural implications of article 3(1).[30] In his dissenting opinion, Justice Bårdsen argued that article 3(1) indeed places obligations on the States and gives the child an individual right. The fact that its wording is vague and general is not unusual in a human rights context. He noted that when the CRC was incorporated into the Human Rights Act, it was presumed to become directly applicable. Even if this might not fully apply to some of the economic, social and cultural rights, such limitations are not relevant to article 3(1). He found a violation of article 3(1) in that it was unclear in the present case whether the norm of making best interests 'a primary consideration' had been applied in a correct manner. Thus, the way I read his opinion, he spoke about the substantive aspect of article 3(1).[31]

In a subsequent article, Bårdsen argues that section 104(2) sheds new light on this issue, and that the solution chosen by the Supreme Court regarding article 3(1) cannot automatically be transferred to the new constitutional rights.[32] He does not elaborate on this point of view.

The possible signifance of the provision will be further discussed in the following.

28 Dokument 16 (n 3) 32.5.4.

29 Rt 2012 p 2039, para 101.

30 See Kirsten Sandberg, 'Barnets beste som rettighet' in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten: Begreper, trender, teorier* (Gyldendal Akademisk 2015) chapter 3, 57–83 for a discussion of art. 3 (1) as containing various elements of rights.

31 Rt 2012 p 2039, paras 116–130.

32 Bårdsen (n 4) 267.

3 The Use of General Comments in the Interpretation

3.1 *General Aspects*

An important question is whether international sources of interpretation of CRC article 3(1) can be used in the interpretation of section 104. According to the statement by the Law Commission mentioned above, the resemblance between the constitutional provision and article 3 makes it possible to use jurisprudence under the latter to interpret section 104(2). It even states that such jurisprudence will make a useful contribution to its interpretation.[33] For a general discussion of the use of international sources in the interpretation of section 104, see chapter 3 above. Below I will specifically discuss the use of General Comment No. 14 in relation to best interests.

3.2 *Best Interests and the Maria Judgement*

General Comment No. 14 on the best interests of the child had already been adopted before the adoption of the human rights provisions in the Constitution in 2014. Thus it does not fall into the category of later jurisprudence of a more dubious position in relation to the Constitution. According to the judgment in the so-called Maria case, Rt. 2015 p. 93, the general comment is a natural starting point for the interpretation of article 3(1) and thus of section 104(2). The Court (Justice Bårdsen) in its reasoning refers to the statement by the Law Commission on the use of international jurisprudence in the interpretation of this provision and applies General Comment No. 14 in its discussion of the balancing of best interests with other interests. With reference to the Committee on the Rights of the Child, it states that the best interests of the child shall carry great weight and not just be one of several considerations: They are to form the starting point, be given particular attention and be in the forefront.[34]

In relation to this judgment, Stang notes as positive that the Supreme Court used section 104 as a basis for conducting a more in-depth examination of the child's best interests assessment undertaken by the administrative authorities than in previous case law. Furthermore, the Supreme Court confirmed that the best interests principle gives the child an individual right to have its interests taken into account as a primary consideration.[35] In her view, case law may indicate that including children's best interests in the Constitution has contributed to strengthening the legal protection of children, particularly in areas

33 Dokument 16 (n 3) 32.5.4.

34 Rt 2015 p 93 (the Maria case), 65.

35 Stang (n 25) 135.

where best interests do not already have such a firm position, for example, in immigration cases.[36]

Aasen sees the judgment as expressing that the Supreme Court considers international rules to be very important, but not as a replacement of a national legal system with the Constitution and the Supreme Court as guarantors of the rights of the individual. She adds that the clear anchoring of the judgment in section 104 brings forebodings of an increased significance of the Constitution as a source of law.[37]

I agree with these authors in their views on the promising aspects of that judgment as such. Still, their comments were written shortly after the judgment was delivered. Already in the same year the Supreme Court in the plenary took a much less active position to the application of best interests in an immgration case, which I will now turn to.

3.3 *Plenary Judgment and General Comment No. 14*

3.3.1 Starting Point of the Interpretation

In a later plenary judgment, Rt. 2015 p. 1388 (immigration, internal flight), section 104 was not seen to be applicable as it had not been adopted at the time of the administrative decision which was under review. The majority, however, could not see that section 104 being applied to the case would have given the children any stronger position than they had before.[38] As noted by Bendiksen and Haugli, the statement tones down the significance of section 104[39] with regard to best interests. But being an obiter dictum, a statement without relevance to the case in question, it does not carry the same weight as it would otherwise have done.

In this case, the Supreme Court is less positive than in the previous judgment to using the Committee's general comments in the interpretation, and General Comment No. 14 on best interests was particularly discussed. Even if the Court's discussion in this respect is not about the constitutional provision, the weight of general comments are of interest not only in interpreting the Convention but also the constitutional provision modelled on it. After presenting the various opinions, I will return to the possible significance of the case for the question we deal with in this book: Does constitutionalisation of children's rights and, more specifically, the best interests of the child, matter?

36 Stang (n 25) 136–37.

37 Aasen (n 27).

38 Rt 2015 p 1388.

39 Lena Bendiksen and Trude Haugli, *Sentrale emner i barneretten* (3rd ed, Universitetsforlaget 2018) 56.

Instead of considering general comments as a natural starting point of the interpretation, the majority states that they are not legally binding. It continues by saying that the weight of a general comment depends on how clearly it expresses the monitoring body's understanding of the parties' obligations under the convention, in particular, whether the statement in question is an interpretative statement or rather a recommendation of best practice. Additionally a statement's relevance to the facts and law of that particular case should be considered.[40] So in spite of its more sceptical attitude even the majority considers general comments to be relevant sources of interpretation.

The minority, in discussing General Comment No. 14, states that although the Committee's general comments are not binding, they are used in the interpretation by, among others, the European Court of Human Rights (ECtHR) and the UK Supreme Court. General comments should carry weight in the interpretation because they are based on the overall experience of the Committee on the Rights of the Child and the special role it has been given as the primary monitoring body in international law under the CRC.[41]

3.3.2 Justification of the Contents and Weight of Best Interests

The difference in approach and attitude appears most clearly in relation to what is required of the justification of the administrative decision. The Court's majority accepts that in the Immigration Board's consideration of humanitarian grounds for granting a residence permit, the best interests of the child were not explicitly discussed, as long as it appeared from the interpretation of the decision that best interests had been a primary consideration.[42]

One of the dissenting opinions (supported by 7 out of the 18 justices) is interesting in this respect:

> It has to appear from the decision that the best interests of the child have been a primary consideration. Thus, the child's interests must be identified and described, and an assessment must be made of those aspects of the child's situation that may be relevant to the case.[43]

Instead of leaving it to the reader to interpret the administrative decision to find out whether the child's best interests have been determined in a satisfactory way, it places more specific requirements on the explicit justification of

40 Rt 2015 p 1388, paras 151–52.
41 Rt 2015 p 1388, paras 271–72.
42 Rt 2015 p 1388, para 192.
43 Rt 2015 p 1388, para 273, Justice Bergsjø.

the decision. This is in line with General Comment No. 14, which requests the following:

> the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; …[44]

Regarding the weight of best interests, General Comment No. 14 says that 'States parties shall explain … how the child's interests have been weighed against other considerations'.[45] According to the Court's majority, it is hard to tell whether this is the Committee's view of how article 3 legally is to be understood or just an aim.[46] In my view, there is no reason to doubt that this is a legal interpretation by the Committee. It is formulated in the language of obligations, not more vaguely as an aim. Also, this interpretation of article 3(1) should be uncontroversial. If the courts are to monitor whether, in an administrative decision, best interests have been balanced with other considerations in a satisfactory way, then the balancing exercise needs somehow to be described in the decision.

The minority, on the other hand, finds good guidance in General Comment No. 14 in considering what article 3(1) requires of the justification of a decision and accepts the Committee's words as a legal requirement.[47] The justification of a decision is seen to be important not only for the sake of an effective judicial review, but also to structure the process of decision-making and ensure that the relevant considerations have been taken into account. In short, the justification should both *ensure* and *demonstrate* that the best interests of the child have been a primary consideration.[48] I find the discussion of these issues clarifying and useful.

3.4 *Some Concluding Remarks on the Interpretation Issues*

The majority in the plenary judgment has an overall sceptical attitude to the interpretative value of the Committee's general comments but does not reject them as a possible argument in the interpretation. In its interpretation of the Committee's statements, however, the majority seems to be influenced by its own basic attitude, demonstrated by what is in my view an unreasonable interpretation of General Comment No. 14 concerning the justification regarding

44 General comment no. 14 (n 6) para 6(c).
45 Ibid.
46 Rt 2015 p 1388, para 185.
47 Rt 2015 p 1388, para 272.
48 Rt 2015 p 1388, para 274.

best interests under article 3(1). A topical question is whether this reserved attitude towards General Comment No. 14 and the lenient expectations of the immigration authorities in justifying their decisions also express a reservation with regard to the weight of best interests. This would actually imply a reservation towards the Constitution section 104(2) as well, through the above mentioned statement which downplays its possible influence.

The encouraging aspect of the latter judgment is the fact that as many as 7 out of 18 justices did not agree with the majority neither on the value of general comments in the interpretation nor on the justification of the best interests consideration. It is a timely question whether the inclusion of best interests in the Constitution could influence the way these issues are considered and bring more Justices to recognise the importance of administrative authorities making proper best interests considerations, including the balancing exercises. As the effects of the constitutionalisation were not properly discussed in the plenary judgment, the majority's brief statement in this regard carries little weight. Arguably, the inclusion of best interests in the Constitution could and should influence the way they are dealt with both by administrative authorities and the courts. By using section 104(2) to expect more of the administrative authorities in the justification of their decisions, the courts could enhance the best interests of the child as a primary consideration. They might well require more of the way the best interests assessment and determination are described, as well as the explanation of how the best interests of the child are balanced with other interests in the case. In that way, the courts could demonstrate the importance of rights being included in the Constitution.

4 Impact on Case Law

4.1 *Introduction*

In discussing the possibility of a stronger position for the best interests of the child following their inclusion in the Consitution, it is not so interesting to try to predict the behaviour of Supreme Court Justices. I will rather try to see if there is anything in the constitutionalisation itself that could arguably lead to a strengthening of the position of the child's best interests in a legal sense. With that in mind, I have looked at recent Supreme Court practice where section 104 has been mentioned. Most of the decisions are short rulings where the provision is either just argued by the parties or briefly mentioned by the Court. Others deal with different parts of section 104 such as the right to be heard. Below I present a few decisions that in my view may indicate something about the value of best interests being included in the Consitution.

4.2 *Child Protection—the Jakob Case*

In a judgment from 2017 in a child protection case, the question was whether contact between parents and child should be denied because the parents had exposed their baby boy to serious violence before he was six weeks old (called the Jakob judgment).[49] At that age it had been discovered that the baby had 19 rib fractures, and the parents were later held criminally liable, the father for causing the injuries and the mother for not providing medical assistance. The Supreme Court decided in favour of supervised contact once a year for one hour. On the constitutional issues the Court states that the right to family life under the Constitution section 102 has to be seen in connection with section 104 and CRC article 3(1). As the two provisions are complementary, the child's interests carry great weight in the consideration of proportionality under section 102, it said. The Court also discussed practice from the ECtHR under article 8,[50] including more recent judgments than the adoption of the Constitutional human rights provisions in 2014, implying that it does not limit its use of such practice to earlier decisions.

The Supreme Court focuses on the requirement of the ECtHR that a measure not in line with the aim of reunification of child and parents may only be applied in 'exceptional circumstances'. Yet, the Supreme Court upholds its own interpretation of this criterion, that contact may only be denied for 'special and strong reasons'. In my view there may be a certain difference between this and the criterion as formulated by the ECtHR. The term exceptional circumstances leads us to look at the child's situation as a whole, taking past and present circumstances into consideration, whereas special and strong reasons may imply that something is needed in addition to the situation being exceptional – at least in the way the Supreme Court applies the criterion in this case. The abuse of the child in my view undoubtedly forms exceptional circumstances. Yet it is almost invisible in the Court's reasoning, which only occupies itself with possible reasons for denying contact, none of which the Supreme Court finds to be special and strong enough. The problem may lie primarily in the application of the criterion in this case, but it may also be a consequence of transforming the ECtHR requirement into something with a slightly dfferent connotation.

Due to the requirement of special and strong reasons it seems that the biological principle in its abstract sense – as a value for the child – overrides the other, more concrete interests of the child. With the Court's reasoning that

49 HR-2017-2015-A.

50 European Convention on Human Rights, Article 8.

contact is of possible advantage for the child in the long run, irrespective of the particular circumstances of the case, great weight is in reality attached to biology. Even though the biological argument may deserve a place among the elements in a best interests assessment, in my view, it was given too much attention in this case at the cost of all the other elements that should be taken into account, which might all in all have been considered as exceptional circumstances justifying the family ties being severed.[51]

4.3 *Other Child Protection Cases*

In the judgment in HR-2016-2262-A concerning whether a three-year-old child should remain in public care, the Supreme Court found that the conditions in the Norwegian Child Protection Act for non-return of the child were fulfilled, and subsequently considered whether human rights might lead to a different result. Referring to the best interests of the child being explicitly mentioned in section 104 and CRC article 3(1) but not in the European Convention on Human Rights (ECHR) article 8, the Court discussed the practice of the ECtHR in this regard. The mother had returned to South America while the child was in a Norwegian foster home, and the child did not yet speak the mother's language. In light of the possibilities of contact in this situation being severely limited, the Court found that retaining the boy in public care would require very strong reasons. Still, it was in the best interests of the child that the placement be continued. Moving to his mother in South America would be a very exceptional strain on the boy and imply a great risk of serious harmful effects. In this situation other considerations, such as the mother's interests and the child's need for contact with his biological mother, her family and her culture and language would have to be set aside. The Supreme Court in this case seems to have undertaken a proper individual best interests assessment, looking into what was in the best interests of the child all things considered.

The judgment in Rt. 2015 p. 110 concerns adoption in a child protection case. The Supreme Court referred to the fact that adoption is a far-reaching decision for which CRC article 21 requires that the best interests of the child shall be not only a primary, but the paramount consideration. On the other hand, the Court said the parents' interests have to yield where decisive circumstances on the part of the child speak in favour of adoption. In this regard, the Court referred to the Constitution section 104(2), CRC article 3(1) and the ECtHR judgment

51 See, also, Markus Jerkø, 'Skal ikke «barnets beste» leses bokstavelig?: En kritikk av HR-2017-2015-A 'Jakob-saken'' (2018) 57(2) Lov og Rett 112.

Aune v. Norway (2010)[52] where no violation was found. The ECtHR stated that an adoption could only be considered necessary under art. 8 if it was motivated by 'an overriding requirement pertaining to the child's best interests'.[53] Since the ECtHR accepted the reasoning in the Norwegian Supreme Court Aune judgment, the expression used there – particularly weighty reasons being required for an adoption to take place – was considered by the Supreme Court in the 2015 decision to express the same norm as the one quoted from the ECtHR.[54] The case is pending before the ECtHR at the moment (1/9/2018, Pedersen). I have included it because the reasoning of the Supreme Court is of interest anyway.

4.4 *Cases from Other Areas*

In a case regarding compensation for manslaughter committed by a child of 15.5 years, the child (represented by his guardians) had asserted that since under section 104 and the CRC article 3(1) the best interests of the child shall be a primary consideration, he should be exempted from liability for compensation to the relatives of the two victims. The Supreme Court interpreted the 1969 Compensation Act[55] in the light of these provisions, pointing to the fact that the Act and its preparatory works were written at a time when children's rights were less prominent. Still, the Court said, the child's best interests are not necessarily decisive. To what extent they override other interests, depends on an individual assessment and balancing of the different relevant considerations (51). The Court discussed CRC article 40 on children in conflict with the law and the importance of rehabilitation, but found that General Comment No. 10 on children in conflict with the law did not shed any light on the issue of compensation. The Court added that the considerations in the general comment had been duly taken care of in deciding the prison sentence in this case.

Summing up, the Court found that the Compensation Act section 1-1 on the liability of children is formulated in such a way as to give the flexibility necessary to comply with the obligations towards children under the Constitution and the CRC. According to section 1-1, children under the age of 18 years are under the obligation to pay compensation for harm they have caused intentionally or negligently, provided that it is reasonable with regard to the child's age, development, behaviour, economy and other circumstances. The Court said that both in relation to the basic requirement for imposing liability on a

52 *Aune v Norway* App no 52502/07 (ECtHR, 28 October 2010).

53 *Aune v Norway* (n 52) para 66.

54 Rt 2015 p 110 para 46.

55 Act relating to compensation in certain circumstances of 13 June 1969 No. 26 (*skadeserstatningsloven*). The English translation is in printed version only.

child and in determining the amount, the best interests of the child shall be a primary consideration. The aims of rehabilitation and resocialisation of the child have to be taking into account in the consideration of reasonableness, but need not be decisive. If the claim for compensation is related to serious criminal acts, eliminating the liability or reducing it below the normal amount would require considerably more than in other cases. All in all, the Court in this case found that the aims of rehabilitation and resocialisation should not lead to a reduction of the young boy's obligation to pay compensation to the relatives, in the light of his brutal acts of killing two individuals. In addition, the compensation was seen as a way to hold the perpetrator accountable for what he had done.

As an example from another area, I find this decision interesting in that it uses the best interests of the child in interpreting the reasonableness criterion in the Compensation Act. The aims of rehabilitation and resocialisation are discussed based on CRC article 40. Although from a different article, these aims also serve to inform the best interests assessment and thus the assessment of reasonableness.

4.5 *Summing Up*

Although the best interests of the child have been examined and considered in all of these cases, the constitutionalisation of the obligation to take them into account as a primary consideration does not seem to have had a bearing on the Court's reasoning in the judgments above. The reason is partly that article 3(1) was already part of Norwegian legislation through the Human Rights Act; partly that best interests were already considered in practice by the ECtHR. As for child protection cases, the best interests of the child have since long been the decisive consideration according to the Norwegian Child Welfare Act. In the judgments no particular arguments are taken from section 104, thus it is hard to say that it has had any independent significance in Supreme Court practice. However, it is always mentioned, which at least underpins the importance of the best interests principle.

5 Impact on the Preparation of Legislation

5.1 *Introduction*

Legislative bodies are specifically mentioned in article 3 among those that are obliged to take children's best interests into account as a primary consideration. Moreover, General Comment No. 14 states that the requirements of article 3 apply at all stages of the adoption of laws, policies, budgets etc. concerning

children in general or as a specific group.[56] Article 3 is not only relevant to an individual child, but to children in general or a certain group of children. All kinds of general implementation measures need to consider the best interests of the child. Regarding legislation, the general comment further states:

> The right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation, not only in laws that specifically concern children.[57]

It is easier to remember to do an assessment of the best interests of the child when preparing legislation with 'child' in the title, but it is just as important to include it for legislation that may be applied to children in other areas.

Best interests being included in the Constitution means a strengthened obligation on legislative authorities to take them into account in developing new legislation or law amendments.[58] As stated by the Law Commission, including best interests in the Constitution makes the principle more visible,[59] thus making it easier to remember and feel obliged to include. Below I have looked into some documents that have led or may lead to changes in the legislation to see whether any influence of the constitutional provision is visible. The laws or areas chosen are the Immigration Act, the Commission on Violence against Children, the proposal of a new Child Welfare Act and the proposed new Criminal Procedures Act, The question here is not whether a consideration of best interests is actually included in a law proposal, but whether it seems to make a difference that the obligation, since 2014, follows from the Consitution, not only from the incorporated CRC.

5.2 *The Immigration Act*

In 2015 and 2016 amendments to the Immigration Act were made in order to introduce a number of restrictive measures.[60] In the preparatory works of both amendments children's best interests were considered.

With regard to taking asylum-seekers into police custody, the relevant provision in the Immigration Act was extended to certain asylum seekers who would

56 General Comment No. 14 (n 6) para 10.
57 General Comment No. 14 (n 6) para 31.
58 Bendiksen and Haugli (n 39) 56.
59 Dokument 16 (n 3) 32.5.1.
60 Act 20 Nov 2015 No. 94 amending the Immigration Act (restrictive measures) (*endringer i utlendingsloven, innstramninger*), Act 17 June 2016 No. 58 (restrictive measures II) (*endringer i utlendingsloven, innstramninger II*).

most probably not have their applications processed (Section 106 g). The aim of taking them into custody would be to ensure that they would not disappear and to facilitate a quick return.[61] Unaccompanied minors and families with children, however, were explicitly exempted from this extension of the authority with the reasoning that even without an explicit exception it would hardly ever be allowed to take them into police custody. In that regard, somewhat surprisingly, reference was only made to provisions in the Immigration Act and the Criminal Procedures Act, not to human rights or the Constitution.[62]

The Bill concerning the second round of restrictive measures in the immigration context, on the other hand, refers to human rights and constitutional obligations for each of the proposed amendments. One of the proposals was to widen the mandate to give children only a provisional residence permit until the age of 18. Reaching that age, the child would have to apply again. Many of the commenting bodies in the written hearing emphasised that the proposal was contrary to children's rights, including article 3.[63] In spite of these objections, the Ministry in the Bill considered the proposal to be in line with Norway's obligations, since article 3 only required that the best interests of the child have been considered and weighed against other relevant considerations in a reliable manner. This did not imply that the child's best interests would necessarily be decisive.[64] Best interests had to be given great weight by the authorities, including the legislator, without dictating a certain outcome. Other considerations might be so weighty that they be prioritised.[65] The considerations weighing more heavily were, as usual in this area, those of immigration regulation, including providing disincentives to families to prevent them from sending a child alone on such a dangerous journey. Several of the commenting bodies disagreed with the Ministry's description of the facts in this respect, including governmental agencies.[66]

With reference to the constitutional provision in this regard, the Ministry explicitly said:

> The Ministry presumes that section 104 second subsection of the Constitution should be interpreted in the light of the corresponding provision

61 Prop. 16 L (2015–2016) Amendments to the Immigration Act (restrictions) (*endringer i utlendingsloven mv., innstramninger*), section 6.3.1, 18.

62 Prop. 16 L (n 61), section 6.3.1, 19.

63 Prop. 90 L (2015–2016) Amendments to the Immigration Act (restrictions II) (*endringer i utlendingsloven mv., innstramninger II*), section 6.5.4.

64 Prop. 90 L (n 63), section 6.5.5, 72.

65 Prop. 90 L (n 63), chapter 4, 21.

66 Prop. 90 L (n 63), section 6.5.

> in the CRC article 3, ref. Rt. 2015 p. 93, and that the provision does not make any additional demands of the legislator than what already follows from the CRC.[67]

It is interesting that the Ministry comments on the relationship between article 3 and section 104, and they may be right in saying the latter makes no additional demands. Yet, seen in relation to the emphasis on best interests not necessarily being decisive, the Ministry reduces the importance not only of article 3 but also of the Constitution section 104(2). Of course, it is correct that 'a primary' consideration means that other considerations may weigh more heavily, but not without a proper examination of the effects on children of the proposed rule, including how the uncertainty of their situation affects their development. In line with children's right to development under article 6, the ultimate purpose of considering the child's best interests should be to ensure the full and effective enjoyment of the rights recognised in the Convention and the holistic development of the child.[68] Such an examination of the effects on children's development had not been undertaken.

5.3 *The Commission on Violence against Children*

In its report from 2017 on serious cases of violence against children, called *Failure and Deceit*,[69] the government appointed Commission on Violence Against Children (the VAC Commission) pays great attention to the principle of the best interests of the child. It states the following:

> The constitutional provision and the incorporation of the CRC through the Human Rights Act implies that legislation which does not explicitly mention the principle of the child's best interests shall be interpreted so as to include it.[70]

The VAC Commission points out that the best interest principle is not explicitly included in a wide range of legislation. Apart from in the area of children and parents – the Children and Parents Act, the Adoption Act and the Child Welfare Act – it is included in the Biotechnology Act and the Immigration

67 Prop. 90 L (n 63) section 6.5.5, 73 (author's translation).

68 General Comment No. 14 (n 6) para 51.

69 NOU 2017: 12 Svikt og svik – Gjennomgang av saker hvor barn har vært utsatt for vold, seksuelle overgrep og omsorgssvikt (Barnevoldsutvalget) <https://www.regjeringen.no/no/dokumenter/nou-2017-12/id2558211/≥ accessed 2 April 2019.

70 NOU 2017: 12, section 13.3.1 (author's translation).

Act.[71] Therefore, the Commission asked the author of this chapter to write a report on how the best interests of the child could be included in legislation in all relevant areas. My report appears as an attachment to the Commission's report.[72] Seen in the light of the topic of this chapter, my report seems to take for granted that including the provision in the Constitution does not add much to the obligations that already followed from CRC article 3, at least it is not discussed. What the report does say is that the best interests of the child have been raised to a higher level within the sources of law.

The Commission itself in its deliberations recommends that the best interest's principle be explicitly included in various pieces of legislation regulating different sectors of society. Interestingly, they say that this should happen not because of, but in spite of, the incorporated article 3 and the Constitution section 104. Since, according to these provisions, the principle is already part of Norwegian legislation, it should not be necessary to include it in other statutes regulating specific areas. Nevertheless, the Commission made this recommendation to make the principle more visible and thus increase the attention to it, as well as to clarify its meaning in certain contexts. The aims would be to improve co-ordination between sectors and to stimulate the various sectors to have a more active role in their work to prevent violence and identify and follow up children exposed to violence.[73]

5.4 *Proposal for New Child Welfare Act*

The Commission preparing the new Child Welfare Act mentions that section 104(2) provides the best interest's principle with constitutional status and that the provision is modelled on CRC article 3(1) and the EU Charter article 24(2). The report then discusses the interpretation of article 3. Thus, article 3 and section 104 are discussed together, and the report does not indicate any additional value of including it in the Constitution, apart from increased status as mentioned.[74]

Attached to the Commission's report is a separate report on child welfare and human rights.[75] This report discusses the difference between the formulation

71 Act 8 April 1981 No. 8 relating to children and parents (Children and Parents Act), Act 16 June 2017 No. 48 relating to adoption (Adoption Act), Act 17 July 1992 relating to child welfare services (Child Welfare Act), Act 5 December 2003 No. 100 relating to the application of biotechnology in human medicine, etc. (Biotechnology Act), Act 15 May 2008 No. 35 relating to the admission of foreign nationals into the realm and their stay here (Immigration Act).

72 Kirsten Sandberg, *Barnets beste i lovgivningen: Betenkning til Barnevoldsutvalget*, 21 December 2016.

73 NOU 2017: 12, section 13.4.2.

74 NOU 2016: 16 Ny barnevernslov – Sikring av barnets rett til omsorg og beskyttelse.

75 NOU 2016: 16, attachment 4, Child welfare and human rights.

in the constitution, which only demands that best interests be 'a primary consideration' and the present Child Welfare Act stating that they shall have 'decisive weight'. The report refers to the preparatory works of the constitutional provision saying that best interests imply a proportionality consideration and that the weight of the child's best interests depends on how strongly affected the child is and how serious the decision is for the child. Since child protection cases are so important for the child, the report concludes that section 104(2) may possibly require that the best interests of the child be decisive in child protection cases, unless the case affects the child insignificantly. In any case, as the report states, there is nothing to prevent the legislator from going further than what the Constitution requires. This would also be in line with the jurisprudence of the ECtHR requiring that in such cases the best interests must come before all other considerations, not just be 'a' primary consideration. The ECtHR has also used the term 'paramount'.[76]

5.5 *Proposal for a New Criminal Procedure Act*

The Law Commission appointed to propose a new Criminal Procedure Act in 2016 submitted a report of around 700 pages.[77] The report, which is an impressive piece of work, does not mention the Convention on the Rights of the Child, except in relation to detention of children before and after the incorporation of the Convention in 2003. Nor does it mention section 104 of the Constitution. Regarding human rights, it mainly concentrates on the European Convention on Human Rights. There should have been a reference to the CRC in relation to children in conflict with the law, at least article 37 on deprivation of liberty and article 40 on procedural safeguards, but also the best interests of the child and the right of the child to be heard. The latter is of interest in respect of children as victims or witnesses as well. The lack of such references and discussions is concerning and seems to suggest an indifference to the situation of children in conflict with the law and their rights.

6 Concluding Remarks

Law proposals to a varying degree refer to the constitutionalisation of the best interests of the child. The two reports which explicitly comment on the

76 *Neulinger and Shuruk* v Switzerland, App no 41615/07 (Grand Chamber 6 July 2010), para. 135, *R. and H.* v. the UK, App no 35348/06 (31 May 2011), para 73.

77 NOU 2016: 24 Ny straffeprosesslov.

significance of section 104(2) take different positions. The Ministry preparing the amendments to the Immigration Act seems to reduce the importance of the provision by saying that it makes no demands in addition to those already following from article 3(1), while, at the same time, stressing that best interests need not be decisive. The report on human rights attached to the Child Welfare Act proposal takes the provision more seriously in suggesting that in light of the proportionality aspects of section 104(2), the legislator may actually have an obligation to make the best interests of the child the decisive factor in child protection cases. Unsurprisingly, the best interests of the child is thus given a stronger position in child protection cases than in immigration cases. Nonetheless, the fact that immigration is a more politicially sensitive area with allegedly strong considerations pointing in the opposite direction, does not justify downplaying the best interests of the child and their constitutionalisation as done by the Ministry.

The Supreme Court in its case law often mentions section 104(2) together with CRC article 3(1) but apparently with no added value. One exception worth noticing is the Maria judgment in early 2015,[78] making more active use of section 104. Even if the majority in the plenary judgment later that year[79] deprived section 104(2) of any independent significance, the weight of that statement is reduced by its being an obiter dictum without relevance to the case in question. In its future practice the Supreme Court should take the opportunity to emphasise the importance of the constitutionalisation by demanding more of the examination of the child's best interests undertaken by administrative authorities, as well as its weight in decision-making, thus strengthening the obligation to take children and their interests seriously.

In this chapter, I have focused on case law and preparation of legislation. Yet, the obligation to make the best interests of the child a primary consideration has a much wider scope. All general measures undertaken by the central, regional and local authorities shall take the best interests of children into account, such as budgeting processes, plans and decisons in all areas – transportation, the environment, health, education, leisure etc. Also, in the everyday life of the child, all actions shall have the best interests of the child as a primary consideration, in regard to play, sports, family life etc.

The prominent status that the best interests of the child have achieved by being included in the Constitution reinforces the right of children to have their

78 Rt 2015 p 93 (see 3.2 above).

79 Rt 2015 p 1388 (see 3.3.1 above).

best interests taken into account and the obligation of the State and other actors to do so. Through a more active attitude to the constitutionalisation, the courts and the law-makers, as well as other actors, should emphasise in practice the added value that the higher status has provided.

References

Bendiksen L and Haugli T, *Sentrale emner i barneretten* (3rd ed, Universitetsforlaget 2018).

Bårdsen A, 'Norges Høyesterett og «barnets beste» som konvensjonsforpliktelse og grunnlovsnorm' in Magnus Matningsdal, Jens Edvin A Skoghøy and Toril Marie Øie (eds), *Rettsavklaring og rettsutvikling: Festskrift til Tore Schei* (Universitetsforlaget 2016).

Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (9 December 2011).

European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Jerkø M, 'Skal ikke «barnets beste» leses bokstavelig? – En kritikk av HR-2017-2015-A 'Jakob-saken'' (2018) 57(2) Lov og Rett 112.

NOU 2016: 16 Ny barnevernslov – Sikring av barnets rett til omsorg og beskyttelse (dato Måned år).

NOU 2016: 24 Ny straffeprosesslov (dato Måned år).

NOU 2017: 12 Svikt og svik – Gjennomgang av saker hvor barn har vært utsatt for vold, seksuelle overgrep og omsorgssvikt (22 June 2017).

Prop. 16 L (2015–2016), Amendments to the Immigration Act (restrictions) (*endringer i utlendingsloven mv., innstramninger*).

Prop. 90 L (2015–2016), Amendments to the Immigration Act (restrictions II) (*endringer i utlendingsloven mv., innstramninger II*).

Sandberg K, 'Barnets beste som rettighet', in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten: Begreper, trender, teorier* (Gyldendal Akademisk 2015).

Sandberg K, *Barnets beste i lovgivningen: Betenkning til Barnevoldsutvalget*, 21 December 2016.

Skjørten K and Sandberg K, 'Children's Participation in Family Law Proceedings' in Malcolm Langford, Marit Skivenes and Karl Harald Søvig (eds), *Children's Rights in Norway: An implementation Paradox?* (Universitetsforlaget 2019).

Stang EG, 'Grunnloven § 104 – en styrking av barns rettsvern?' in Geir Kjell Andersland (ed), *De Castbergske barnelover 1915–2015* (Universitetsforlaget 2015).

UN Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard* (20 July 2009) CRC/C/GC/12.

UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para. 1*) (29 May 2013) CRC/C/GC/14.

Aasen HS, 'Grunnloven § 104 og barnets beste: Høyesterett viser vei' (2015) 3 *Tidsskrift for familierett, arverett og barnevernrettslige spørsmål* 197–201.

CHAPTER 9

Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?

Hannele Tolonen, Sanna Koulu and Suvianna Hakalehto

1 Introduction

The best interests of the child is both internationally and nationally accepted as the most central, recurrent concept in modern legislation on childhood as well as in judicial praxis in matters concerning children and their legal status. The paramountcy of the best interests of the child is well established in child law and the concept has received wide attention in jurisprudence. Internationally, the best interests standard has been emphasised in the Convention on the Rights of the Child (CRC) and developed in the legal discussion on its provisions. Despite the lack of a specific provision on the best interests of the child in the European Convention of Human Rights (ECHR), the concept has also been developed in the jurisprudence of the European Court of Human Rights (ECtHR).[1]

In the Finnish legislation, the concept of best interests has been present from the early 20th century. Today, the principle is central for example in legislation concerning parental responsibility, adoption, paternity, child welfare, social welfare and immigration law.[2] However, throughout the 20th century the concept of best interests has been employed mostly in substantive legislation. There is no specific mention of the best interests of the child in the Constitution itself. While the best interests of children are not specifically mentioned, it should be noted that several constitutional provisions can be seen to

1 See eg *Handbook on European law relating to the rights of the child* (European Union Agency for Fundamental Rights and Council of Europe 2015) 30–31.

2 Act on Child Custody and Right of Access (361/1983 laki lapsen huollosta ja tapaamisoikeudesta, Custody Act), Adoption Act (22/2012 adoptiolaki), Paternity Act (11/2015 isyyslaki), Child Welfare Act (417/2007 lastensuojelulaki), Social Welfare Act (1301/2014 sosiaalihuoltolaki), and Aliens Act (301/2004 ulkomaalaislaki).

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reflect similar dimensions of the concept that are expressed in the CRC, such as treating children as individuals.[3]

Despite the widespread adoption of the principle in legislation, the UN Committee on the Rights of the Child has given Finland feedback for not understanding its importance. The Committee has also noted that the principle has not been implemented systematically in legislation and in courts.[4] This implies that the understanding of the principle rooted in Finnish legal system is perhaps still not equivalent to the Committee's interpretation of the principle.

There are also diverging viewpoints within the Finnish literature on the role of the principle of the best interests of the child and on the importance of international and human rights provisions. For example, *Nieminen* has emphasised the conceptual connection between best interests and constitutional and human rights, arguing that the best interests are realised when children's constitutional and human rights are realised.[5] On the other hand, *Helin* has pointed out that the concept of best interests had strong roots in the substantive family law of the 1980s, arguing that the constitutional substance on the concept is meagre.[6]

The openness of the interpretation of the concept also gives rise to debate. The contested and debated nature of the principle of best interests reflects important tensions in children's legal position and family and child policy. Firstly, the best interests principle has been criticized for having been interpreted too narrowly as only promoting the protection of children as vulnerable minors, and calls have been made to include the participation of the child more clearly in the assessment of his or her best interests.[7] Secondly, the principle can be adopted in favour of a number of political stances regarding children and families. When the parliament restricted the right to early childhood education and care from full-time to part-time for children whose parent is staying at home,

3 See also Merike Helander, 'Utvecklingsbehov i den finländska lagstiftningen om barn' (2018) Nordisk Administrativt Tidsskrift nr. 1, 5, 7–9.

4 UN Committee on the Rights of the Child, *Concluding observations: Finland* (20 June 2011) CRC/C/FIN/CO/4 para 27.

5 Liisa Nieminen, 'Lasten perus- ja ihmisoikeussuojan ajankohtaisia ongelmia' (2004) Lakimies 591, 621.

6 Markku Helin, 'Perusoikeuksilla argumentoinnista', in Tero Iire (ed), *Varallisuus, vakuudet ja velkojat: Juhlajulkaisu Jarmo Tuomisto 1952 - 9/6 – 2012* (University of Turku, Faculty of Law 2012). On the discussion, see also Liisa Nieminen, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013).

7 The UN Committee on the Rights of the Child notes succinctly that 'there can be no correct application of article 3 if the components of article 12 are not respected', see *General Comment No. 12 (2009) The right of the child to be heard* (1 July 2009) CRC/C/GC/12 para 74.

the best interests concept was used in public debate not merely advocating for children's rights but also to promote the interests of parents as well as professionals in early childhood education and care.[8] In these discussions, the concept can sometimes seem inconsistent, as the legal meanings intertwine with other interpretations.

In this paper, we wish to make sense of these interpretations and tensions in the Finnish context. We discuss how the principle of promoting the child's best interests gained ground in Finnish 20th century legislation and examine the arguably crucial change that has taken place since the 1980s: the best interests of the child is increasingly interpreted in light of providing for the child's human rights and the rights of a child. We also examine whether a 'constitutionalisation' of this principle might be taking place. To this end we analyse current research, legislative work and case law, focusing especially on parental responsibility, child protection, immigration law and education. We pay particular attention to the material from the early 1980s, when the best interests principle was strengthened in a large legislative reform. After that, we move on to discuss the development from the 1990s – when the Constitution was renewed – to the present day. Last, we illustrate the current situation with some examples of the national legislation and its recent development and case law.

2 The Best Interests Principle in the Past and in the Present

2.1 *The Historical Roots of the Principle*

In Finnish legislation, national statutory provisions on the best interests of the child (*lapsen etu, barnets bästa*) have long preceded the current Constitution and CRC. The concept is mentioned in the adoption and matrimonial legislation from the 1920's, as well as in the first Child Welfare Act (1936). An early example of discussion on the concept can be found in Melander's dissertation on parental responsibility that was published in 1939.[9]

During the 1970's and the early 1980's, the aim to advance individual children's best interests by means of legislation gained more ground in the significant reform of legislation on children's person and family relations, where children's equality and participation were acknowledged in a rather modern way. These child law reforms can be said to have transformed the principle into

8 Suvianna Hakalehto and Toomas Kotkas, 'Subjektiivinen päivähoito-oikeus – sosiaalioikeutta, lapsioikeutta vai molempia?' (2005) Lakimies 1040–1063.

9 Ilmari Melander, *Lapsen huollosta: Yksityisoikeudellinen tutkimus 1* (Suomalainen Lakimiesyhdistys 1939).

a cornerstone of national legislation.[10] In 1983, the aim of advancing the child's interests became the cornerstone of the 'twin statutes': Custody Act and Child Welfare Act.

According to the Custody Act, which is still in force, any decision on parental responsibility must be made *in accordance with the best interests of the child*.[11] The purpose of child welfare and child protection measures was to guarantee the quality of care. Similar provisions also came to apply in adoption and in implementing individual decisions and agreements on parental responsibility. In CRC article 3, the best interests are famously stated to be *a* – instead of *the* – primary consideration[12] while in the above-mentioned Finnish legislation the principle is, at least on the surface, meant to be decisive.[13]

The concept of the best interests of the child became a subject of a lively discussion in the Finnish legal doctrine on children's family relations.[14] In the aftermath of the legislative reform, *Savolainen* analysed the different aspects of the concept in light of the new custody legislation in detail, making references to psychological literature as well as to the international discussion.[15] One of the most profound changes was the turn from the previous ideal of a sole caretaker to a new ideal of joint custody. This shift took place relatively early in Finland, as was stated by *Kurki-Suonio* in a dissertation on changing legal interpretations of the best interests of the child in divorce or separation.[16] In 2006, *Auvinen* concluded the earlier discussion on the best interests of the child in a

10 See eg Government Proposals HE 224/1982 vp 4–6 and HE 13/1983 vp 8–9. For discussion, see also Matti Savolainen, *Lapsen huolto ja tapaamisoikeus* (Suomen Lakimiesliiton Kustannus 1984).

11 Custody Act section 10 subsection 1.

12 See, for example, Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 91.

13 See eg the Finnish Supreme Court case KKO 2003:126 in which the court states that according to section 10 of the Custody Act: 'all matters concerning custody and visiting rights of the child are decided on the basis of the child's best interests, regardless of whether parents agree or disagree on the matters at hand' (translation here).

14 Also researchers on social work have been active in studying topics around the best interests of the child. See, for example, Maritta Törrönen (ed), *Lapsen etu ja viidakon laki* (Lastensuojelun keskusliitto 1994).

15 Savolainen (n 10).

16 Kirsti Kurki-Suonio, *Äidin hoivasta yhteishuoltoon*: *lapsen edun muuttuvat oikeudelliset tulkinnat - Oikeusvertaileva tutkimus* (Suomalainen Lakimiesyhdistys 1999). In the dissertation, Finnish discussion was compared with that in Sweden, Germany, England and California. It is stated that the preference of joint custody was first adopted in a Californian reform on 1980. Finland and Sweden followed shortly thereafter, in 1983. On the English summary, see *ibid* 566. Personal relations and contact with both parents are emphasised for example in the later adopted CRC, article 9.

way that reflected the widening dimensions and openness of the concept. The definition given in the dissertation on custody proceedings includes societal, psychological, cultural and moral dimensions. The best interests are described as both communal and individual.[17]

During recent years, the discussion on the principle of the best interests of the child and its importance in legislative work and court practice has continued in the Finnish jurisprudence.[18] In a doctoral dissertation examining children's rights, it is common to include a special chapter dedicated to the best interests principle.[19]

2.2 *Best Interests in Light of Children's Fundamental and Human Rights*

The 1990s brought a change in Finnish doctrine, as the CRC and the ECHR were ratified and implemented nationally, and human rights considerations became increasingly influential for legal decision-making. The understanding of the best interests of the child was still rooted in substantive legislation, but its interpretations started drawing on treaty obligations[20] and, slowly, ECtHR case law. In 1995, the previous Constitution was renewed, adding provisions on fundamental rights (969/1995). These provisions were strongly influenced by human rights instruments, which brings similarity to their content, despite the conceptual differences.[21]

17 Maija Auvinen, *Huoltoriidat tuomioistuimissa: sosiaalitoimi selvittäjänä, sovittelijana, asiantuntijana* (Suomalainen Lakimiesyhdistys 2006) 203.

18 See, for example, Annika Parsons, *The best interests of the child in asylum and refugee procedures in Finland* (Ombudsman for Minorities, publication 5, 2010); Virve-Maria de Godzinsky, *Lapsen etu ja osallisuus hallinto-oikeuksien päätöksissä* (Oikeuspoliittinen tutkimuslaitos 2014); Suvianna Hakalehto, 'Lapsen edun arviointi korkeimman oikeuden perheoikeudellisissa ratkaisuissa' (2016) Defensor Legis 427–455; Milka Sormunen, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24 IJCR, 155–184.

19 See Henna Pajulammi, *Lapsi, oikeus ja osallisuus* (Talentum 2014) 181–203; Sanna Koulu, *Lapsen huolto- ja tapaamissopimukset* (Lakimiesliiton Kustannus 2014) 308–315; Hannele Tolonen, *Lapsi, perhe ja tuomioistuin: Lapsen prosessuaalinen asema huolto- ja huostaanotto-oikeudenkäynnissä* (Suomalainen Lakimiesyhdistys 2015) 74–98; Virve-Maria Toivonen, *Lapsen oikeudet ja oikeusturva: lastensuojeluasiat hallintotuomioistuimissa* (Alma Talent 2017) 79–118.

20 See eg Liisa Nieminen, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990) and Liisa Nieminen 2013 (n 6) 305. Human rights provisions were also increasingly, although sporadically, applied in case law. See eg the Finnish Supreme Court decision KKO 1996:151, in a case related to international child abduction.

21 See Heikki Karapuu, 'Perusoikeuksien käsite ja luokittelu' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 67.

However, the constitutional reform did not include the concept of the best interests in the list of fundamental rights. This meant that even after the reform, the concept of best interests continued to develop in the light of human rights obligations more than based on constitutional rights. In the Constitution, the concept of best interests is still not mentioned. On the other hand, it is important not to overstate the significance of this omission, as children's rights and the CRC were specifically considered in the reform.[22] The equal treatment of children was added to the list of the fundamental rights, reflecting the wording of the CRC: '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'.[23] Children's wellbeing and personal development were also included in the provision on social security, where the support to families and others responsible for providing for children is highlighted.[24]

According to the constitutional provision on protection of basic rights and liberties, the public authorities shall also guarantee the observance of human rights.[25] When the constitutionality of legislative proposals is supervised in the parliament, their relation to international human right treaties is also assessed.[26]

In the recent discussion, the effects of the international conventions on the concept of the best interests have become more visible. The importance of the CRC has been made explicit.[27] References to the provisions of this convention

22 A reference to the CRC was made in the preparatory works. Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta (HE 309/1993) 44–45. It has been pointed out that children's constitutional rights have earlier roots. See Nieminen 2004 (n 5) 592.

23 The Constitution of Finland 731/1999 (*Suomen perustuslaki*) section 6(3). An unofficial translation of Constitution is available at <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731_20111112.pdf> accessed 2 April 2019.

24 Nowadays in the Constitution, section 19 subsection 3. On emphasis on the family in the preparatory works see Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (PeVM 25/1994) 10. See also Perustuslakivaliokunnan lausunto (PeVL 30/2009 vp) hallituksen esityksestä laeiksi lastensuojelulain, vankeuslain 4 ja 20 luvun sekä tutkintavankeuslain 2 luvun 5 §:n muuttamisesta.

25 Section 22.

26 Section 74. The sections mentioned in this paragraph and other features of the system are also discussed in S Hakalehto, 'Constitutional Protection of Children's Rights in Finland', this volume, chapter 4; S Koulu, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?', this volume, chapter 17; H Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings, this volume, chapter 12.

27 See, for example, Markku Helin, 'Perheoikeuden siveellinen luonne' (2004) Lakimies 1244, 1252.

and, increasingly, to the Committee's general comments have become common in the later doctrine. The ECHR also plays a role in the discussion.[28] Even though the convention does not contain a specific provision on the best interests of the child, the concept has been developed in the jurisprudence of ECtHR, where it has been discussed in light of the provisions of the CRC.[29] It has been pointed out that the effective supervisory mechanism of the ECHR has underlined its importance also when children are concerned.[30]

These human rights provisions point out that a child's best interests must be determined in the context of his or her close relations, especially in relations with the child's *family members*. This aspect can clearly be seen in the text of the CRC, where close relations and the procedural rights of family members are protected by separate provisions, for example, in articles 9 and 18. In this sense, the umbrella of the best interests can be seen to encompass family relations in the convention.[31]

In the case law of the ECtHR, the discussion on the best interests of children has often taken place in the cases where the focus has been on questions concerning *protection of family life* (article 8).[32] It should be noted that protection of family relations has formed an interesting, twofold relation with the concept of the best interests. On the one hand, it is generally in accordance with children's best interests to keep their family relations as intact as possible. On the other hand, in cases of negligence or violence the individual child's best interests can be seen to require that a family relation be restricted.[33] Thus a decision on taking a child in care has seldom been considered to breach the

28 See, for example, Liisa Nieminen 2004 (n 5) 591, 594; Koulu (n 19) 67; Tolonen (n 19) 41; Milka Sormunen, 'Lapsen etu Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä' in Suvianna Hakalehto and Virve Toivonen (eds), *Lapsen oikeudet lastensuojelussa* (Kauppakamari 2016) 308.

29 See, for example, Nieminen 2013 (n 6) 344.

30 Nieminen 2004 (n 5) 594.

31 See also John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017) 53, 65: 'Instead of pitting the rights of parents against those of children, the CRC offers a *relational rather than individualistic* conception of rights …' (emphasis added).

32 The relation of these two principles is examined later in this volume. See eg Koulu 2019 (n 26).

33 See, for example, *A.E.L. v Finland* App no 59435/10 (ECtHR, 10 December 2013) para 60. On the Finnish discussion on this aspect in light of the recent ECtHR case law see Tolonen (n 19) 93; Sormunen (n 28) 328. See also Sami Mahkonen *Lastensuojelu ja laki* (3rd ed, Edita Publishing 2010) 131.

article 8 rights,[34] but the authorities have an obligation to facilitate the reunification of the family in a reasonable way.[35]

The decisions on taking into care bring up an important conceptual division in the concept of the best interests: the concept relies on an understanding of what children's best interests are *generally*, while it also needs to account for an *individual* child's best interests in the specific circumstances of the case.[36] Since the 1990s, children's individual treatment has been acknowledged in the Constitution, while the best interests principle has traditionally been strongly connected to safeguarding the welfare of the child.[37] The dual aspect of the best interests is widely acknowledged in recent discussion.[38] *Koulu* has noted that both conceptions of the best interests standard are present in Finnish case law, and their sometimes uneasy co-existence can show tensions in our understanding of children's legal standing.[39] In a similar vein, *Hakalehto* has found that the Supreme Court examines four main elements in assessing the best interests of the child in family law cases: i.e. securing the development of the child, maintaining relationships to both parents, paying attention to the views of the child and factors concerning the execution of the decision.[40]

Originally, the best interests of the child were linked mainly to the child protection, custody and maintenance, and adoption.[41] The 1983 Custody Act connected the principle firmly with the child's individual situation and circumstances.[42] Since then, children's own, individual input has been more clearly included in the definition of the concept of the best interests. In the

34 However, see the discussion on case *K. and T. v Finland* [GC] App no 25702/94 (12 July 2001) below in 3.2.

35 Finnish handbooks and commentaries on ECtHR case law are one crucial channel through which human rights praxis is adopted in national legal reasoning. For some examples, see eg Matti Pellonpää and others, *Euroopan ihmisoikeussopimus* (6th ed, Alma Talent 2018) and Päivi Hirvelä and Satu Heikkilä, *Ihmisoikeudet: Käsikirja EIT:n käytäntöön* (Alma Talent 2017). On international discussion, see for example Frédéric Sudre, *Droit européen et international des droits de l'homme* (13e ed, Presses Universitaires de France 2016) 770.

36 See Matti Mikkola and Jarkko Helminen, *Lastensuojelu* (Karelactio 1994) 21, where this division is discussed in light of the Child Welfare Act of 1983.

37 Pajulammi 2014 (n 19) 188.

38 See for example Pajulammi 2014 (n 19); Tolonen 2015 (n 19); Toivonen 2017 (n 19).

39 Koulu (n 19).

40 Hakalehto (n 18) 427–455.

41 Suvianna Hakalehto 'Lapsen oikeudet lapsen oikeuksien sopimuksessa' (2011) Defensor Legis 515. On the international discussion, see Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Kluwer 2002).

42 See Savolainen (n 10) 116.

earlier discussion, the concept of child's best interests can be described as foremostly based on objective grounds. The best interests could be construed by an outside observer looking at the circumstances. In the later discussion, more subjective stances on the concept have emerged.[43]

In line with the constitutional provision and the more detailed approach of the international conventions and their interpretations, the importance of children's participation when their best interests are determined has also gained ground in the Finnish legislation and discussion.[44] Early on, children's wishes were considered separate from their best interests, but this understanding is perhaps giving way to a more integrated approach. In light of the CRC, it is indeed doubtful whether a decision could be considered to be in accordance with the best interests of the child if sufficient attention has not been paid to the child's views and opinions.[45]

In the later Finnish legal research, the challenges of using the best interests principle have been emphasised.[46] An issue here is that the criteria used for assessing the best interests of the child are shaped by the perspectives of different professions, such as social workers and doctors and the police, which may lead to inconsistent interpretations.[47] Calls for a more precise formulation of the concept of the best interests have continued in the recent discussion.[48] One approach is to connect the principle more firmly with the rights-based view based on the provisions of the CRC. The rights-based view of this principle has also been emphasised by the Children's Ombudsman in statements concerning legislative proposals ever since the office was established in 2005.

In recent case law, Supreme Court has mentioned children's constitutional rights in the context of their best interests. The Court has stated that holders of parental responsibility must take into account the restrictions that are

43 Here, the terms objective and subjective are used in a similar way that can be found in for example Swedish preparatory works. See Statens offentliga utredningar 1997:116, section 6.2.1.

44 The concept of participation and the procedural aspects are discussed in more detail by one of the authors in another article in this volume. See Tolonen (n 26).

45 See UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* (29 May 2013) CRC/C/GC/14, para 43. See also Nieminen 2004 (n 5) 691; Pajulammi (n 19) 190.

46 See, for example, Toivonen (n 19) 107–109 and Koulu (n 19) 308–315.

47 Päivi Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa* (WSOYpro 2006) 234–235. The vagueness of the best interests principle might result from the culture of reasoning: the elements of the best interests of the child are not always clearly stated and it might remain unclear which criteria has been taken into account.

48 See Toivonen (n 19) 112–113.

possibly set by children's constitutional rights and to aim for decisions that realise children's overall best interests.[49] In effect, the best interests of the child were conceptualised in light of constitutional rights as well as human rights obligations. If this line of thinking were to become more prevalent, it would require paying attention not only to the concrete welfare of the child or to international human rights instruments like the CRC but also to the constitutional rights provisions in the Constitution.

3 The Best Interests Principle in Recent Legislative Work and Case Law

3.1 *Parental Responsibility*

According to the *Custody Act* (361/1983), the purpose of custody (*huolto*) includes ensuring the welfare and balanced development, good care and age-appropriate supervision of the child. Education, environment, understanding and affection are also mentioned among the criteria, as well as supporting the child's growth towards independence and responsibility. Corporal punishment is specifically prohibited.[50] In the discussion, these provisions have been interpreted to reflect the idea of children having constitutional rights, despite the lack of a specific reference in the preparatory works.[51]

A recent reform in legislation, which will come in force in December 2019, brings several changes in the Custody Act and some related provisions. In the preparatory works, the constitutional provision on children is mentioned and international human rights provisions are discussed.[52]

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49 See the criminal law case KKO 2018:81 (on publishing filmed material on child protection measures) where a reference was made to an earlier Supreme Court case KKO 2008:93 (on male circumcision).

50 Section 1 reads like this, according to an unofficial translation: 'The purpose of child custody is to ensure the welfare and balanced development of a child in accordance with the child's individual needs and wishes. The purpose is also to secure a close and affectionate relationship in particular between the child and his or her parents. (2) A child must be ensured good care and upbringing as well as supervision and protection appropriate for his or her age and stage of development. A child should be brought up in a secure and stimulating environment and receive an education that corresponds to his or her inclinations and wishes. (3) A child must be brought up with understanding, security and affection. A child must not be subdued, corporally punished or treated offensively in any other way. The growth of a child towards independence, responsibility and adulthood must be supported and encouraged.' <https://www.finlex.fi/en/laki/kaannokset/1983/en19830361.pdf≥ accessed 9 December 2018.

51 See Nieminen 2004 (n 5) 593–594.

52 Government proposal HE 88/2018 vp. Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi

Many of the modifications can be seen to strengthen the goals of more individualised determination of a child's best interests. Firstly, the goal of protecting children against possible risks will be more clearly expressed in the provision on the purpose of custody. An obligation to protect the child from all physical and mental violence, mistreatment and abuse was added in section 1. According to the preparatory works, the purpose is to realise the obligations that can be derived from CRC article 19.[53] During the parliamentary work, a related modification was also made to the provision on the grounds for decision on parental responsibility (*huolto ja tapaamisoikeus*, custody and visitation). The parents' ability to protect children against all violence was added among the criteria.[54]

Secondly, more flexibility will be introduced to material decisions on children's living and access arrangements. The possibility of alternating residence (*vuoroasuminen, växelvis boende*) is acknowledged in the provisions. It may be agreed or given a court order that a child lives alternately with two parents or a parent and another person who has parental responsibility.[55] Another change towards a more individualised determination of children's best interests is that a court may make an order on a child's contact with other relatives and close persons, if their relation with the child is comparable to that of a parent and child. In the preparatory works, references are made to ECtHR case law on article 8.[56]

The provision on veto power that children have when decisions or agreements on parental responsibility or contact are enforced is also slightly modified, calling for a more individual determination of the situation. According to the current legislation, children's right to refuse enforcement is expressed in absolute terms, leaving little leeway for individual considerations.[57] In *C. v*

laeiksi. In preparation of the proposal, a wide range of interest groups from different fields of society were heard. The discussion and comments illustrate the differing interpretations children's best interests can be given, depending on the point of view.

53 HE 88/2018 vp (n 52) 18.

54 Custody Act (190/2018) section 1 subsection 2; section 10 subsection 3. See also Legal Affairs Committee Report 12/2018 vp. Lakivaliokunnan mietintö hallituksen esityksestä eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi (LaVM 12/2018 vp).

55 See Custody Act (190/2018) section 7; section 7b; section 9 subsection 2.

56 Custody Act (190/2018) subsection 9c. On the preparatory works, see HE 88/2018 vp (n 52) 13–14.

57 Enforcement may not take place against the will of a child who has attained 12 years or against the will of a younger child if they are considered sufficiently mature (laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta 619/1996 section 2).

Finland (2006), ECtHR criticised the Finnish Supreme Court for giving an impression that 12- and 14-year-old children could decide the outcome of a parental responsibility case.[58] According to the modified provision, the factors possibly affecting children's opinion are to be given consideration when assessing their refusal.[59]

A tendency to take children's best interests better into account in the more general procedural framework is also gaining momentum. In the recent discussion, the need for suitable, tailored approaches in decision-making has been called for to ensure the best interests of the individual child. All parental responsibility conflicts are not the same. In *Auvinen's* analysis of parental responsibility cases, standard 'equal' conflicts were differentiated from more complicated cases: psychosocial conflicts, where parents' abilities may be compromised, and pathological conflicts, where conflict level is heightened.[60] If risk factors for the child's wellbeing are in sight, a more thorough procedural approach and additional safeguards may be needed to protect the best interests than in a situation where all available alternatives can be deemed safe.[61]

An example of new, more tailored approach to parental responsibility proceedings is a special court mediation, which was legislated in 2014. The mediation takes place in district courts with the help of an expert mediator.[62] According to the recently reformed provisions in the Custody Act, such experts are also introduced in cases that are not mediated but disputed in court. A court may appoint an expert (*asiantuntija-avustaja*) to help to hear a child a child-friendly way. Besides helping the judge, the expert may also meet the parents.[63]

3.2 *Child Protection*

The objective of child welfare services (child protective services, *lastensuojelu*) is intertwined with the goal of safeguarding and promoting the best interests

58 *C. v Finland* App no 18249/02 (9 May 2006). In more detail, see Tolonen (n 26).

59 Laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta (191/2018) section 2 subsection 2.

60 Auvinen (n 17) 254.

61 Tolonen (n 19) 360. On this standpoint in light of the Swedish system see Anna Kaldal, *Parallella processer: En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål* (Jure Förlag 2010) 169.

62 Custody Act chapter 3a (315/2014). See also Kirsikka Salminen, 'Mediation and the Best Interests of the Child from the Child Law Perspective' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 209, 212.

63 Custody Act (190/2018) section 15a. See also HE 88/2018 vp (n 52). The provision aims to strengthen children's possibilities for participation. The aim is also reflected in the changes on children's personal hearing by the courts and by the social authorities. The aspects of participation are discussed in Tolonen (n 26).

of the child. In the current Child Welfare Act,[64] the objective of the act is 'to protect children's rights to a safe growth environment, to balanced and well-rounded development and to special protection'. In the same vein, it is 'first and foremost the interests of the child that must be taken into account' in providing child welfare services (Child Welfare Act, section 4).[65] The fact that the best interests of the child are an important justification for state intervention[66] also leads to a fundamental tension for child welfare services. The best interests of the child are a key concern in carrying out child welfare measures, but many of those measures can also affect the child's life in negative ways by e.g. limiting the child's contact with her family or by placing restrictions on her enjoyment of other constitutional rights.[67]

This tension between safeguarding the child's best interests and intervening in her daily life has been recognized in Finnish legislative work early on[68] and it underlies many of the ECtHR decisions regarding Finland. An important strand of case law concerns the separation of the child from her family via decisions on taking the child into care. Thus, for example, the case *K. and T. v Finland* [GC] (2001)[69] involved several emergency care orders, care orders, and restrictions on access that were examined separately in the light of article 8 of ECHR. No violation was found for the normal care orders or the restrictions on access, and they were considered to be in service of the authorities' primary task of protecting the children's best interests.[70] At the same time, the Court

64 Child Welfare Act (417/2007, lastensuojelulaki). An unofficial translation of the Act is available at <https://www.finlex.fi/fi/laki/kaannokset/2007/en20070417_20131292.pdf≥ accessed 24 August 2018.

65 The complete list in section 4(2), according to an unofficial translation, is the following: '1) balanced development and wellbeing, and close and continuing human relationships; 2) the opportunity to be given understanding and affection, as well as supervision and care that accord with the child's age and level of development; 3) an education consistent with the child's abilities and wishes; 4) a safe environment in which to grow up, and physical and emotional freedom; 5) a sense of responsibility in becoming independent and growing up; 6) the opportunity to become involved in matters affecting the child and to influence them; and 7) the need to take account of the child's linguistic, cultural and religious background.'

66 Cf *Handbook on European law relating to the rights of the child* (n 1) 99.

67 In Finnish jurisprudence this tension, and the relation between the governance of families and the protection of children, has been examined eg by Eeva Valjakka in her doctoral dissertation *Vain lakiko lasta suojelee?* (University of Turku 2016) 191–196.

68 Government proposal HE 13/1983 vp (n 10) 5.

69 *K. and T. v Finland* [GC] App no 25702/94 (12 July 2001).

70 See also *Olsson v Sweden* (*No. 1*) App no 10465/83 (24 March 1998), where the placement decisions had eg significantly restricted family life due to geographical distance.

noted that the Finnish authorities had overstepped the margin of appreciation especially with regard to the extremely harsh measure of taking a new-born into care based on an emergency care order, and had not taken proper steps to reunite the family. The reasoning of the Court shows the importance of procedural safeguards. In addition, children's rights considering the ECHR also require the state parties to make sure that social services are available to protect children and that effective remedies exist for negligence or other shortcomings in the provision of those services.[71]

In domestic terms, the case law of ECtHR was a significant influence on the current Child Welfare Act. The current act dates from 2007 and was based on thorough reforms that aimed at bringing the legislation up to date regarding Finland's international treaty obligations. The constitutional rights reform of 1995 and the implementation of the CRC were a key element in the need for reform, and the case law of ECtHR was analysed carefully regarding involuntary care orders in particular.[72] The provisions of the ECHR are reflected e.g. in the procedural provisions in chapters 14 (Administrative court proceedings) and 15 (Appeals) of the reformed Act[73] and the preparatory works specifically examine the case law of the Court.[74] Meanwhile, the provisions of the CRC were highlighted in connection with safeguarding children's agency and participation rights in the reformed Act.[75]

> Interestingly, the best interests of the child are not directly based on human rights obligations in the preparatory works preceding the reform.[76] Instead, the best interests standard is presented more as a measure of the child's day-to-day well-being than a treaty obligation, perhaps drawing from the established tradition of evaluating the best interests of the child in family law contexts. In comparison with the weight given to human rights treaties in the reform of procedural provisions and children's participation, the concept of the best interests of the child remains more flexible.

71 See eg *Z and others v the United Kingdom* [GC] App no 29392/95 (10 May 2001) .

72 See Government proposal HE 252/2006 vp Hallituksen esitys lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi, chapter 2.1.2.

73 See HE 252/2006 vp (n 72).

74 HE 252/2006 vp (n 72) 44–45.

75 HE 252/2006 vp (n 72).

76 See eg HE 252/2006 vp (n 72) 117, where section 4 on determining the child's best interests is discussed very briefly. CRC is mentioned but not really utilized in formulating the content of the section.

The reform of 2007 was comprehensive, and in addition to the changes drawing directly on human rights considerations, it introduced several improvements in its practical implementation. Some of the improvements are not immediately obvious, though, nor is there always an explicit connection to the underlying treaty obligations. For example, section 32, on identifying the network of people close to the child, is hidden away in chapter 6 on procedural rules. The section provides that before a child's placement away from home 'it is necessary to investigate what opportunities there are for the child to live with the parent with whom the child does not primarily reside, with the relatives or with other persons close to the child, or for these parties otherwise to participate in supporting the child.' The section goes on to note that 'A matter concerning the child's accommodation or placement location must always be resolved in a manner consistent with the child's interests.' There is an implied connection between a child's best interests and family relations, but the preliminary works focus on the child's well-being and do not include references to specific treaty obligations or general comments.[77]

The developments of the past decade also show in domestic case law. Unlike cases on child custody and contact, which belong to the Supreme Court (*korkein oikeus*), child welfare cases are part of the ambit of the Supreme Administrative Court (*korkein hallinto-oikeus*). The Supreme Administrative Court has adopted a human-rights-sensitive approach early on in its reasoning, and the recent case law reflects this to a notable extent.[78] For example, in its decision KHO 2004:121, the Supreme Administrative Court examined whether and when open care orders might be shown to be insufficient to safeguard the best interests of the child, and bases its decision on the provisions of the CRC as well those of the ECHR and national legislation.[79]

However, the picture on the grassroots level is not quite as rosy as the well-founded reasoning of the Supreme Administrative Court might suggest. Child welfare services are chronically underfunded, and the dual role of social services (as services aiming to provide for children and their families' well-being, versus as decision-makers on sensitive topics such as access) makes for friction in the provision of services. The praxis of the Parliamentary Ombudsman (*Eduskunnan oikeusasiamies*) has noted several issues that affect the

77 HE 252/2006 vp (n 72) 150.

78 However, see Sormunen (n 18) where the author notes that the consideration of the best interests principle depends largely on the issue in question.

79 The court referred specifically to CRC articles 3, 9 and 20, and to article 8 of the ECHR. The court also mentioned the case law of ECtHR and especially the decision in *Couillard Maugery v France* App no 64796/01 (1 July 2004).

constitutional rights of children and families, and one key area in this praxis is whether the best interests of the child are safeguarded appropriately. The most recent yearly report lists shortcomings in child welfare services as one of ten pressing issues in the realization of human and constitutional rights in Finland.[80] Many of the shortcomings the report calls out are related to the need for more resources and more effective oversight for child welfare services. The report also emphasises the constitutional rights of children in care, especially institutional care, and the importance of system-level integration of mental health care and child welfare services.

3.3 *Education*

3.3.1 Basic Education

In Finland, it is still not common to see school as an area where children should be noticed as independent right holders regardless of their status according to the Constitution of Finland. When the Finnish Basic Education Act[81] was prepared, the CRC was mentioned at the list of the human rights treaties, but no further attention was paid to children's rights.[82] Instead the Act mostly highlights the duties of pupils.[83] The same goes with the Act of General Secondary Education[84] and the Vocational Education and Training Act.[85]

Disciplinary methods are one key area where human rights obligations should be considered in education, and, in 2013, amendments were made to the education legislation concerning them.[86] The preliminary works refer to the CRC but the role of the Convention in school legislation is not discussed closely. However, participation rights which are an essential element of the

80 See Parliamentary Ombudsman's yearly report 2017, 113. The report is available in Finnish and Swedish at <https://www.oikeusasiamies.fi/fi/toimintakertomukset≥ and <https://www.oikeusasiamies.fi/sv/web/guest/verksamhetsberattelser≥ accessed 24 August 2018.

81 Perusopetuslaki, 628/1998.

82 Government proposal HE 86/1997 vp. Hallituksen esitys eduskunnalle koulutusta koskevaksi lainsäädännöksi, 13.

83 The Finnish Basic Education Act sets three duties for the students: the duty to attend classes, the duty to behave correctly and the duty to complete the tasks diligently (section 35). On children's rights and duties at school, see Suvianna Hakalehto, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012).

84 Lukiolaki, 714/2018.

85 Laki ammatillisesta koulutuksesta, 531/2017.

86 Government proposal HE 66/2013 vp. Hallituksen esitys eduskunnalle laeiksi perusopetuslain, lukiolain, ammatillisesta koulutuksesta annetun lain, ammatillisesta aikuiskoulutuksesta annetun lain ja kunnan peruspalvelujen valtionosuudesta annetun lain 41 ja 45 §:n muuttamisesta.

best interests of the child were introduced on a general level with new sections. Thus, section 47a of the Basic Education Act obligates schools to promote participation of pupils and to examine views of parents and students. However, the general right of the child to participate in his or her own matter is not embedded in school legislation except in a few specific situations.[87]

There is no general provision on the best interests of the child in the Basic Education Act.[88] This is probably one of the reasons best interests of the child have not been referred to in court praxis concerning school. The scarcity of the case law also plays a part, as there have been no school-related cases concerning children's rights in the Supreme Court. There are few cases in the Supreme Administrative Court, mainly on the right to free school transportation. The CRC or the best interests of the child have not been referred to in the reasoning of the school-related cases of the Supreme Administrative Court.[89]

The invisibility of the best interest principle in case law concerning children's rights at school probably follows from the lack of provision on the best interests of the child in school legislation. In the recent report of the Ministry of Education and Culture on preventing bullying at school one of the proposals is to add a provision concerning the best interests of the child to the Basic Education Act.[90]

Parliamentary Ombudsman refers regularly to the CRC in the cases concerning school. Ombudsman has stated that the best interests of the child must be a primary consideration in all decisions concerning arranging the teaching of an individual child.[91]

In Finland, school inspection was abolished in the early 1990s. No independent authority exists in charge of monitoring how children's rights are realised

87 According to the Basic Education Act the student must be heard before the decision on the special needs support is made (section 17, subsection 3) and before some of the disciplinary methods are used (section 36a, subsection 1). According to section 18, subsection 1 of the School Welfare Act (1287/2013; oppilas- ja opiskelijahuoltolaki) student's views must be given due weight according to his or her age and development.

88 Best interests of the child is included in section 17 of the Basic Education Act. No referral to CRC can be found in the preliminary work concerning the provision. Government proposal HE 109/2009 vp. Hallituksen esitys eduskunnalle perusopetuslain muuttamiseksi.

89 See KHO 2004:99, KHO 2006:10, KHO 2006:79, KHO 2006:80, KHO 2009:130 and KHO 2013:127. On Supreme Administrative Court's argumentation based on the best interests of the child see Sormunen (n 18) 155–184.

90 See 'Kiusaamisen ehkäisy sekä työrauhan edistäminen varhaiskasvatuksessa, esi- ja perusopetuksessa sekä toisella asteella. Loppuraportti' Opetus- ja kulttuuriministeriön julkaisuja 2018:16.

91 See, for example, EOA 12.7.2015, Dnro 1633/4/14 on the right of the child to get special support for learning.

in schools. National evaluations of education concentrate on learning outcomes rather than the legality of the activities and operation of schools. One of the main problems concerning children's rights and realising the best interests of the child in education seems to be the lack of the systematic and rights-based approach in legislation and in the everyday life at school.[92]

3.3.2 Early Childhood Education and Care

In contrast with the sparse provisions on children's rights in school settings, the legislation on early childhood education and care has recently been reformed in line with the obligations of the CRC. The new act on Early Childhood Education and Care[93] entered into force in September 2018. The preliminary work of the Act begins by citing the general principles of the CRC and listing the contents of the articles 3, 12, 18, 23 and 28.[94] The preliminary works refer to the latest Concluding Observations to Finland by the UN Committee on the Rights of the Child where the Committee recommends that the State party drafts a new general act on early childhood care and education, strengthening the child rights perspective.[95]

There is a provision on the best interests of the child in the Act (section 4), according to which, the best interests of the child must be given a primary consideration when planning, arranging and making decisions on early childhood education and care. The section 20, subsection 1, obligates to find out children's opinions and wishes when planning, arranging and evaluating early childhood education and care.

Similarly, with school settings, early childhood education and care may also involve everyday situations in which children's personal liberty and integrity are being limited, for example, when children must be prevented from doing something that is harmful to them or to the other children. However, contrary to the school legislation, the legislator has chosen not to regulate these situations in early childhood education and care. This raises the question if the constitutional rights of children under seven years old are considered somehow minor compared to the older children or if limiting constitutional rights

92 See Suvianna Hakalehto-Wainio, 'The Best Interests of a Child in School' (2014) Family Law & Practice 105–112 and Niina Mäntylä, 'Effective Legislation Regarding School Bullying? The Need for and Possibility of Law Reform in Finland' (2018) 18 Education Law Journal 186–198.

93 Varhaiskasvatuslaki, 540/2018.

94 Government proposal HE 40/2018 vp. Hallituksen esitys varhaiskasvatuslaiksi ja siihen liittyväksi lainsäädännöksi.

95 Concluding observations of the Committee on the Rights of the Child: Finland (n 4) para 56.

in certain situations in day care is in general regarded to be in the best interest of the child. The matter was not discussed in the Parliament during the process of passing the Early Childhood Education and Care Act.[96]

3.4 *Immigration*

In the immigration law, children are mostly involved in matters concerning asylum, family reunification and deportation. The Finnish Aliens Act[97] includes several sections concerning minors. According to section 6, in any decision issued under the Act concerning a child under eighteen years of age, special attention shall be paid to the best interests of the child and to the circumstances related to the child's development and health.[98]

Best interests of the child can have significance when considering requirements for means of support when issuing a residence permit. According to the Aliens Act, section 39, subsection 1 issuing a residence permit requires that the alien does have secure means of support. In individual cases, an exemption may be made from this requirement if there are exceptionally weighty reasons for such an exemption or if the exemption is in the best interest of the child.[99] The recent case law shows that the threshold to make an exemption based on the best interests of the child is high. The reasons have related to the health of the child.[100]

There are several referrals to the CRC on the preparatory works of the Aliens Act. Despite of the difference in wording between CRC article 3 ('shall be a primary consideration') and Aliens Act section 6 ('special attention shall be paid'), it seems clear that legislator has aimed the section to be in the conformity with the CRC.[101] According to the Government proposal, the child's best interests should

96 See Suvianna Hakalehto, *Lapsioikeuden perusteet* (Alma Talent 2018) 271–272.

97 Ulkomaalaislaki, 310/2004. The Finnish Aliens Act is founded on conflicting aims: to promote a controlled immigration and to provide international protection respecting fundamental and human rights the former aim having gained more and more weight in recent years.

98 The role of the best interests of the child in the Aliens Act differs from for example child welfare and child custody where the best interests of the child is a decisive factor (Child Welfare Act s 40 ss 2; Child Custody Act s 10 ss 1). Aliens Act s 6 ss 3 obligates authorities to handle cases concerning minors with urgency.

99 According to the Aliens Act section 146, when considering refusal of entry, deportation or prohibition of entry and the duration of the prohibition of entry, account must be taken of the facts on which the decision is based and the facts and circumstances otherwise affecting the matter as a whole. Particular attention must be paid to the best interests of the children and the protection of family life.

100 KHO 2014:51.

101 Government proposal HE 28/2003 vp 8–10. Hallituksen esitys eduskunnalle ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi. Administration Committee Report HaVM 4/

be considered as a whole taking into account the child's individual needs, wishes and opinions. It is also mentioned in the proposal that the person deciding has to clarify what is in the best interests of the child in question.[102]

The Finnish Immigration Service is the first instance to decide on applications concerning asylum, residence permit, family reunification and other immigration law related issues. The Committee on the Rights of the Child has issued a general comment on treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6).[103] This comment as well as general comments 12 and 14 are referred to on the guidelines concerning handling and decision-making in the Finnish Immigration Service.[104]

NGOs advocating for asylum-seekers' and children's rights have criticized the Finnish Immigration Service because of the lack to make an individual decision concerning each child when they are in Finland with their guardian. The status of a child as an independent rights-holder supports individual decision-making even when the child is in Finland with a family member.[105]

The best interests of the child are referred to in most of the Supreme Administrative Court immigration-related cases. This results from the above cited provision of the Aliens Act, according to which special attention shall be paid to the best interests of the child. The CRC has been mentioned in one-third of the immigration law related decisions of the Supreme Administrative Court.[106] It is possible to recognize certain factors that the Supreme Administrative Court

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2004 vp, 8. Hallintovaliokunnan mietintö hallituksen esityksistä (HE 28/2003 vp, HE 151/2003 vp) ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi.

102 Government proposal HE 28/2003 vp (n 101) 9.

103 According to the general comment, the State parties should respect the best interests of the child in their territory when providing assistance for unaccompanied minors and looking after their affairs at every stage of the process. 'A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing ethnic, cultural and linguistic background, particular vulnerabilities and protection needs'. The views and wishes of the unaccompanied or separated child must be taken into consideration.

104 Maahanmuuttovirasto: Lapsen asian käsittely ja päätöksenteko Maahanmuuttovirastossa. MIGDno/2013/1037. 23.4.2015. According to the study from 2010 the best interests of the children are not being assessed when a minor asylum seekers arrives in Finland accompanied by guardians. This conclusion is based on the finding that decisions do not include anything on the interests of the children or, even if they are mentioned, it is not disclosed how the matter was taken into consideration. See Parsons (n 18) 95–96.

105 See Suvianna Hakalehto and Katariina Sovela, 'Lapsen etu ja sen ensisijaisuus ulkomaalaisasioita koskevassa päätöksenteossa' in Toomas Kotkas, Heikki Kallio and Jaana Palander (eds), *Ulkomaalaisoikeus* (Alma Talent 2018) 407–445.

106 See Hakalehto and Sovela (n 105). See also Milka Sormunen, 'Ulkomaalaislain muutokset lasten perus- ja ihmisoikeuksien näkökulmasta' (2017) Lakimies 387–408.

takes into account when assessing the best interests of the child.[107] The Court considers if the decision will lead to separating the child from the safe and familiar environment.[108] Related to this is the stability of the circumstances and the capability of the child to adjust to new conditions.[109] Also, the length of the time the child has lived with the parent and the reasons for separation are taken into account as is the factual bond between the child and the parent.[110] A lot of attention is paid to the matters concerning health of the child or the parent[111] and considering if the circumstances of the country of origin or country where the child is living will threaten safety, health or development of the child.[112] Financial interests are often mentioned.[113]

In 2016, the legal status of minor asylum-seekers deteriorated in a significant way when amendments were made to the Finnish Aliens Act. The application of the requirement or means of support related to family reunification was broadened which can be seen problematic for the rights of the child. This has brought criticism on the legislator for understanding the best interests of the child in an overly narrow way.[114]

4 Conclusions

One of our key findings is that both subtle and more profound changes have taken place in the content and dimensions of the concept of the best interests of the child, maybe more so than is visible at the level of terminology. The concept of the best interests is more varied and nuanced today than in the past, and international human rights instruments and their interpretations have played an important role in this development. The domestic constitutional provisions have not yet quite followed suit, having been somewhat less visible in the discussion. However, the constitutional dimensions of the concept are reflected in the recent case law, where children's constitutional rights have been discussed in the context of decision-making on their best interests. Attention has been paid not only to the international human rights instruments such as the CRC but also to the Constitution.

107 See Hakalehto and Sovela (n 105) 407–445.
108 KHO 2013:97, KHO 2016:75.
109 KHO 2010:18, KHO 2012:47.
110 KHO 2009:86, KHO 2014:162.
111 KHO 2010:18, KHO 2017:6.
112 KHO 2013:23, KHO 2017:73, KHO 2017:74.
113 KHO 2003:92, KHO 2010:17, KHO 2014:50.
114 See Sormunen (n 106) 408.

The role of the international human rights obligations is increasingly important in the interpretation of the best interests of the child. The CRC and its implementation in Finnish legislation are significant in principle, and references to the convention and to the committee's general comments are becoming commonplace. However, there may be a risk that the implementation of the CRC obligations is fragmented among different fields of law and that the convention provisions do not always inform the interpretation of national legislation on the grassroots level. Here, the European Convention of Human Rights provides an interesting point of comparison, as the complaints mechanism and especially the case law of the ECtHR may help national courts engage more fully with the convention obligations in practice. It may be that the interpretation of the best interests of the child will continue to be influenced by the ECtHR case law, which presents a model for considering the role of the CRC rights in the context of legal reasoning.

One of the most central changes is a shift of focus to protecting close relationships of the child and the importance of preserving them. In the light of the human rights provisions, children's best interests must be determined in this context. In this sense, the umbrella of the best interests can be seen to include family relations. In the case law of the ECtHR, the best interests of children are often discussed in the light of protection of family life (article 8). In the praxis, the protection of family relations has formed an interesting, twofold relation with the concept of best interests. Generally, preserving children's family relations is considered to be in accordance with their best interests. However, the individual child's best interests may require that a family relation be restricted.

More generally, a clear focus has been placed on children's individual status and their input in determining the content of their best interests, which are both acknowledged in the Constitution. This aspect has gained a foothold in recent legislation, bolstered by the constitutional provision on treating children as individuals. Possible risk factors affecting child's welfare have also gained increasing attention along with the importance of non-discrimination and the needs of marginalised and at-risk groups. One can draw some parallels between these lines of discussion, but inherent conflicts are also present.

References

Administration Committee Report HaVM 4/2004 vp. Hallintovaliokunnan mietintö hallituksen esityksistä (HE 28/2003 vp, HE 151/2003 vp) ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi.

Auvinen M, *Huoltoriidat tuomioistuimissa: sosiaalitoimi selvittäjänä, sovittelijana, asiantuntijana* (Suomalainen Lakimiesyhdistys 2006).

Breen C, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Kluwer 2002).

Committee on the Rights of the Child, *Concluding observations: Finland* (20 June 2011) CRC/C/FIN/CO/4.

Committee on the Rights of the Child, *General Comment No. 12* (2009) *The right of the child to be heard* (1 July 2009) CRC/C/GC/12.

Committee on the Rights of the Child, *General Comment No. 14* (2013) *on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para 1*) (29 May 2013) CRC/C/GC/14.

Constitutional Law Committee Report PeVM 25/1994 vp. Perustuslakivaliokunnan mietintö hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta.

Constitutional Law Committee Statement PeVL 30/2009 vp. Perustuslakivaliokunnan lausunto hallituksen esityksestä laeiksi lastensuojelulain, vankeuslain 4 ja 20 luvun sekä tutkintavankeuslain 2 luvun 5 §:n muuttamisesta.

Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999).

de Godzinsky V-M, *Lapsen etu ja osallisuus hallinto-oikeuksien päätöksissä* (Oikeuspoliittinen tutkimuslaitos 2014).

Government proposal HE 224/1982 vp. Hallituksen esitys eduskunnalle laeiksi lapsen huollosta ja tapaamisoikeudesta ja holhouslain muuttamisesta sekä niihin liittyvien lakien muuttamisesta.

Government proposal HE 13/1983 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi.

Government proposal HE 309/1993 vp. Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta.

Government proposal HE 86/1997 vp. Hallituksen esitys eduskunnalle koulutusta koskevaksi lainsäädännöksi.

Government proposal HE 28/2003 vp. Hallituksen esitys eduskunnalle ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi.

Government proposal HE 252/2006 vp. Hallituksen esitys eduskunnalle lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi.

Government proposal HE 109/2009 vp. Hallituksen esitys eduskunnalle perusopetuslain muuttamiseksi.

Government proposal HE 66/2013 vp. Hallituksen esitys eduskunnalle laeiksi perusopetuslain, lukiolain, ammatillisesta koulutuksesta annetun lain, ammatillisesta aikuiskoulutuksesta annetun lain ja kunnan peruspalvelujen valtionosuudesta annetun lain 41 ja 45 §:n muuttamisesta.

Government proposal HE 40/2018 vp. Hallituksen esitys eduskunnalle varhaiskasvatuslaiksi ja siihen liittyväksi lainsäädännöksi.

Government proposal HE 88/2018 vp. Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi.

Hakalehto S, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).

Hakalehto S, 'Lapsen edun arviointi korkeimman oikeuden perheoikeudellisissa ratkaisuissa' (2016) Defensor Legis 427.

Hakalehto S, *Lapsioikeuden perusteet* (Alma Talent 2018).

Hakalehto S and Kotkas T, 'Subjektiivinen päivähoito-oikeus – sosiaalioikeutta, lapsioikeutta vai molempia?' (2015) Lakimies 1040.

Hakalehto S and Sovela K, 'Lapsen etu ja sen ensisijaisuus ulkomaalaisasioita koskevassa päätöksenteossa' In Toomas Kotkas, Heikki Kallio, Jaana Palander (eds), *Ulkomaalaisoikeus* (Alma Talent 2018) 407.

Hakalehto-Wainio S, 'Lapsen oikeudet lapsen oikeuksien sopimuksessa' (2011) Defensor Legis 510.

Hakalehto-Wainio S, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012).

Hakalehto-Wainio S, 'The Best Interests of a Child in School' (2014) Family Law & Practice 103.

Handbook on European law relating to the rights of the child (European Union Agency for Fundamental Rights and Council of Europe 2015).

Helander M, 'Utvecklingsbehov i den finländska lagstiftningen om barn' (2018) Nordisk Administrativt Tidsskrift nr. 1, 5.

Helin M, 'Perheoikeuden siveellinen luonne' (2004) Lakimies 1244.

Helin M, 'Perusoikeuksilla argumentoinnista', in Tero Iire (ed), *Varallisuus, vakuudet ja velkojat: Juhlajulkaisu Jarmo Tuomisto 1952 – 9/6 – 2012* (University of Turku, Faculty of Law 2012) 11.

Hirvelä P, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa* (WSOYpro 2006).

Hirvelä P and Heikkilä S, *Ihmisoikeudet: Käsikirja EIT:n käytäntöön* (Alma Talent 2017).

Kaldal A, *Parallella processer: En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål* (Jure Förlag 2010).

Karapuu H, 'Perusoikeuksien käsite ja luokittelu' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011).

Koulu S, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Koulu S, *Lapsen huolto- ja tapaamissopimukset* (Lakimiesliiton Kustannus 2014).

Kurki-Suonio K, *Äidin hoivasta yhteishuoltoon: lapsen edun muuttuvat oikeudelliset tulkinnat – Oikeusvertaileva tutkimus* (Suomalainen Lakimiesyhdistys 1999).

Legal Affairs Committee Report LaVM 12/2018 vp. Lakivaliokunnan mietintö hallituksen esityksestä eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi (LaVM 12/2018 vp).

Maahanmuuttovirasto, Lapsen asian käsittely ja päätöksenteko Maahanmuuttovirastossa. MIGDno/2013/1037. 23.4.2015.

Mahkonen S, *Lastensuojelu ja laki* (3rd ed, Edita Publishing 2010).

Melander I, *Lapsen huollosta: Yksityisoikeudellinen tutkimus 1* (Suomalainen Lakimiesyhdistys 1939).

Mikkola M and Helminen J, *Lastensuojelu* (Karelactio 1994).

Mäntylä N, 'Effective Legislation Regarding School Bullying? The Need for and Possibility of Law Reform in Finland' (2018) 18 Education Law Journal 186.

Nieminen L, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990).

Nieminen L, 'Lasten perus- ja ihmisoikeussuojan ajankohtaisia ongelmia' (2004) Lakimies 591.

Nieminen L, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013).

Pajulammi H, *Lapsi, oikeus ja osallisuus* (Talentum 2014).

Parliamentary Ombudsman's yearly report 2017.

Parsons A, *The best interests of the child in asylum and refugee procedures in Finland* (Ombudsman for Minorities, publication 5, 2010).

Pellonpää M and others, *Euroopan ihmisoikeussopimus* (6th ed, Alma Talent 2018).

Salminen K, 'Mediation and the Best Interests of the Child from the Child Law Perspective' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 209.

Savolainen M, *Lapsen huolto ja tapaamisoikeus* (Suomen Lakimiesliiton Kustannus 1984).

Statens offentliga utredningar 1997:116. Barnets Bästa i främsta rummet. FN:s konvention om barnets rättigheter i Sverige. Barnkommittéens huvudbetänkande (Socialdepartementet 1997).

Sormunen M, ' "In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24 IJCR, 155.

Sormunen M, 'Lapsen etu Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä' in Suvianna Hakalehto and Virve Toivonen (eds), *Lapsen oikeudet lastensuojelussa* (Kauppakamari 2016) 308.

Sormunen M, 'Ulkomaalaislain muutokset lasten perus- ja ihmisoikeuksien näkökulmasta' (2017) Lakimies 387.

Sudre F, *Droit européen et international des droits de l'homme* (13e ed, Presses Universitaires de France 2016).

Tobin J, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman, *Handbook of Children's Rights. Global and Multidisciplinary Perspectives* (Routledge 2017) 53.

Toivonen V-M, *Lapsen oikeudet ja oikeusturva: lastensuojeluasiat hallintotuomioistuimissa* (Alma Talent 2017).

Tolonen H, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Tolonen H, *Lapsi, perhe ja tuomioistuin: Lapsen prosessuaalinen asema huolto- ja huostaanotto-oikeudenkäynnissä* (Suomalainen Lakimiesyhdistys 2015).

Törrönen M (ed), *Lapsen etu ja viidakon laki* (Lastensuojelun keskusliitto 1994).

Valjakka E, *Vain lakiko lasta suojelee?* (University of Turku 2016).

CHAPTER 10

The Elusive Best Interest of the Child and the Swedish Constitution

Johanna Schiratzki

1 Introduction: the Best Interests of the Child vs. the Well-Being of the Individual[1]

The relation between the principle of the best interests of the child and principles of constitutional law is intricate. This is, in part, explained by child law being a comperatively modern field of law, as well as the elusive nature of the principle of the best interests of the child as a legal principle, which has only recently begun to be explored. Constitutional law, on the contrary, has a longer history. The Swedish constitutional tradition dates back to 1634. The first constitution in the form of an Instrument of Government (*Regeringsformen*) was issued 1809 and replaced by the current Instrument of Government in 1974. Several amendments have been made, i.e. in 1994 and 2002, to meet requests related to the Swedish membership in the European Union (EU).[2] In 2011, the Instrument of Government was amended to include a dedicated provision for children. This provision is not enforceable but part of the general aims and ambitions for the governance of children (as well as adults) in the Swedish society.[3] Chapter 1, section 2.5 of the Instrument of Government now reads as follows:[4]

> The 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.

1 Approved by the ethical board of Stockholm 17-05-2018. Registration number 2018/704-31-5.

2 Sveriges riksdag, *Sveriges grundlagar och riksordning*, Riksdagsförvaltningen, enheten riksdagstryck, Stockholm 2015.

3 Legislative Bill 2009/10:80 (*Prop. 2009/10:80 En reformerad grundlag*). *See Titti Mattsson*, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

4 Translated in Magnus Isberg, *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* (Riksdagen 2016).

In addition, children have a constitutional right to education. The principle of the best interests of the child, as opposed of those declared, but alas undefined, rights of the child, is not included in the Swedish constitution.

All the same, the Swedish Government, as early as in 1997, held that the chapter 1, section 2.2 of the Instrument of Government, which states that the aim of public affairs should be the well-being of the individual, age not defined, could be understood as to reflect the spirit and ambition of article 3.1 of the United Nations Convention on the Rights of the Child (CRC).[5] The statement should be read in its context. It was made in the 1990s, during the first discussion of the implementation of the CRC. At the time, the CRC was treated as any other international convention on human rights in that the intention of the Swedish government was that the CRC should be implemented by transformation in accordance with the general Swedish position on the implementation of international undertakings. The government was, therefore, looking for similarities between the CRC and Swedish law. The statement, that the best interests of the child could be understood as being included in the Instrument of Government, was not repeated in later preparatory works, such as the amendments of the constitution leading to the expressive inclusion of children's rights in the Swedish Constitution, 2011.[6] It is a matter of speculation if the lack of mentioning of the best interests of the child is due to the fact that it was seen as obvious that the best interests of the child was included in the well-being of individuals or if it was seen as a too far-reaching interpretation of a general constitutional provision. My own position has been that the impact of the principle of the best interests of the child is broader than the concept of the well-being of any other, that is, adult individual.[7]

Not-withstanding the context, the view expressed by the 1997 Swedish government, that the principle of the best interests of the child could be read into a general article on the respect for the well-being of the individual, reflects the fluidity of the principle of the best interests of the child, as well as the difficulties of pin-pointing the meaning of the principle. Since the late 1990s, some progress has been made in the challenging task of interprenting and understanding the best interests of the child.[8] The United Nations Committee on the Rights of the Child has thus suggested that the best interest of the child should

5 Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv del I*) 244; Johanna Schiratzki, *Barnets bästa i ett mångkulturellt Sverige* (2 edn, Iustus förlag 2005).

6 Legislative Bill 2009/10:80.

7 Johanna Schiratzki, *Barnrättens grunder* (7 edn, Studentlitteratur 2019).

8 Eg Julia Fionda (ed), *Legal Concepts of childhood* (Hart Publishing 2001); Michael Freeman, 'Article 3: The Best Interests of the Child' in Alen Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007); Jonathan Herring, 'Farwell Welfare?' (2005) 27(2) Journal of Social Welfare and Family

be seen as a substantive right, a fundamental interpretative legal principle, as well as a rule of procedure.[9] In relation to *constitutional* law, the position that the principle of the best interests of the child should be regarded as a substantive right is arguably the most relevant.[10] As we will see, this is a position upheld in the Charter of the European Union (article 24).

2 To Believe or Not Believe in an Abundancy of Rights

Alongside the advancement towards a more elaborated understanding of the best interests of the child, the last decades have seen an interest in children's rights and the principle of the best interests of the child in many jurisdictions, including Sweden and the other Nordic countries, in all fields of domestic law such as legislation, court praxis and other sources of law.[11] This development has led to a somewhat polarised discussion between 'uncritical proponents', at the one hand, and 'uncritical opponents', at the other hand. The former has a strong belief in the obvious positive effects of expressing children's rights in the law. The latter radically deny the value that children's rights – be it on a global or local level in constitutional or other forms of law – could have in the aim to realise a greater respect for children.[12]

The CRC is to be incorporated in Swedish law in 2020.[13] The process towards an incorporation of the CRC into national law has proven to be a watershed between 'believers' and 'opponents'. The Swedish legislator is to be found among the believers in the usefulness of children's rights. So are the children's rights movements of the Swedish civil society. The opponents are found among the Swedish judiciary and other legal institutions – as represented by the respondents to the referral procedure for formal consultation of the findings in the Swedish Government

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Law 159–171; Kirsten Sandberg, 'Barnets beste som rettighet' in Ingun Ikdahl and Vibeke Strand (eds), *Rettigheter i welferdsstaten* (Gyldendal 2016); Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 The International Journal of Children's Rights 483–499.

9 UN Committee on the Rights of the Child, *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* (29 May 2013) CRC/RC/C/GC/1.

10 Sandberg (n 8).

11 Schiratzki (n 7).

12 Dieder Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between 'believers' and 'opponents': Critical discussions on children's rights' (2012) 20 The International Journal of Children's Rights 155.

13 Legislative Bill 2017/18:186 (*Prop. 2017/18:186 Inkorporering av FN:s konvention om barnets rättigheter*).

Official Report on the incorporation of the CRC.[14] Their criticism, however, is not directed against children's rights *per se* but rather against the perception that the incorporation of the CRC in to Swedish law will be a tool to achieve a better situation for children. It is held that the lack of precision in the CRC is hard to amend with general demands of the rule of law such as clarity, transparency as well as predictability in the application of the law.[15] These points are argued in relation to the Swedish legal system as whole to give the CRC a constitutional stand has not been suggested in the Swedish Government Official Report. Although these are concerns in regard to the CRC all together, it seems specifically weighty with regards to the principle of the best interests of the child (article 3), which is as Philip Alston has pointed out, a principle with a multiple of feasible interpretations.[16] This position is shared by the Committee on the Rights of the Child, in its General comment no. 14. The Committee suggests the following:

> Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.[17]

The usefulness of the General comments of the committee on the rights of the child, have been debated in the process of the incorporation of the CRC in to the Swedish legislation. The debate take as its starting point is the fact that comments and other observations from UN Committees are not binding legal sources according to international law.[18] All the same, the General comments and other comments from Committee on the Rights of the Child could, in my opinion, be used as advisory sources of law, with the same standing as, for example legal literature, for the determination of rules of law.[19] Legal literature is accepted as an advisory source for the interpretation of law in article 38(d) of the Charter of the *International Court of Justice.* Article 38(d) considers

14 Swedish Government Official Reports 2016:19 (*SOU 2016:19 Barnkonventionen blir svensk lag*). Legislative Bill 2017/18:186.

15 The administrative court of appeal in Stockholm (*Kammarrätten i Stockholm*), 2016-09-23, dnr KST 2016/189. The Parliamentary Ombudsmen (*Justitieombudsmannen*) 2016-10-04, R 29–2016.

16 Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child* (Clarendon Press 1994).

17 UN Committee on the Rights of the Child (n 9) para 32.

18 Legislative Bill 2017/18:186 91.

19 Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 116–198.

'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. This recalls the criteria for chosing the Committee on the Rights of the Child, which should consist of experts with 'high moral standing and recognized competence' in the field covered by the CRC (article 43 CRC).[20]

The opposition of significant parts of the Swedish judiciary against the incorporation of the CRC should be seen in light of the fact that children's rights in Sweden are protected by several national and international legal instruments apart from the CRC, i.e. other legal instruments of the United Nations as well as European law. Several sources of European law are binding on Swedish courts; i.e. the Charter of the European Union, the Regulations of the European Union and the case law of European Court of Justice as well as the European Council's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of European Court of Human Rights (ECtHR). The principle of the best interests of the child is not to the found in the ECHR. The ECtHR, however, are including the fundamental principles and provisions of the CRC in the court's judgement.[21] The principle of the best interest of the child is quoted by the ECtHR in case law related to article 8 on the right to a family life.[22] Considering the impact of the ECHR in Swedish law this presumably strengthens the general position of the principle in this field of law, which is dominated by case on compulsory care of children. It is worth noticing that in other areas of child law such as education, the principle of the best interest of the child appears not to be quoted. These are cases in which parental rights are quoted more frequently in relation to the right to education according to article 2, the First Additional Protocol.[23]

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20 The Swedish Ministry of Social Affairs, however, does not seem to share this position, as the Ministry states in one of its directives that General comments are no sources of law. Dir. 2018:20 (*Kartläggning av hur svensk lagstiftning och praxis överensstämmer med barnkonventionen*) 4. Professor Karin Åhman is assisting the Ministry of Social Affairs in preparing guidelines on the interpretation and application of the CRC, its legal history and the documents of the UN Committee on the Rights of the Child (CRC), see n 36.

21 Ursula Kilkelly, 'The CRC in Litigation under the ECHR' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child* (Springer 2014); Elisabeth Gording Stang, 'The Child's Right to Protection of Private Life and Family Life' in Said Mahmoudi and others (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

22 Eg Case of *K. and T. v Finland* [GC] App no 25702/94 (ECtHR, 12 July 2001); Case of *Gnahoré v France* App no 40031/98 (ECtHR, 19 September 2000); Case of *S.J.P. and E.S. v Sweden* App no 8610/11 (ECtHR, 28 August 2018).

23 Eg Case of *Lautsi and others v Italy* App no 30814/06 (ECtHR, 18 Mars 2011). Case *Relating to certain aspects of the laws on the use of languages in the education in Belgium v*

3 Constitutional Pluralism

Contrary to the Swedish constitution and the ECHR, the principle of the best interests of the child is included in the Charter of the European Union. According to its preamble, the Charter of the European Union stems from the constitutional traditions and international obligations common to the Member States, the ECHR as well as the Social Charters adopted by the Union and by the Council of Europe, the case law of the Court of Justice of the European Union. Article 24 of the EU Charter states the following:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 24.2 of the Charter of the European Union corresponds to article 3 of the CRC on the best interests of the child. Article 24.1 of the Charter corresponds with article 12 of the CRC on the right of children to express their views. Article 24 of the EU Charter on the rights of the child, which includes the principle on the best interests of the child, has been interpreted by the European Court of Justice in a growing number of judgments regarding European Union citizenship,[24] parental responsibility,[25] victimised children[26] and asylum-seeking children from third countries.[27] In the asylum law case of MA, BT, DA against the United Kingdom, the European Court of Justice, granted

Belgium App no 1474/62 (ECtHR, 9 February 1968); 1677/62; 1691/62; 1769/63; 1994/63; 2126/64; Case of *El Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016); Case of *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011).

24 Eg Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-413/99 *Baumbast and R* [2002] *ECR I-7091*. See also Case C- 255/99 *Humer* [2002] *ECR* I-1205; Case C-286/03 *Silvia Hosse v Land Salzburg* [2006] ECR I-1771.

25 Eg Case C-435/06 *C* [2007] ECR *I-11531*; Case C-523/07 *A* [2009] ECR I-02805, Case C-195/08 *Rinau* [2008] *I-5271*; Case C-403/09 PPU *Deticek* [2009] ECR I-12193; Case C-256/10, *Purrucker* [2010] ECR I-07353.

26 Case C-105/03 *Pupino* [2005] *ECR I-5285; Case C-400/10 PPU McB* [2010] *ECR I-8965.*

27 Case C-648/11 MA, BT, DA [2013].

unaccompanied asylum-seeking children the right to choose in which Member State of the EU to apply for asylum. The European Court of Justice based its position on the principle of the best interests of the child. The Court stated the following:[28]

> Those fundamental rights include, in particular, that set out in article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.
>
> Thus, the second paragraph of article 6 of Regulation No 343/2003 cannot be interpreted in such a way that it disregards that fundamental right (see, by analogy, *Detiček*, paragraphs 54 and 55, and Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraph 60).

It is a subject for further research to discuss if the position of the best interests of the child in the European Charter constitutes a constitutional or semi-constitutional protection or, more likely, could be seen as a part of a growing constitutional pluralism.[29] Constitutional pluralism has been considered a result of constitutional competence could being shared by several authorities, national as well as supra-national. Or as Neil Walker has pointed out:

> States are no longer the sole locus of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority, most prominently [...] those situated at the supra-state level ...[30]

It seems reasonable for this shared responsibility for fundamental rights and freedoms to be particularly interesting to discuss in relation children's rights, as it is an area that has been very much influenced by international development and agreements. In any case, Swedish authorities should give priority to the ECHR over national statues and interpret its legal regulation including the constitution in solidarity with its obligation under EU law.[31]

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28 Case C-648/11 MA, BT, DA [2013] paras 57–58.

29 See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastningen* [1963], 1, on the effect of EU-law in relation to the constitution of a Member State.

30 Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

31 Chapter 2, section 19 Instrument of Government. Legislative Bill 2017/18:186 (*Prop. 2017/18:186 Inkorporering av FN:s konventionen om barnets rättigheter*) 63.

4 How Is the Principle of the Best Interests of the Child Expressed and Implemented in Swedish Law?

Article 3 of the CRC on the principle of the best interests of the child is one of the two articles of the CRC that are most frequently implemented into Swedish legislation. The other one is article 12 on the right of the child to be heard.

The Swedish process towards the implementation of the CRC, as we have seen, started in 1997 with the statement that the chapter 1, section 2.2 of the Instrument of Government could be understood to reflect the spirit and ambition of article 3.1 of the CRC.[32] The amendments to the Aliens Act and the Social Services Act to include the articles 3 and 12 followed the next year, 1998, by the Parental Code on custody. A section on the principle of the best interests of the child in relation to compulsory care was introduced 2003 in the Care of Young Persons Act (*Lag med särskilda bestämmelser om vård av unga*). In 2009 and 2010, the principle of the best interests of the child was implemented into the health and care area e.g. the Health and Medical Services Act (*hälso- och sjukvårdslag*) as well as into the Support and Service for Person with Certain Functional Impairments Act (*Lag om stöd och service till vissa funktionshindrade*). In 2011, the principle of the best interests was implemented in the Educational Act (*skollag*). The principle is further implemented in the Detention Act (*häkteslagen*), the Prisons Act (*fängelselagen*), the Act on a Representative for the Child, (*lag om särskild företrädare för barn*), the Act on International Child Adoption (*lag om internationell adoptionsförmedling*), and the Act on Dental Care (*tandvårdslagen*). The principle of best interests of the child was implemented in the Patients Act (*patientlagen*) 2015 and 2018 in chapter 5 of the Parental Code on adoption.[33] The principle of the best

32 Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv del I*) 244; Schiratzki (n 5).

33 Utlänningslag (1980:376), (2005:716) Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv*); Föräldrabalken (1949:381), Legislative Bill 1997/98:7 (*Prop. 1997/98:7 Vårdnad, boende och umgänge*); socialtjänstlagen (2001:453), Legislative Bill 2000/01:80 (*Prop. 2000/01:80 Ny socialtjänstlag m.m.*); lag (1990:52) med särskilda bestämmelser om vård av unga, Legislative Bill 2002/03:53 (*Stärkt skydd för barn i utsatta situationer m.m.*); häkteslag (2010:614), Legislative Bill 2009/10:135 (*En ny fängelse- och häktningslagstiftning*); lag om särskild företrädare (1999:997) Legislative Bill 1998/99:133; lag (2018:1289) om internationell adoptionsfömedling, Legislative Bill 2017/18:121 Modernare adoptionsregler; tandvårdslag (1985:125); skollag (2010:800) Legislative Bill 2009/10:165 (*Den nya skollagen – för kunskap, valfrihet och trygghet*); lag (1993:387) om stöd och service till viss funktionshindrade, Legislative Bill 2009/10:176 (*Personlig assistans och andra insatser – åtgärder för ökad kvalitet och trygghet*); patientlag (2014:821), Legislative Bill *2013/14:106* (*Patientlag*).

interests of the child may presumably be given divergent interpretations in the various field of law.

The principle of the best interests of the child is invoked in both branches of the Swedish two-branched court system: the general courts that hear cases within private and criminal law and the administrative courts that hear cases on welfare law, migration, etc. In some of the judgments, an individual child is considered as a member of an aged-defined group in need of particular protection. In other judgments, the child is considered as a right-holder with particular rights. Both these interpretations could be accommodated within the principles of the best interests of the child.

The source of law used by the courts tend to be foremost Swedish legislation implementing article 3 of the CRC. Other sources of laws used are, Swedish Legislative Bills, case law and legal literature as well as the ECHR and the rulings of the European Court of Human Rights.[34] References to other international obligations, such as the rulings of the European Court of Justice, are slightly less frequent.[35] References to the General comments from Committee on the Rights of the Child are made now and then. An example from the Migration Court of Appeal relates to the right to family re-unification.[36]

The judgments of the two Swedish Supreme Courts relating to the best interests of the child could be divided into cases with a bearing on children's autonomy to express views, right to family life, and miscellaneous. Two miscellaneous cases concern enforcement (*utmätning*) and tort liability.

> The judgment on enforcement, Supreme Court case NJA 2013 p. 1241, regards the equity of enforcement of a family home when the surplus is relatively modest in relation to the inconvenience for the debtor and his family. The Supreme Court recalled that a subject has a right to respect for his or her home, according to article 8 of the European Convention. The court added that the consideration of the best interests of the child according to the CRC was relevant.

34 Louise Dane, 'Europadomstolen och barnets bästa' (2015) *Förvaltningsrättslig tidskrift* 193–224; Maria Grahn Farley, 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen' (2017) Europarättslig tidskrift 651–669.

35 Marlene Wind, 'The Scandinavians: Foot-dragging supporters of European Law?' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union* (Hart Publishing 2018).

36 UM 5407–18, MiG 2018-20 13 November 2018.

In addition, the Swedish Supreme Court has invoked the principle of the best interests of the child in Supreme Court case NJA 2001 p. 234 on tort liability.

> In Supreme Court case NJA 2001 p. 234, regarding a 13-year old with an intellectual disability who had burnt down his caretaker's home, the Supreme Court held that the culpability of the child should be assessed in accordance with the 'objective' liability law principle, i.e. without any 'subjective' considerations relating to the child's age, ability and maturity. The culpability of the child was assessed as if the child was an adult.

It has been suggested that the Supreme Court's application of the 'objective' liability law principle regarding the child has no bearing on the principle of the best interests of the child, or at least not in the negative.[37] This position – that it generally is in the best interests of the child to be treated as an adult – may be construed as supporting the idea that rights for children, including the paramount position of the best interests of the child, aim at the promotion of the capable adult-like child's ability, not to protect the vulnerable child.

5 Lost in Translation

The principle of the best interests of the child is established in Swedish legislation and case law as well as in supra-national sources of law applicable in Sweden, such as the EU charter and the CRC, albeit not in the Swedish constitution. It is worth noting that the wording of the principle of the best interests in Swedish legislation generally is more far reaching than in the article 3 of the CRC or article 24(2) of the Charter of the European Union. The wording used in Swedish legislation is that 'the best interests of the child should be *the* primary consideration' (*barnets bästa ska komma i främsta rummet*), not *a* primary consideration. This wording reflects a previous official Swedish translation of the CRC.

As part of the process towards the incorporation of the CRC year 2020, a new official Swedish translation of the CRC has been issued.[38] In the 2018 official

37 Håkan Andersson, 'Den symbolladdade agstiftningen om det sällsamt strikta föräldraansvaret: Ett och annat om problemen med bråkiga barn, barnrättsliga moralister och brutal lagstiftning med beskäftig preventionsövertro' in Margareta Brattström and Maarit Jänterä-Jareborg (eds), *Vänbok till Anna Singer: för barns bästa* (Iustus förlag 2017) 24; Schiratzki (n 7).

38 Prop. 2017/18:186 7–57.

Swedish translation, the last sentence of article 3.1 reads: '*i första hand beaktas vad som bedöms vara barnets bästa*'. This could be translated back in English as 'what could be considered to be the best interests of the child'.

As a consequence of the 2018 translation, the scope for the principle of the child's best interests, according to the CRC, may appear to be more limited than according to many of the Swedish Acts and other sources of law in which the principle of the best interests has been transformed during the last 20 years. This impression is emphasised by the fact that some articles in the 2018 translation seem to give less scope for the child's best interests than the authentic language versions. An example is article 18.1 CRC (last sentence). The authentic English version reads:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the up-bringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In the authentic French version the last sentence reads: '*Ceux-ci doivent être guidés avant tout par l'intérêt supérieur de l'enfant*'. The last sentence is translated into Swedish as follows: '*Dessa ska låta sig vägledas av vad som bedöms vara barnets bästa*'. The Swedish translation suggests that the best interests should be a guideline or concern for the parents, but not a basic concern, as an equivalent to the word 'basic' (or 'avant tout') is lacking. It is too early to assess what impact these changes will have.

6 In Conclusion

To summarise, the intersection between the vehicles of what could be labeled constitutional pluralism, the Instrument of Goverance and sources of European law, such as the Charter of the European Union, applicable in Sweden and the principle of the best interests appears somewhat crammed and foggy. The principle of the best interests of the child is not included in the Swedish Instrument of Government. It could, however, be argued that close connection between the rights of the child and the principle of the best interests of the child as recognised in the fundamental legal instruments of European law, such as the Charter of the European Union, suggests that at least the right-oriented aspects of the principle of the best interests of the child are covered by chapter 1, section 2 of the Swedish Instrument of Government. What this implies remains

to be clarified. It is matter of observation, however, that the CRC, including the principles of the best interests of the child, tend to be invoked by children with a weak position according to other Swedish legal sources. An example is the 8-year-old Syrian refugee whose right to family reunification to a large extent was decided on the basis of the the General comments no. 6 on treatment on un-accompanied and separeted children and General comments no. 14 of article 3 on the principle of the best interests from the UN Committee on the Rights of the Child alongside case law from the ECHR.[39]

References

Alen A and others, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007).

Alston P, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child* (Clarendon Press 1994).

Andersson H, 'Den symbolladdade lagstiftningen om det sällsamt strikta föräldraansvaret: Ett och annat om problemen med bråkiga barn, barnrättsliga moralister och brutal lagstiftning med beskäftig preventionsövertro' in Margareta Brattström and Maarit Jänterä-Jareborg (eds), *Vänbok till Anna Singer: för barns bästa* (Iustus förlag 2017).

Brattström M and Jänterä-Jareborg M (eds), *Vänbok till Anna Singer: för barns bästa* (Iustus förlag 2017).

Dane L, 'Europadomstolen och barnets bästa' (2015) 2 *Förvaltningsrättslig tidskrift* 193–224.

Derlén M and Lindholm J (eds), *The Court of Justice of the European Union* (Hart Publishing 2018).

Dir. 2018:20 (*Kartläggning av hur svensk lagstiftning och praxis överensstämmer med barnkonventionen*).

Fionda J (ed), *Legal Concepts of childhood* (Hart Publishing 2001).

Freeman M, 'Article 3: The Best Interests of the Child' in André Alen A and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007).

Grahn Farley M, 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen' (2017) Europarättslig tidskrift 651–669.

Herring J, 'Farwell Welfare?' (2005) 27(2) Journal of Social Welfare and Family Law 159–171.

Ikdahl I and Strand VB (eds), *Rettigheter i velferdsstaten* (Gyldendal 2016).

39 UM 5407–18, MiG2018-20 13 Nov 2018.

Isberg M, *The Constitution of Sweden The Fundamental Laws and the Riksdag Act* (Riksdagen 2016).

Keller H and Grover L, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University 2012) 11–198.

Kilkelly U, 'The CRC in Litigation under the ECHR' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child* (Springer 2014).

Legislative Bill 1996/97:25 (*Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv del I*).

Legislative Bill 1997/98:7 (*Prop. 1997/98:7 Vårdnad, boende och umgänge*).

Legislative Bill 2000/01:80 (*Prop. 2000/01:80 Ny socialtjänstlag m.m.*).

Legislative Bill 2002/03:53 (*Prop. 2002/03:53 Stärkt skydd för barn i utsatta situationer m.m.*).

Legislative Bill 2009/10:80 (*Prop. 2009/10:80 En reformerad grundlag*).

Legislative Bill 2009/10:135 (*Prop. 2009/10:135 En ny fängelse- och häktningslagstiftning*).

Legislative Bill 2009/10:165 (*Prop. 2009/10:165 Den nya skollagen – för kunskap, valfrihet och trygghet*).

Legislative Bill 2009/10:176 (*Prop. 2009/10:176 Personlig assistans och andra insatser – åtgärder för ökad kvalitet och trygghet*).

Legislative Bill *2013/14:106* (*Prop. 2013/14:106 Patientlag*).

Legislative Bill 2017/18:121 Modernare adoptionsregler.

Legislative Bill 2017/18:186 (*Prop. 2017/18:186 Inkorporeringen FN:s konvention om barns rättigheter*).

Liefaard T and Doek JE (eds), *Litigating the Rights of the Child* (Springer 2014).

Mahmoudi S and others, *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

Mattsson T, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Reynaert D, Bouverne-De Bie M and Vandevelde S, 'Between 'believers' and 'opponents': Critical discussions on children's rights' (2012) 20 The International Journal of Children's Rights 155.

Sandberg K, 'Barnets beste som rettighet' in Ingun Ikdahl and Vibeke Strand (eds), *Rettigheter i velferdsstaten* (Gyldendal 2016).

Schiratzki J, *Barnets bästa i ett mångkulturellt Sverige* (2nd edn, Iustus förlag 2005).

Schiratzki J, *Barnrättens grunder* (Studentlitteratur 2019).

Stang E G, 'The Child's Right to Protection of Private Life and Family Life' in Said Mahmoudi and others (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

Swedish Government Official Reports 2016:19 (*SOU 2016:19 Barnkonventionen blir svensk lag*).

UN Committee on the Rights of the child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (29 May 2013) CRC/RC/C/GC/1.

Walker N, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

Wind M, 'The Scandinavians: Foot-dragging supporters of European Law?' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union* (Hart Publishing 2018).

Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 The International Journal of Children's Rights 483–499.

PART 4

Children's Right to Participation in Nordic Law

CHAPTER 11

Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy

Anna Nylund

1 Introduction to Children's Participation Rights in Norway

Under Norwegian law, the right of the child to be heard is widely recognised. Nevertheless, children's voices are sometimes absent in decision-making or, alternatively, hearing children is treated as a formality with little impact. The 2014 constitutional reform introduced an explicit provision on children's right to participation, which is a shorthand version of the United Nation's Convention on the Rights of the Child (CRC), art 12. Since the Human Rights Act of 1999 already incorporated the Committee on the Rights of the Child, giving it a semi-constitutional status, the constitutional reform codified the status quo.[1] The question is whether including a specific provision on children's participatory rights signifies a reform or cements existing ideas and concepts.

Section 104, subsection 1, second sentence reads: '[Children] have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development'.

This text explores the relationship between the Constitution, legislation and practices involving children in decision-making, both individually and collectively. The main question is how children's participation is defined in Norwegian legislation. Does the definition refer to nominal, instrumental, representative and transformative participation? The definition of participation is likely to be reflected in whether and how children participate in decision-making in practice, including the role of the adults involved.

First, I will discuss the right to participate from a theoretical perspective. Second, I will analyse which theoretical assumptions the Norwegian Constitution relies on. Third, I will examine Norwegian legislation on the child's right to participation in light of these theoretical models. I will cover participation

1 For a more detailed discussion on this topic, see Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

both as a collective and an individual right. The main focus will be on parental responsibility, child welfare and health care.

2 Theoretical Perspectives on the Right to Participate

Our image of children and childhood has transformed from viewing children as dependent and in need of protection, as 'human becomings', to viewing children as capable subjects vested with knowledge and rights, as 'human beings' with different and evolving capabilities and desires than adults. Children are autonomous agents and have also a right to make mistakes. As human beings, children should be respected here-and-now, rather than emphasising children as 'an investment in the future'. Naturally, children have the right to protection, but it should not prevent them from exercising self-determination, voice and choice.[2]

The shift in our notion of children requires us to reposition our view of children's participation in decision-making. Active participation is a quintessential element in respecting human dignity of the child. It empowers and teaches children self-determination and decision-making skills. Children have as diverse needs and preferences as adults, thus, the method and level of participation may vary, and agency must be balanced with protection.[3] Children often have good insight of their own needs and benefit personally from involvement in decision-making.[4] Therefore, including the child is likely to produce better outcomes, improved services and enhanced skills and self-esteem. Respecting children as individuals also means respecting their right to make choices adults regard as 'misguided'. Otherwise, we will eliminate the children's right to

2 Eg David Archard, *Children: Rights and Childhood.* (3rd edn, Routledge 2015).

3 Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Teachers College Press 1998); Allison James, 'To be (come) or not to be (come): Understanding children's citizenship' (2011) 633 The annals of the American academy of political and social science 167; Karen Smith, *The Government of Childhood: Discourse, Power and Subjectivity* (Springer 2014); Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (Brill Nijhoff 2018).

4 See eg Mark Henaghan, 'Article 12 of the UN Convention on the Rights of Children' (2017) 25 International Journal of Children's Rights 537, at 541; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2009) 240. Sinclair has made a summary of eight reasons for hearing children, see Ruth Sinclair, 'Quality Protects Research Briefing No 3 Young People's Participation' (London: Department of Health 2000).

make choices until adulthood, when they are expected to make rational choices with limited experience in decision-making.[5]

I utilise Sarah White's theory on participation, which distinguishes between four forms of participation: nominal, instrumental, representative and transformative.[6] Nominal and instrumental participation are inherently tokenistic, whereas representative and transformative participation are classified as true participation.

Nominal participation functions to fulfil legal obligations, to legitimise adult decision-making. The term 'the right to be heard' may be indicative of a nominal approach. The child is heard because the decision-maker has a duty to do so and because the opinion of the child, when concordant with the decision-maker's assessments, helps to legitimise the outcome. The voice of the child risks becoming muted unless the child gives a 'rational' answer, which requires sufficient cognitive, emotional and linguistic maturity. Younger children and children with a disability risk being denied a voice. The duty to hear the child is often delegated, and the conflicts of interests between the person representing the child and the child's best interest is overlooked or downplayed.

Instrumental participation is a means to an end, such as to gain information from the child to enable adults to make informed decisions that are in the best interest of the child. The approach to interview the child is often primarily forensic, but may include aspects of therapy or giving the child a right to participate. For younger children, observation may serve the purpose of participation.

In representative participation, adults run the decision-making process, but children are consulted and their opinions are taken seriously. Hearing the child involves ideally a dialogue where the adult and child discuss, share information on, and deliberate the issues at hand. The child's view is broadly defined as the child's perspectives on the matter. A representative of the child promotes the views of the child rather than its best interests. Depending on the issues at stake, even a fairly young child could participate, as a child may express his or her view through play or behaviour rather than words.

Finally, participation could be transformative, where children share power and responsibility for decision-making. Children shape the agenda and

5 David Archard, *Children: Rights and childhood* (n 2) 71–79; Michael Freeman, 'Why it remains important to take children's rights seriously' (2007) 15 The International Journal of Children's Rights 5, 14.

6 The scale of four approaches to participation used in children's rights literature is based on Sarah C White, 'Depoliticising development: the uses and abuses of participation' (1996) 6 Development in practice 6.

alternative solutions available, bringing in their unique perspectives, empowering them to make a significant impact on their lives. Children may choose how to participate and set the agenda. This approach gives children the right to meaningful participation, where the children themselves define 'meaningful' and could be characterised as 'true' participation.

The first two, tokenistic, approaches focus on the adult making the decision for the child, and the adult's need for (legally or psychologically) relevant information, whereas the true participation approach stresses the value of the child's unique perspective, regardless of whether it will aid the adult in making decisions.[7]

The approach to participation assumed will be likely to influence the definition of the right to participation, the implementation of the right in legislation, and practices. It is likely to influence when children are allowed to participate, and the methods used to involve the child and its views in the decision-making process. It will also indicate how the view of the child is represented in decision-making, and whether the child participates directly or indirectly. The more instrumental the view, the more likely the adult representing the child will promote the best interests of the child rather than the child's views (best-interests representation). At worst, it results in a failure to recognise the tension between best-interests representation and representing the voice of the child. The more empowering the participation and more the specific views of the child are weighted, the more likely a representative will represent the views of the child.[8] An emphasis on autonomy is likely to result in including the voice of the child.

However, participation requires that the child understands the issue and is capable of having views on it. If the child is not sufficiently mature, the adult can only represent the best interests of the child, not the child's views.

The view on participation rights answers the question why children should be given voice and choice. The 'why' question influences, in turn, the answer

7 See, eg, Nigel Thomas, 'Towards a theory of children's participation' (2007) 15 The International Journal of Children's Rights 199; Harry Shier, 'Pathways to participation: Openings, opportunities and obligations' (2001) 15 Children and society 107; Ruth Sinclair, 'Participation in practice: Making it meaningful, effective and sustainable' (2004) 18 Children and society 106.

8 See, eg, Rebecca H. Heartz, 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Role to Improve Effectiveness' (1993) 27 Family Law Quarterly 327; Andy Bilson and Sue White, 'Representing Children's Views and Best Interests in Court: An International Comparison' (2005) 14 Child Abuse Review 220. On the concepts of best-interest representation and representing the views of the child, see Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (n 3) 235ff.

to who, where, when and how to include children in decision-making.[9] Next, I will analyse how the Norwegian Constitution and statutory law answers these questions.

3 Participatory Rights in the Norwegian Constitution

The preparatory works of the Norwegian Constitution,[10] a key tool for interpretation, acknowledges the interconnection between the right to human dignity and participation rights. Human dignity entails exercising autonomy, being able to influence one's life by participating in decision-making.[11] Participation is quintessential for teaching children to be and become responsible citizens, able to exercise self-determination. The preparatory works stress that the right to be heard and influence decisions is an autonomous right. Thus, it must be specifically included as a right, not merely an obligation for the authorities. A specific provision for participatory rights must be included because the right to participation cannot be derived from other human rights. The right to participation also signifies that the child has a right to refrain from participating.

The rationale for introducing a specific provision on participation rights was to emphasise the human dignity of children and to highlight self-determination as an imperative step towards fostering citizenship and as a means to become a self-sufficient, responsible adult. However, the preparatory works fail to draw a closer connection between the ideals and practices producing the desired outcomes. The relationship between participation and the best-interests standard and other rights is not discussed. Nor is the question raised what respecting human dignity of children entails in practice. The preparatory works do not discuss what 'hearing the child' and 'the views of the child' mean. Do the terms refer to giving children merely the right to state their opinion on the issue at hand or does it refer to a duty to respect children's perspectives, their preferences and experiences? Do adults have the duty to facilitate participation and empower children to participate or merely a duty to give the child some

9 Andrew West, 'Children and Participation: Meanings, Motives and Purpose' in David Crimmens and Andrew West (eds), *Having Their Say Young People and Participation: European Experiences* (Russell House Publishing 2004).

10 Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, 190–191.

11 For a more detailed discussion of human dignity, see Randi Sigurdsen, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

voice and choice? What are the prerequisites of meaningful participation, for instance, in terms of access to information?

The Constitution and the preparatory works[12] use the term 'the right to be heard'. The right to be heard could potentially denote a narrower scope than the right to participate does. It implies that the child is allowed to state his or her opinion on a matter, not that children should be involved in shaping the decision-making process, defining the relevant issues and options available. Limiting participation to the right to state one's opinion will probably result in less involvement of children. The question is whether the wording impacts on the interpretation of the Constitution and consequently children's right to participation in Norway.

Some parts of the text could be read as a manifestation of existing views on the rationale for and the principle of including children in decision-making. Yet the introductory part on children's rights and the first paragraphs on participation rights indicate a more progressive, empowering approach. It expresses an equivocal view on children's participation. In its ambiguity, it serves to legitimise existing nominal and tokenistic practices in some contexts, such as mediation in cases on parental responsibility, and to promote true participation in others, such as child welfare cases.

According to section 104 of the Constitution, the right to be heard is limited to 'questions that concern [the child]'. The delimitation is simultaneously self-evident and contradictory. It is self-evident that the right to be heard is mostly limited to persons with sufficient interest in the outcome. It is contradictory because it may narrow the matters where children have the right to participate. The Constitution does not enshrine a right to collective participation for adults, but adults have unquestionably a right to participate in decision-making. For instance, the Public Administration Act[13] mandates informing and consulting persons and organisations with an interest in the outcome. Moreover, exercising the right to freedom of speech, enshrined in section 100 of the Constitution, does not guarantee sufficient participation, neither for children nor for adults, but the issue of the relationship between participation and

12 An unofficial English translation of the Norwegian Constitution is available at <https://lovdata.no/dokument/NLE/lov/1814-05-17> accessed 8 February 2019. Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (19 December 2011) <https://www.stortinget.no/Global/pdf/Dokumentserien/2011–2012/dok16-201112.pdf> accessed 8 February 2019.

13 Act relating to procedure in cases concerning the public administration of 10 February 1967 (Lov om behandlingsmåten i forvaltningssaker). An unofficial English translation is available at <https://lovdata.no/dokument/NLE/lov/1967-02-10> accessed 8 February 2019.

freedom of speech is not raised. Hence, the question is whether the threshold for the sufficient interest is different for children than for adults.

The preparatory works state that the duty to hear the child and give due weight to the views of the child according to the age and maturity of the child means that each child and each situation must be individually assessed. No general age limit is set, because the limit is necessarily contextual. Considering the debate on the requirements on age and maturity, particularly for disabled children, younger children and adolescents[14] and the criticism from the UN Committee on the Rights of the Child on the implementation of children's participatory rights in practice,[15] one would have expected a comment emphasising the right to direct participation for adolescents and older children and a discussion on how to involve young and children with a disability in a meaningful way.

The Public Administration Act is an example of a narrow understanding of children's participatory rights. Section 17 limits the right to be heard to children who have the formal status as parties. A party is the person to whom the decision is directed or who is directly concerned, according to section 2. In practice, the term directly concerned is interpreted narrowly. Monetary welfare benefits serve as an example. Often only the adult who is the formal beneficiary is heard, although the child is directly concerned and involving the child could improve the child's situation.[16] The same applies to services and benefits offered to parents whose children have a long-term, serious illness or disability. The practice of not hearing children is widespread, although the administration has a duty to secure sufficient information on the case thoroughly before making decisions.

The preparatory works for the Constitution must obviously be brief and general. However, even short comments indicating how these questions should

14 UN Committee on the Rights of the Child, *General comment No. 20 on the implementation of the rights of the child during adolescence* (6 December 2016) CRC/C/GC/20; UN Committee on the Rights of the Child, *General comment No. 9 The rights of children with disabilities* (27 February 2007) CRC/C/GC/9; UN Committee on the Rights of the Child, *General comment No. 7 Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7.

15 UN Committee on the Rights of the Child, *Concluding Observations: Norway* (3 March 2010) CRC/C/NOR/CO/4 5.

16 Helsetilsynet, Glemmer kommunene barn og unge i møte med økonomisk vanskeligstilte familier? Kartlegging og individuell vurdering av barns livssituasjon og behov ved søknader om økonomisk stønad. Oppsummering av landsomfattende tilsyn 2012. Helsetilsynets rapport 2/2013. <https://www.helsetilsynet.no/globalassets/opplastinger/publikasjoner/rapporter2013/helsetilsynetrapport2_2013.pdf> accessed 8 February 2019.

be answered would be helpful. For instance, the Government Report could have stated that children should be afforded direct participation in decision-making processes concerning themselves, or when that is not appropriate, children should have the right to effective indirect participation. Equally, the report could have stated that the delimitation of issues concerning children should be interpreted broadly to include *inter alia* services for children.

The absence of discussions on what the right to be heard or the right to participate entails and clear indications supporting true participation can serve to legitimise a limited, tokenistic approach to participation and manifest current views and practices. Regrettably, the commission drafting the Constitution did not properly recognise the complexities of granting children the right to participation, nor apprehend the deficiencies of existing practices.

Until today, the provision has not been subject to direct interpretation by the Supreme Court. The Supreme Court has, however, indicated that the provision has an impact on the application of existing provisions on hearing children and that the right to be heard is fundamental.[17] Nonetheless, it has also stated that the right to be heard may be limited in exceptional cases when the best interests of the child so require.[18] The Parliamentary Ombudsman (*Sivilombudsmannen*) has stated that the right to participate in decision-making is absolute.[19] The Supreme Court has a pivotal role in interpreting the law and in exercising judicial review, therefore, its views on the participation rights prevail despite criticism.

In sum, section 104, subsection 1 of the Norwegian Constitution is a paradox. It refers to the innate human dignity of children, yet the preparatory works reflect an ambiguous understanding of participatory rights. It could be interpreted to encompass instrumental participation only or to advocate empowering participation.

4 No Constitutional Right to Collective Participation

Under Norwegian law, participatory rights have often been treated as primarily an individual right. The wording of the Constitution does not indicate who the

17 HR-2017-18-U and HR-2016-2314-U have an indirect reference to section 104. In the *Maria* case (HR-2015-206-A), the Supreme Court gave a child independent legal standing in a case where the decision to deport her mother was challenged. However, in later immigration cases, children have been refused standing, see, eg, HR-2017-1130-A. None of the immigration cases has a direct reference to children's participatory rights.

18 HR-2016-2314-U.

19 SOM-2016-1152.

holders of participatory rights are. Neither the CRC, nor the Norwegian Constitution grant children political (voting) rights. The preparatory works explicitly state that an age-limit applies to voting rights but does not state the precise limit.[20] In the 2015 municipal elections, the voting age was lowered to 16 years in 20 municipalities. The outcome of the elections was that youngsters had similar voting patterns as adults. Lowering the age-limit does not influence the outcome. Therefore, further reforms have not been advanced.[21] The Ombudsman for Children, however, advocates lowering the age limit to 16 years in all elections to increase the influence children have on important societal decisions.[22] In spite of the fact that adolescents lack voting rights, many municipalities and counties have youth councils. However, these have practically no power to make binding decisions and cannot, therefore, compensate for the lack of political power in municipal elections.

The preparatory works for the Constitution explicitly do not give children collective participatory rights. The constitutional right to be heard is an individual right and can only be bestowed on small, closed groups of children, such as siblings.[23] Therefore, authorities have no obligation under the Constitution to hear children as a group, even when a decision concerns a specific group of children, such as the pupils in a specific school or children living in a specific neighbourhood.

The general comments on the CRC require collective participatory rights, albeit not a constitutional guarantee for those rights.[24] Letting children participate in decision-making will bring new perspectives, render better outcomes for children and participation in decision-making teaches children democracy and general civic skills. The preparatory works also acknowledge this but fail to draw the link to advocating a broad understanding of rights concerning the

20 Dokument 16 (2011–2012) 186.

21 Approximately the same percentage of youngsters voted as adults did, and youngsters voted on the same parties as adults did. <https://www.regjeringen.no/no/aktuelt/stemmerettsforsok/id2521804/> accessed 8 February 2019.

22 <http://barneombudet.no/dine-rettigheter/delta-og-bli-hort/stemmerett-for-16-aringer/> accessed 8 February 2019.

23 Dokument 16 (2011–2012) 191.

24 UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para 10, where 'the Committee strongly recommends' that children are included as a group even when the assessment of the age and maturity of the group is difficult and General comment No. 20 (n 14) on the implementation of the rights of the child during adolescence, paras 24–25. See also criticism from the CRC Committee in its *Concluding observations on the combined fifth and sixth periodic reports of Norway* (4 July 2018) CRC/C/NOR/CO/5–6, Part III para 14.

child. Children can practice participating in democratic processes in mock-councils, but such limited participation will not enrich current decision-making with their (fresh) perspectives.

In 2011, a government report accentuated the importance of including teenagers in policy-making and decision-making at various levels.[25] It advocated participation rights in the public sphere by highlighting the value of existing mechanisms and the need to implement them elsewhere. The report could have served as a source of arguments for the Human Rights Commission in drafting the Constitution. Instead, the commission uses vague language and is partly self-contradictory in advocating participation and denying it simultaneously by recognising the virtues of affording children collective participatory rights and still delimiting the constitutional right to participation to an individual right. Thus, the view on children's participation in collective matters seems to conform with an instrumental perspective, at best.

In absence of a constitutional right to participate in decision-making, children still have rights enshrined through the status of the CRC as semi-constitutional law. Additionally, the right to participation is, to some extent, included in ordinary legislation. The Education Act serves as an example.[26] Each primary and secondary school must have a coordinating committee and an environment committee consisting of representatives of faculty, parents, pupils, staff and the municipality or county. Schools must also have a pupil's council, but only pupils in year five and above have a right to participate in the council. The Day Care Institutions Act[27] gives children the right to express their views and participate in planning and evaluating activities. Thus, young children have a right to participation at their day-care institution, but once they enter school, they have no right to participate in decision-making, neither during school hours nor in after-school care. The Day Care Institutions Act is from a more recent date and could, therefore, reflect a shift in the views on participation. However, if that would be the case, the Education Act could have been amended to obtain coherence. Another explanation could be that pupils in schools participate in formal decision-making in the school board, whereas

25 NOU 2011:20 Ungdom, makt og medvirkning.

26 Lov om grunnskolen og den vidaregåande opplæringa (opplæringslova) 17 July 1998 no 61. Unofficial translation available at <https://www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf> accessed 8 February 2019.

27 Barnehageloven 17 June 2005 no. 64. Unofficial English Translation available at <https://www.regjeringen.no/globalassets/upload/kilde/kd/reg/2006/0037/ddd/pdfv/285752-barnehageloven-engelsk-pdf.pdf> accessed 8 February 2019.

children in day care do not. Nevertheless, even this problem could have been overcome. These two acts display lack of coherent regulation of participation rights.

5 Participation Rights in Individual Matters

In this part, children's right to participation in parental responsibility cases is contrasted with their rights in child welfare and protection cases to illustrate the prevailing understanding of children's participation and the influence of the Constitution on legislation. Recent changes to legislation on health care are discussed to enrich the picture.

5.1 *Processes Concerning on Parental Responsibility*

The Children Act regulates *inter alia* issues on child custody, residence and contact.[28] Parents have a duty to hear the child in all matters affecting the child and to give the opinion weight according to the maturity of the child, section 31. Section 33 states the parents have a duty to increasingly extend the child's right to make his or her own decisions. From the age of seven and younger, children capable of forming their own opinions have the right to information and to state their opinion. The opinion of children above the age of 12 should be given particular weight, section 31, subsection 2.

5.1.1 Out-of-Court Processes

All separating couples, whether married or cohabiting, with children under the age of 16 must attend mediation for at least one hour, usually at a Family Counselling Office (*Familievernkontor*), a state organisation. The services are offered free-of-charge. Most parents reach agreement before, during or shortly after mediation. After unsuccessful mediation, a parent may instigate court proceedings within six months. After six months have passed, parents must attend mandatory mediation to be able to file a case.[29]

28 Lov om barn og foreldre (barnelova) 8 April 1981 no 7. An unofficial English translation is available at <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/≥ accessed 8 February 2019.

29 For a more detailed account on resolution of conflicts on parental responsibility, see Anna Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

The Children Act does not regulate the mediation process or children's participation in it. Until recently, children were heard in less than 5 per cent of mandatory mediation cases. In 2017, the number was 21 per cent. The primary reason for not letting children participate is that parents are presumed to understand the best interests of their children and to act accordingly. By keeping the children out of mediation, children are supposedly protected against involvement in the potential parental conflict.[30] Mediators had, until recently, limited training and experience in involving children in decision-making and fear discussing with the children will harm their relationships with their parents. By not letting children participate, the mediator avoids these problems.[31]

In recent years, children have increasingly been included in mediation through the BIM model pilot project (*Barn i Mekling*, Children in Mediation).[32] In the model, the mediator speaks with the children before commencing mediation with the parents. The view of the child is understood broadly to give the parents insight in the child's perspective on the situation and the future. The child's message has a transformative capacity. It shapes the agenda of the mediation and introduces new issues. Children from the age of four have participated in the model. The project significantly enhances children's participation, as it shifts from non-inclusion to empowerment. Although the model neither allows children to select the form of participation nor direct participation, it is created a giant leap forward.

The BIM model was originally developed by a single therapist and demonstrates the paramount roles of models for hearing children and training of adults involved in decision-making. Today, the model is used in some Family Counselling Offices. Other offices use another model where the discussion with the child is directly focused on the child's views related to residence and contact.[33] Despite the fact that two competing models for involving children

30 Fritz Leo Breivik and Kate Mevik, *Barnefordeling i domstolen: Når barnets beste blir barnets verste* (Universitetsforlaget 2012).

31 The author has been involved in the pilot project on child-informed mediation. Some of the participants in the pilot have expressed these opinions as reasons for excluding children from mediation. The results are currently unpublished.

32 For an English language overview of the project and its outcomes, see Renee Thørnblad and Astrid Strandbu, 'The Involvement of Children in the Process of Mandatory Family Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

33 Bufdir, Modell for høring av barn – Videreføring av utviklingstiltak Brukerundersøkelse. Familievernkontoret for Asker og Bærum. <https://www.bufdir.no/Global/Modell_for_hoering_av_barn_Viderefoering_av_utviklingstiltak_Brukerundersoekelse.pdf> accessed 8 February 2019.

have been developed, almost 80 per cent of children are not allowed to participate in mediation.[34]

5.1.2 Court Procedures

In Norway, the majority of families agree on parental responsibility outside courts. Only approximately 10–15 per cent of separated families instigate proceedings in courts. These families tend to have prolonged high levels of conflict.

Mediation is the routine method for disposing of cases on parental responsibility, Children Act, section 61. The court appoints an expert to (co-)mediate and mentor the parents. If the parents do not settle, the expert becomes an evaluator, assessing and promoting the best interests of the child. The expert hears the children on behalf of the court, together with a judge, for forensic purposes or any combination of these purposes.[35] Thus, the expert has a dual role in both representing the views of the child and assessing the best interests of the child. These two roles may be at odds, which diminishes the child's right to participate in decision-making. The child has the right to a dedicated representative only in exceptional cases, usually when the child has been subject to abuse. The representative is a lawyer and is primarily the legal counsel and best-interests representative (*guardian ad litem*), not the voice of the child. The multiple, partly contradicting roles of the expert and a focus on settlement may be contrary to the rights of the child.[36]

The multiple, partly contradictory roles of the expert may result in downplaying, or even muting, the voice of the child and deter children from deliberating their views. The expert may meet the children or the judge can hear the children, but children do not attend the court hearing. Until recently, there were no specific guidelines on how to include children in mediation and court proceedings. The view of the child was construed narrowly, restricting it to the question of residence and contact, rather than allowing the child to discuss his or her views more

34 Bufdir, Årsrapport 2017. Barne-, ungdoms- og familiedirektoratet. <https://www.bufdir.no/arsrapport2017/> accessed 8 February 2019. See also criticism from the CRC Committee in its Concluding observations on the combined fifth and sixth periodic reports of Norway (n 24) Part III para 14.

35 For more details see Camilla Bernt, 'Custody Mediation in Norwegian Courts-A Conglomeration of Roles and Processes' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018); Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' (n 29).

36 See also Bernt, 'Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes' (n 35).

broadly.[37] The education of court-appointed experts focuses on forensic methods, not methods to include children in the process.[38] However, new guidelines for judges emphasise hearing the views of the child in a broad sense to enable the court and the parents to include the child's perspective in their decision making.[39] They refer explicitly to the constitution in advocating open questions and a focus on the child's view in lieu of asking specifically about the child's opinion on residence and contact schedules. The question remains whether practitioners will change their practices rapidly, or whether a culture change could take years as it has in the Family Counselling Offices.

Another promising development is that the weight given to the opinion of the child has increased. In 2012, courts cited the opinion of the child as a determinant for the outcome in 40 per cent of the cases, three times as many as a decade earlier.[40] Courts tend to give particular weight to the opinion of children above the age of 10.[41] The reason seems to be partly the criticism of earlier practices and the difficulties in determining the 'correct' outcome in cases on parental responsibility, which induces courts to let the child's opinion be decisive in difficult cases.

Adapting participation to the age and maturity of the child depends on the attitude and skills of the expert and the judge.[42] There is reason to believe that at least some experts still assume a tokenistic approach to hearing children, and that they define the opinion of the child narrowly. Letting children shape the agenda and issues and to select the form of participation is still utopia. Including children's right to participate in the Constitution has spurred some development that could in the long run lead to a major shift. Still, most changes are more appropriately attributed to the view of children in general.[43]

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37 Barneombudet, *Barnas stemme stilner i stormen: En bedre prosess for barn som opplever samlivsbrudd* (2012); Kristin Skjørten, 'Barns meninger om samvær' in Anne Trine Kjørholt (ed), *Barn som samfunnsborgere – til barnets beste?* (Universitetsforlaget 2010).

38 Agenda Kaupang, *Evaluering av utdanningsprogram for barnefaglige sakkyndige* (2017).

39 Domstolsadministrasjonen, Den gode barnesamtalen i foreldretvistar (Domstolsadministrasjonen 2017) <https://www.domstol.no/no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/> accessed 8 February 2019.

40 Kristin Skjørten, *Samlivsbrudd og barnefordeling* (Gyldendal 2005) 67.

41 Kristin Skjørten, 'Mellom beskyttelse og selvbestemmelse: Barns rettigheter i foreldretvister om bosted og samvær' in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten: Begreper, trender, teorier* (Gyldendal 2016).

42 For similar observations in selected common law jurisdictions, see Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (n 3) 252ff.

43 Skjørten, 'Mellom beskyttelse og selvbestemmelse: Barns rettigheter i foreldretvister om bosted og samvær' (n 41).

5.2 *Child Welfare and Child Protection Decision-Making Processes*

The Child Welfare Act[44] gives children the right to participation, section 1-6. Participation is defined as giving the child sufficient and appropriate information and providing the child an opportunity to express his or her views freely, verbally and non-verbally.[45] The provision emphasises the perspective of the child and that participation should be deliberative and continuous.[46] To accentuate the importance of participation and that the right applies to all aspects of child welfare services and decision-making, the provision was moved from chapter 4 to chapter 1 of the Act in 2017.[47] Concurrently, the terminology used shifted, marking a turn to real participation, where the child's perspectives on its current situation and options for the future is paramount.

Participation in child welfare cases, in general, in both the administrative stage and in court proceedings is regulated in more detail in section 6-3. The provision enshrines a right to information and to be heard, either directly or through a representative. The Child Welfare Act operates with an age-limit of seven of giving children an unconditional right to be heard. Younger children who are able to form an opinion have also the right to be heard. Children age 12 or above are often invited to the hearing in the tribunal.[48] Children, who are at least 15-years-old and sufficiently mature younger children have legal standing in child welfare matters. Children with serious behavioural problems have legal standing independent of their age since more intrusive measures may be ordered against them. Children with legal standing have a right to be present at the proceedings and a right to a legal counsel of their choice, section 6-3, subsection 2.[49]

The County Social Welfare Board (*Fylkesnemnda for barnevern og sosiale saker*) is a special tribunal that makes the initial decision on mandatory care. The County Social Welfare Board generally appoint a spokesperson (section 7-9)

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44 Lov om barneverntjenster (barnevernloven) Lov 17. juli 1992 nr 100. An unofficial English translation is available at <https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/> accessed 8 February 2019.

45 The Decree on Participation and Support Persons (Forskrift om medvirkning og tillitsperson) FOR-2014-06-01-697.

46 Government Bill Prop.106 L (2012–2013) Endringer i barnevernloven.

47 Government Bill Prop.169 L (2016–2017) Endringer i barnevernloven mv. (bedre rettssikkerhet for barn og foreldre) 141–142.

48 See HR-2013-1960-U where the Court of Appeals (*lagmannsretten*) did not hear a 13-year-old directly, only through a spokesperson. The Supreme Court found the lack of direct hearing was a breach of the procedural rights of the child and quashed the ruling. In a previous case, the Supreme Court found that appointing a spokesperson sufficed, see HR-2012-1198-U.

49 See HR-2014-1022-U.

to children above the age of seven, but not for younger children.[50] To be eligible to appear on the County Board's list of spokespersons, significant professional experience with children is required, e.g. as a teacher, social worker or nurse.[51] The child welfare services have a duty to inform the child of the right to a spokesperson.[52] The spokesperson represents the views of the child. He or she may not express any evaluation of the best interests of the child. Although the spokesperson usually does not know the child, he or she meets with the child as a rule only once. The dialogue with the child itself is to be 'child-friendly', and the spokesperson must attempt to use language understandable to the child. Based on this meeting, the spokesperson drafts a memorandum that must be submitted to the court. The spokesperson may not withhold information from the County Board or the parties to the case, i.e. the child's parents and the child welfare services. Thus, the child cannot use the occasion to deliberate whether and how certain information should be forwarded to the County Board.

The rules regulating the spokesperson ensues from a nominal approach to representative participation. The right to state one's opinion primarily serves the formal requirement of involving children, not involving the child because it could be beneficial and include new insights. The child is supposed to discuss a difficult, private matter with a stranger who, in turn, must share essential information with the parents, the child welfare services and the County Board.

In most cases, the County Boards do not refer to the child's opinion in their rulings, and even when they do so, they mention it only briefly. The Boards consider or elaborate on the child's opinion in 28 per cent of the cases. The child's perception of its situation is as a rule absent.[53] More weight is put on

50 Anne-Mette Magnussen and Marit Skivenes, 'The Child's Opinion and Position in Care Order Proceedings' (2015) 23 The International Journal of Children's Rights 705; Svein Arild Vis and Sturla Fossum, 'Representation of children's views in court hearings about custody and parental visitations: A comparison between what children wanted and what the courts ruled' (2013) 35 Children and Youth Services Review 2101.

51 Decree on the Spokesperson of the Child in the County Social Welfare Board. Forskrift om barnets talsperson i fylkesnemnda FOR-2013-02-18-203.

52 Q-11/2013 Rundskriv om barnets talsperson – kommentarer til forskrift 18. februar 2013 nr. 203 om barnets talsperson i saker som skal behandles i fylkesnemnda for barnevern og sosiale saker (Circular on the Spokesperson of the Child).

53 Magnussen and Skivenes, 'The Child's Opinion and Position in Care Order Proceedings' (n 50). See, *inter alia*, Randi Sigurdsen, *Tvangsplassering av barn med utfordrende atferd: En sammenligning av regler i barnevernloven, helse- og omsorgstjenesteloven og psykisk helsevernlov* (Fagbokforlaget 2015) 447–451.

the child's opinion when it is concordant with the views of the child welfare services, and less weight when the views contradict.[54]

In 2014, children in foster care gained a right to a support person (*tillitsperson*) of their choice, section 1-6. The support person has no formal role in the proceedings, but he or she facilitates participation *inter alia* by making the child more comfortable to express his or her views and by aiding the child in sharing perspectives. The child may choose any adult as its support person, for instance, a teacher, coach or relative.[55] The regulation of the support person appears to advocate true, empowering participation, or at least a consultative approach. The spokesperson was retained as a partially overlapping function.

In recent years, mediation has been introduced as an alternative to traditional proceedings in the County Boards. The County Board decides whether and how the child participates in mediation. The child may be invited to discuss the matter with the leader of the County Board or an expert. Children who have status as a party have a right to participate in mediation sessions.[56] The child's right to participate depends on the County Board.

Research on child participation reveals a dismal picture. Although the child welfare services have a duty to hear the child, the case manager often does not hear the child or hears the child for forensic purposes only.[57] The views of the child, in the broad sense, have limited impact on the outcome and placement arrangements and contact with family and friends. Thus, even when children are formally heard, the level of participation is often nominal or tokenistic. The obstacles to children's participation are attitudes towards hearing children (participation is not considered necessary), a desire to protect children, lack

54 Vis and Fossum, 'Representation of children's views in court hearings about custody and parental visitations: A comparison between what children wanted and what the courts ruled' (n 50).

55 Decree on Participation and Support Person; NOU 2011:20 (n 25) 104.

56 Retningslinjer for samtaleprosess i fylkesnemndene (Guidelines for discussion process in the County Boards) <https://www.fylkesnemndene.no/globalassets/pdfer/samtaleprosess.pdf> accessed 8 February 2019.

57 Elisabeth Gording Stang, *Det er barnets sak: Barnets rettsstilling i sak om hjelpetiltak etter barnevernloven § 4-4* (Universitetsforlaget 2007) 126–131, 272ff; Svein Arild Vis and Nigel Thomas, 'Beyond talking – children's participation in Norwegian care and protection cases' (2009) 12 European Journal of Social Work 155; Svein Arild Vis, Amy Holtan and Nigel Thomas, 'Obstacles for child participation in care and protection cases: why Norwegian social workers find it difficult' (2012) 21 Child Abuse Review 7; Øivin Christiansen, 'Hvorfor har barnevernet problemer med å se og behandle barn som aktører' (2012) 89 Norges Barnevern 16; Sissel Seim and Tor Slettebø, 'Challenges of participation in child welfare' (2017) 20 European Journal of Social Work 882.

of processes and methods facilitating children's participation, communication difficulties, insufficient training and heavy workloads.

The Constitution seems to have limited bearing on the right to participate in child welfare and child protection proceedings. Moving the provision on the right to participation from chapter 4 to the general provisions in chapter 1 of the Child Welfare Act is a symbolically important and tangible proof of increased weight given to children's participatory rights. Nevertheless, shifts in legislation emanate primarily from general attitudes towards children and development of manuals and training of professionals, not from the Constitution.

5.3 *Self-Determination in Health Care*

All health care requires informed consent. Parents or guardians make decisions on behalf of children under the age of 16, Health and Rights Act[58] sections 4-3 and 4-4. However, the parents have a duty to inform and consult the child before making decisions when the child has turned seven years of age or when the child is sufficiently mature to understand the matter, whichever comes first. The views of the child are given weight according to the age and maturity of the child, section 3-1. In 2017, children's right to participate in decision-making was strengthened. Children age seven and older, and younger children capable of forming an opinion on the matter, have a right to obtain information and to express their views. Parents and guardians are obliged to hear the child and give weight to the child's opinion according to the maturity of the child. Significant weight is given to the opinion of children age 12 and older.

For children under the age of 16, the parents or guardian of the child are to be informed of all health-related decisions, even when the child seeks medical help on his or her own. However, children age 12–15 have a right to self-determination limited to situations where the child wishes so for acceptable reasons, section 3–4. Acceptable reasons are limited to *inter alia* children wanting a vaccination although their parents are against vaccination and children who wish to use contraceptives. In these situations, information is withheld from the parents. In 2017, a possibility to withhold information from parents when the child is younger than 12 was enacted. The right is limited to exceptional circumstances, for instance, cases of child abuse or highly personal issues such as sexuality and sexual identity. Children must be informed

58 Act of 2 July 1999 no. 63 (Lov om pasient- og brukerrettigheter).

of their right to request an exemption from the rules on parents' access to information.[59]

The 2017 amendments emphasise the child's right to receive information, which is an indication of how the view on participation has shifted from tokenistic to empowerment and involvement. By discussing health care with children, they can influence at least some aspects of care even when they are not sufficiently old and mature to influence whether and which type of care is given. The preparatory works expressly refer to the Constitution.[60] Unlike in the domain of child welfare, children's constitutional right to participation in decision-making has had a tangible effect on children's position in matters related to health care.

6 Age, Maturity and Increasing Self-Determination

The autonomy and development of children would suggest increasing participatory rights with increasing age and maturity. The form of participation available should match the maturity and preferences of the child. The preparatory works recognise the role of age, but do not explain its implications. While age limits may be material when establishing participatory rights, they may still impede participatory rights and development of child-centric practices. Firstly, age limits may be applied mechanistically preventing younger children from participating. Second, the question of age may overshadow the nature of participation and, hence, hold back development of practices ensuing transformative participation. Third, the age-limit may result in a dichotomous approach to maturity, where the same process for participation is offered to all children above the age limit rather than developing a range of processes that match children of different ages and with different preferences. Finally, hearing the child does not suffice, the child's views must be given due weight.

The rationale of the specific age requirements in the Children Act and Child Welfare Act is not explained. The age limit of seven corresponds with the compulsory school age at the time of enactment. Similarly, teenagers have traditionally gained rights at the age of 15, which is the age of criminal responsibility. It is also the time of the first communion in the Evangelical Lutheran Church, the State church in Norway. These key events seem to have been decisive and are maintained without questioning. As a result, children under the

59 Prop.75L (2016–2017) Endringer i pasient- og brukarrettslova, helsepersonellova m.m. (styrking av rettsstillinga til barn ved yting av helse- og omsorgstenester m.m.) 86.

60 Prop. 75 L (2016–2017) 85–87.

age of seven are seldom heard and adolescents must adhere to rules adapted to younger children. In contrast, the Public Administration Act does not operate with age-limits but has tied the duty to hear children to their formal status as parties. Although there is a duty to clarify the relevant facts before making administrative decisions, children are often overlooked. Based on a comparison of these statutes, operating with age limits would seem to improve children's (constitutional) rights, at least when children have not been ensured participatory rights in practice previously. When involving children has become part of a general practice within a specific legal domain, age limits could perhaps be abolished to secure younger children the right to participate.

The current view on participation inadvertently stresses verbal communication, which gives a disadvantage to children with less developed verbal skills. In accentuating neutrality when transmitting the opinion of the child, guidelines fail to recognise the way younger children and children with verbal or cognitive disorders express themselves. Transmission of their subjective view to an audience who does not know them personally requires 'translation'.[61] Assessment of their maturity is rarely problematized; how is maturity assessed, who assesses it and how does one assess maturity when it varies across different aspects of it.[62]

Furthermore, the view on participation effects whether and how children are heard. The more hearing of the child signifies merely a right to discuss options available, the more advanced cognitive and linguistic skills are required. In contrast, if the decision-maker values the child's individual perspective and lets the child participate in setting the agenda, younger children may participate successfully.

The Decree on Participation and Support Person in child welfare and child protection cases is an exception in that it expresses a broad view of participation. It stresses non-verbal communication and a broad concept of 'view' that includes the child's perspective on its situation in general. The child's unique view is important regardless of whether he or she expresses the preference of an option or gives information directly relevant to establish the best interests of the child or the outcome. The child may express his or her views in many ways – in words, through play or art, or body language. However, a support person should be someone who the child knows and trusts, someone who is able to facilitate a deliberation, who understands the language of the individual child, not a stranger. Nonetheless, using support persons routinely probably

61 Kari Ofstad and Randi Skar, *Barnevernloven: Kommentarutgave* (Gyldendal 2009) 312–313.

62 See Randi Sigurdsen, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

enhances participation for young children. The Decree should serve as a blueprint for involving children in all types of proceedings.

7 True Participation and Autonomy: Still Not There?

The analysis of children's right to participate in Norway indicates that although the wording of the Constitution is fairly clear, the preparatory works are ambiguous and vague. Norwegian law does not sufficiently distinguish between best-interests representation and representing the voice of the child, and the problems of combining the two roles. Thus, children's participatory rights are often nominal or tokenistic, affording children no right to direct participation and empowerment. Although the notion is changing, the old notion still permeates much of the provisions in the Children Act and the Child Welfare Act. The Constitution is rather vague.

Nonetheless, a shift in the view of children's right to participate has emerged in the last decade or so. Earlier, children were regularly excluded from decision-making. In recent years, the support person in child-welfare processes is an important step, representing a turn from hearing the child to participation as consultation. The BIM project and the amendment of health care law are other positive examples. The examples above illustrate how including the right to participation in the Constitution has resulted in advances in domains where children have had weak rights, such as in health law. In other areas, the results are so far meagre. Progress stems primarily from elsewhere, *inter alia*, increased awareness of children's rights and the need to include children's perspectives, vocal groups of children with experience from child welfare services and proceedings, critical research, and critical reports from the UN Committee on the Rights of the Child.

The main hindrances to consultative and empowering participation are paternalistic attitudes combined with a lack of understanding of the value and benefits of participation, along with insufficient training and skills of professionals involved in these processes. Moreover, crosspollination across the systems and stages of proceedings seems to be limited. Advances in one area do not seem to induce change in other areas. Mediation, in particular, is problematic because children are not routinely invited to participate in the mediation process or are heard before or during mediation.

The main progress in the area of children's participatory rights in Norway ensues from a shift in the view of children, not the Constitution. Nevertheless, promoting children's empowerment and self-determination at a constitutional level could expedite change in practices. The vague wording of the preparatory

works, particularly, the fact that they do not unequivocally endorse direct, empowering participation limits the use of the Constitution as an impetus for rethinking current practices.

References

Agenda Kaupang, *Evaluering av utdanningsprogram for barnefaglige sakkyndige* (2017).

Archard D, *Children: Rights and Childhood* (3rd edn, Routledge 2015).

Barneombudet, *Barnas stemme stilner i stormen: En bedre prosess for barn som opplever samlivsbrudd*. 2012.

Bernt C, 'Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

Bilson A and White S, 'Representing Children's Views and Best Interests in Court: An International Comparison' (2005) 14 Child Abuse Review 220.

Breivik FL and Mevik K, *Barnefordeling i domstolen: Når barnets beste blir barnets verste* (Universitetsforlaget 2012).

Bufdir, Årsrapport 2017. Barne-, ungdoms- og familiedirektoratet. <https://www.bufdir.no/arsrapport2017/> accessed 8 February 2019.

Bufdir, Modell for høring av barn – Videreføring av utviklingstiltak Brukerundersøkelse. Familievernkontoret for Asker og Bærum. <https://www.bufdir.no/Global/Modell_for_hoering_av_barn_Viderefoering_av_utviklingstiltak_Brukerundersoekelse.pdf> accessed 8 February 2019.

Christiansen Ø, 'Hvorfor har barnevernet problemer med å se og behandle barn som aktører' (2012) 89 Norges Barnevern 16.

Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence* (6 December 2016) CRC/C/GC/20.

Committee on the Rights of the Child, *Concluding Observations: Norway* (3 March 2010) CRC/C/NOR/CO/4.

Committee on the Rights of the Child, General comment No. 9 (2006): The rights of children with disabilities.

Committee on the Rights of the Child, *General comment No. 7 (2005): Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7.

Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Norway* (4 July 2018) CRC/C/NOR/CO/5–6.

Daly A, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (Brill Nijhoff 2018).

Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (19 December 2011).

Domstolsadministrasjonen, Den gode barnesamtalen i foreldretvistar (Domstolsadministrasjonen 2017) <https://www.domstol.no/no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/> accessed 8 February 2019.

Fortin J, *Children's Rights and the Developing Law* (Cambridge University Press 2009).

Freeman M, 'Why it remains important to take children's rights seriously' (2007) 15 The International Journal of Children's Rights 5.

Haugli T, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Heartz RH, 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Role to Improve Effectiveness' (1993) 27 Family Law Quarterly 327.

Helsetilsynet, Glemmer kommunene barn og unge i møte med økonomisk vanskeligstilte familier? Kartlegging og individuell vurdering av barns livssituasjon og behov ved søknader om økonomisk stønad. Oppsummering av landsomfattende tilsyn 2012 Helsetilsynets rapport 2/2013. <https://www.helsetilsynet.no/globalassets/opplastinger/publikasjoner/rapporter2013/helsetilsynetrapport2_2013.pdf> accessed 8 February 2019.

Henaghan M, 'Article 12 of the UN Convention on the Rights of Children' (2017) 25 International Journal of Children's Rights 537.

James A, 'To be (come) or not to be (come): Understanding children's citizenship' (2011) 633 The Annals of the American Academy of Political and Social Science 167.

James A, Jenks C and Prout A, *Theorizing Childhood* (Teachers College Press 1998).

Magnussen AM and Skivenes M, 'The Child's Opinion and Position in Care Order Proceedings' (2015) 23 The International Journal of Children's Rights 705.

NOU 2011:20 Ungdom, makt og medvirkning.

Nylund A, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

Ofstad K, Skar R, *Barnevernloven: Kommentarutgave* (Gyldendal 2009) 312–313.

Prop.106 L (2012–2013) Endringer i barnevernloven.

Prop.169 L (2016–2017), 141–142. Endinger i barneverneloven mv. (bedre rettssikkerhet for barn og foreldre).

Prop.75L (2016–2017) Endringer i pasient- og brukarrettslova, helsepersonellova m.m. (styrking av rettsstillinga til barn ved yting av helse- og omsorgstenester m.m.).

Q-11/2013 Rundskriv om barnets talsperson – kommentarer til forskrift 18. februar 2013nr. 203 om barnets talsperson i saker som skal behandles i fylkesnemnda for barnevern og sosiale saker.

Retningslinjer for samtaleprosess i fylkesnemndene <https://www.fylkesnemndene.no/globalassets/pdfer/samtaleprosess.pdf> accessed 8 February 2019.

Seim S, Slettebø T, 'Challenges of participation in child welfare' (2017) 20 European Journal of Social Work 882.

Shier H, 'Pathways to participation: Openings, opportunities and obligations' (2001) 15 Children and society 107.

Sigurdsen R, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Sigurdsen R, *Tvangsplassering av barn med utfordrende atferd: En sammenligning av regler i barnevernloven, helse- og omsorgstjenesteloven og psykisk helsevernlov* (Fagbokforlaget 2015).

Sinclair R, 'Participation in practice: Making it meaningful, effective and sustainable' (2004) 18 Children & society 106.

Sinclair R, 'Quality Protects Research Briefing No 3 Young People's Participation' (Department of Health 2000).

Skjørten K, 'Mellom beskyttelse og selvbestemmelse. Barns rettigheter i foreldretvister om bosted og samvær' in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten: Begreper, trender, teorier* (Gyldendal 2016).

Skjørten K, 'Barns meninger om samvær' in Anne Trine Kjørholt (ed), *Barn som samfunnsborgere – til barnets beste?*, (Universitetsforlaget 2010).

Skjørten K, *Samlivsbrudd og barnefordeling* (Gyldendal 2005).

Smith K, *The government of childhood: Discourse, power and subjectivity* (Springer 2014).

Stang EG, *Det er barnets sak: Barnets rettsstilling i sak om hjelpetiltak etter barnevernloven § 4-4* (Universitetsforlaget 2007).

Thomas N, 'Towards a theory of children's participation' (2007) 15 The International Journal of Children's Rights 199.

Thørnblad R and Strandbu A, 'The Involvement of Children in the Process of Mandatory Family Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

Vis SA and Fossum S, 'Representation of children's views in court hearings about custody and parental visitations: A comparison between what children wanted and what the courts ruled' (2013) 35 Children and Youth Services Review 2101.

Vis SA, Holtan A and Thomas N, 'Obstacles for child participation in care and protection cases – why Norwegian social workers find it difficult' (2012) 21 Child Abuse Review 7.

Vis SA, Thomas N, 'Beyond talking – children's participation in Norwegian care and protection cases' (2009) 12 European Journal of Social Work 155.

West A, 'Children and Participation: Meanings, Motives and Purpose' in David Crimmens and Andrew West (eds), *Having Their Say Young People and Participation: European Experiences* (Russell House Publishing 2004).

White SC, 'Depoliticising development: the uses and abuses of participation' (1996) 6 Development in practice 6.

CHAPTER 12

Children's Right to Participate and Their Developing Role in Finnish Proceedings

Hannele Tolonen

1 Introduction

1.1 *On Participation*

Children's right to participate is a wide concept. Participation can take place in many contexts, from collective participation in community decision-making to individual participation in court and administrative proceedings, as well as in everyday situations in education and health care.[1]

Since 1995, Finnish children have had a constitutional right to influence matters that affect them, in accordance to their development.[2] Long before that, provisions on children's participation have existed in many fields of legislation. After turning 15 years, children have independent procedural participatory rights (*puhevalta*) in court proceedings that concern their person, along with their representatives. Since the 1970s, provisions on taking into account children's opinion have become common in many areas, for example, in legislation on parental responsibility and child protection measures.

Children's opportunities to participate in judicial and administrative proceedings have been emphasised in the United Nations Convention on the Rights of the Child (CRC, article 12), which has been implemented in the Finnish legislation since 1991. In the recent years, providing children opportunities for participation has been widely discussed in Finland and emphasised in various fields. According to the *Youth Act* 1285/2016 (*nuorisolaki*), the aim now applies well into adulthood.

Despite the strong institutional support for children's participation, there are also concerns on strengthening children's role in decision-making. One of the main questions is whether the child benefits from the involvement or whether it will be harmful, for example straining their family relations, when

1 On the aspects of the concept, see for example UN Committee on the Rights of the Child, *General comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12 para 32.

2 *Suomen perustuslaki* (731/1999) section 6, subsection 3.

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the matter concerns them.[3] On the other hand, the *UN Committee on the Rights of the Child* has criticised Finland for not sufficiently ensuring children's hearing, mentioning parental responsibility proceedings as an example.[4]

When children's family members are involved in legal proceedings that concern children, questions arise on children's representation when the interests of children and adults may conflict. In handling of these conflicts, a sharp division has emerged between the fields of Finnish family legislation. This became evident when Finland ratified the European Convention on the Exercise of Children's Rights (CECR) in 2011. Some of its provisions discuss special representation for children in case of a conflict of interests between the child and the holders of parental responsibility.[5] In Finland, the CECR is only applied in the fields of child protection, paternity and adoption,[6] but not in proceedings on parental responsibility and contact, for example. In the recent case law on the right to family life (the European Convention on Human Rights (ECHR) article 8), the European Court of Human Rights (ECtHR) has taken a stronger stand on the standards of children's participation in parental responsibility proceedings, underlining for example the principles that are expressed in the CECR.[7]

1.2 *The Scope and Material*

In this work, the roots, the effects, and the limitations to children's right to participate are discussed in the Finnish context. Where have we now arrived, what are the main trends of development and how does the current system of children's procedural participation compare to the developing international standards?

I begin with a concise introduction to the constitutional framework and children's collective and individual participatory rights in light of the Finnish

3 On possible risks see, for example, Eva Gottberg, 'Lapsen subjektiudesta ja osallisuudesta huoltokysymyksissä ja lastensuojelussa' (2008) 3 Defensor Legis 319, 321. On international discussion see for example Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press 2008) 14; Jill Duerr Berrick and others, 'International Perspectives on Child-responsive Courts' (2018) 26 Int J of Children's Rights 251, 254.

4 UN Committee on the Rights of the Child, *Concluding observations: Finland* (3 August 2011) CRC/C/FIN/CO/4 paras 29–30. The word used in the text is custody.

5 If internal law precludes the holders of parental responsibilities from representing the child because of such conflict of interests, judicial authorities shall have a power to appoint a special representative (article 9.1) and the child shall have a right to apply for one (article 4.1).

6 Tasavallan presidentin asetus lasten oikeuksien käyttöä koskevan eurooppalaisen yleissopimuksen voimaansaattamisesta sekä yleissopimuksen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta annetun lain voimaantulosta (13/2011) section 3.

7 The case law will be discussed later.

legislation. Then, children's rights to participate in court proceedings are more closely examined, analysing in more detail some aspects of their procedural participation. The focus here is in proceedings on parental responsibility and child protection, where discussion is abundant and legislative measures are developing. Adoption, paternity, immigration and criminal proceedings are also mentioned where relevant.

The main sources are legislation, preparatory works, case law of the two supreme courts and legal doctrine, as well as material on international human rights conventions. In addition to the case law of ECtHR, references are made to the discussion on the CRC and the CECR.[8] The focus is in the recent developments, but to illustrate the background, some examples are given on the legislative history.

2 Children, Constitution and Participatory Rights

2.1 *On the Constitutional Framework*

The Constitution of Finland 731/1999 (*Suomen perustuslaki*) came to force in 2000. A domestic turning point in the development of fundamental rights has been set a few years before, when the previous Constitution was modified (969/1995) after Finland joined the ECHR.[9] According to the preparatory works, the constitutional rights and the international human rights would be brought closer together, and the need to harmonise their interpretations would become more pronounced.[10] The human rights provisions are considered to set a minimum standard of protection, which may be surpassed in the domestic constitutional norms. However, it has been pointed out that the courts give considerable weight to the case law of ECtHR in their interpretations.[11]

8 Children's right to express their views and have them taken into consideration is also acknowledged in the Charter of Fundamental Rights of the European Union, article 24(1). The charter will not be discussed in this work.

9 See Pekka Länsineva, 'Perusoikeusliike' in Tatu Hyttinen and Katja Weckström (eds), *Turun yliopiston oikeustieteellinen tiedekunta 50 vuotta* (Turun yliopisto, oikeustieteellinen tiedekunta 2011) 339, 342.

10 Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (PeVM 25/1994) 5.

11 Tuomas Ojanen and Martin Scheinin, 'Kansainväliset ihmisoikeussopimukset ja Suomen perusoikeusjärjestelmä' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 191–194. The writers call for a stronger role to the Constitution. On criticism of a strong fundamental right approach see Markku Helin, 'Perusoikeuksilla argumentoinnista' in Tero Iire (ed), *Varallisuus, vakuudet ja velkojat: Juhlajulkaisu Jarmo Tuomisto 1952 – 9/6 – 1912* (Turun yliopisto, oikeustieteellinen tiedekunta 2012) 11.

Finnish courts may give primacy to the Constitution if there is an evident conflict with an Act.[12] Primarily, the constitutionality of legislative proposals is supervised by the Constitutional Law Committee of the Parliament (*perustuslakivaliokunta*).[13] In its supervisory role, the Constitutional Law Committee also assesses how the proposals relate to international human rights treaties, such as the ECHR and – as in questions on children's participation – the CRC.[14]

From the historical perspective, children have not always been considered holders of fundamental rights as they clearly are today.[15] In the constitutional reform, children's constitutional rights were acknowledged in a specific provision. Firstly, children shall be treated *equally and as individuals*. Secondly, their right to participation is acknowledged: children shall be allowed to *influence matters that concern them in accordance to their level of development*.[16] The provision was influenced by the CRC, which is mentioned in the preparatory works.[17]

According to the government's proposition, children have fundamental rights, but in practical situations, the central question may be who exercises these rights.[18] This stance puts the focus on formal participation by children's representatives – generally parents – and emphasises the material aspects of decision-making instead of children's procedural participation. Nevertheless, it has been pointed out that restricting children's autonomy calls for sufficiently

12 Constitution, section 106. An unofficial translation is available at <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731_20111112.pdf≥ accessed 11 February 2019. On Supreme Court case law see, for example, KKO 2012:11 and KKO 2015:14, where procedural rights were discussed in light of ECtHR case law.

13 If the committee has ruled out a conflict in a certain specific question, the chance of a court finding otherwise has been considered narrow. Veli-Pekka Viljanen, 'Perusoikeuksien merkitys lainsäädäntötyössä' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 847–848.

14 See Perustuslakivaliokunnan lausunto hallituksen esityksestä lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi (PeVL 58/2006), where the Constitution, ECtHR case law and CRC were discussed in assessing the proposition for the Child Welfare Act 417/2007 (lastensuojelulaki).

15 On the discussion in the 1970s and 1980s, see Liisa Nieminen, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990) 7.

16 Section 6, subsection 3. Originally, *Suomen Hallitusmuoto* (969/1995) section 5, subsection 3. The latter part of the provision was added during the parliamentary work. PeVM 25/1994 (n 10) 7.

17 Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta (HE 309/1993) 45. See also Liisa Nieminen, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013) 338; Henna Pajulammi, *Lapsi, oikeus ja osallisuus* (Talentum 2014) 109–110.

18 HE 309/1993 (n 17) 24 and 44.

precise legislation[19] and that the provision should be interpreted in the context of the specific situation at hand.[20]

A more general framework for procedural participation is also set in the Constitution. Guarantees of a *fair trial* are included in the provision on constitutional right to protection under the law (Section 21, *oikeusturva*). According to the preparatory works, the purpose is to guarantee the rights that are provided in ECHR article 6.[21] According to ECtHR, mere formal rights are not enough. Instead, effective possibilities for participation have to be provided.[22] In *Blokhin v Russia* (2016), the Grand Chamber concluded that the applicant – a child – was not afforded a fair trial in child protection proceedings because of the lack of legal assistance in police hearings and not having a chance to ask questions from the witnesses.[23]

In the case law of ECtHR, requirements to procedural participation also stem from the right to respect for *privacy and family life* (article 8). In the Finnish Constitution, the concept of family life is not mentioned. According to the preparatory works, it is included in the right to privacy.[24] It has been argued that the close connection to the conceptual framework of ECHR, article 8, underlines the importance of ECtHR case law in interpreting this section.[25]

In ECtHR case law on family proceedings that fall under article 8, the parents' sufficient involvement in the decision-making process has generally been required.[26] In a parental responsibility case *M. and. M. v Croatia* (2015), similar

19 Nieminen (n 17) 340.

20 Pajulammi (n 17) 110.

21 HE 309/1993 (n 17) 73. The provision of International Covenant on Civil and Political Rights, Article 14 Section 1 is also mentioned here.

22 On the case law see, for example, Robin C. A. White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 255 and 260; Matti Pellonpää and others, *Euroopan ihmisoikeussopimus* (6th edn, Alma Talent 2018) 332.

23 *Blokhin v Russia* App no 47152/06 (ECtHR, 23 March 2016). The proceedings were interpreted to constitute criminal proceedings within the meaning of article 6. Therefore, more far-reaching procedural guarantees were applied.

24 Constitution, section 10 and HE 309/1993 (n 17) 53. See also Nieminen (n 17) 43. The right to family life in the Finnish context is discussed in more detail by Sanna Koulu, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 17.

25 Veli-Pekka Viljanen, 'Yksityiselämän suoja (PL 10 §)' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 393.

26 On the case law see, for example, Päivi Hirvelä and Satu Heikkilä, *Ihmisoikeudet: Käsikirja EIT:n oikeuskäytäntöön* (2 edn, Alma Talent 2017) 766 (child protection) and 770 (parental responsibility).

considerations were applied to a child who could express her views but had not been provided the opportunity to be heard. ECtHR found a breach of the child's article 8 rights, referring to CRC article 12 and the comments of the UN Committee on the Rights of the Child.[27]

2.2 *On Children's Collective Participation*

A distinction can be made between children's participation in individual cases and their more general collective participation in society.[28] In collective participation, one can distinguish between political or democratic participation and participation in governance, which can further be divided to electoral and non-electoral mechanisms.[29]

Electoral mechanisms are not generally available to children in Finland. According to the Constitution, the right to vote applies to persons who have attained eighteen years of age. In the provision, national and municipal elections and referendums, as well as European Parliamentary elections are mentioned.[30] In parish elections, children of 16 years may vote.[31]

According to the Constitution, the public authorities also have a more general duty to promote individual opportunities to participate in societal activities. No age limit is set here.[32] It has been pointed out that there may be a lack of precise forms of collective participation that would accommodate the special needs of children.[33] According to the legislation on communities, youth councils have to be appointed in communities in order to secure children's and

27 *M. and M. v Croatia* App no 10161/13 (ECtHR, 3 September 2015) paras 181–187. A breach of article 3 was also found, because the allegations of ill treatment had not been effectively investigated (para 163). The cases mentioned in this section will be discussed later in more detail.

28 See, for instance, Niina Mäntylä, 'Lasten ja nuorten osallistumisen oikeudelliset ongelmat' in Niina Mäntylä (ed), *Lapset ja nuoret yhteiskunnan toimijoina* (Vaasan yliopiston julkaisuja 2011) 25. Available at <https://www.univaasa.fi/materiaali/pdf/isbn_978-952-476-379-0.pdf≥ accessed 11 February 2019.

29 On terminology, see Meda Couzens, 'Child Participation in Local Governance' in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook on Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017) 516. In Mäntylä (n 28) 25, the term 'yleinen' (general) participation is used when discussing collective participation. See also Pajulammi (n 17) 340.

30 Constitution section 14.

31 The provision is now in the Church Act 414/2014 (kirkkolaki) chapter 23 section 12. The age limitation was lowered in 2009 (689/2008).

32 Constitution, section 14, subsection 4. See also HE 309/1993 (n 17) 62.

33 Mäntylä (n 28) 25; Pajulammi (n 17) 360.

young people's opportunities for participation. In the preparatory works, the Constitution and CRC were acknowledged.[34]

2.3 *On Children's Individual Participation*

Provisions on children's right to express their views and opinions in matters that concern them have become common in the Finnish legislation. Many of them have similarities to CRC, article 12, requiring that children's views be taken into account according to their age and maturity.[35] Such provisions with no specific age limit are present in legislation on child protection, parental responsibility, social welfare, and early childhood education, among others.[36] Holders of parental responsibility also have to take into account children's opinions and views when making decisions on children's personal matters.[37]

An example of a more age-determined approach is in the *Aliens Act.* Hearing a child is required if the child is at least 12 years old before a decision concerning the child is made by an authority. An exception can be made if hearing is manifestly unnecessary. Younger children may be heard if they are sufficiently mature for their views to be taken into account.[38] In a recent case concerning international protection, where a 13-year-old had not been heard by the immigration authorities, the Supreme Administrative Court stated that the concept of 'manifestly unnecessary' (*ilmeisen tarpeetonta*) should be interpreted narrowly. The court stated that the obligation to hear the child should be assessed in light of CRC articles 12 and 3(1), discussing the comments of the Committee

34 Kuntalaki (410/2015) section 26. Hallituksen esitys eduskunnalle kuntalaiksi ja eräiksi siihen liittyviksi laeiksi (HE 268/2014) 24.

35 On recent discussion of legislation in light of the CRC, see also Merike Helander, 'Utvecklingsbehov i den finländska lagstiftningen om barn' (2018) 1 Nordisk Administrativt Tidsskrift 5, 8.

36 See also legislation on immigration integration (1386/2010) and international protection (746/2011).

37 Act on Child Custody and the Right of Access 361/1983 (Laki lapsen huollosta ja tapaamisoikeudesta, Custody Act) section 4, subsection 2. An unofficial translation is found at <https://www.finlex.fi/en/laki/kaannokset/1983/en19830361> accessed 11 February 2019. In a recent legislative reform, a specific provision on the obligation to give information was added. Custody Act section 4 subsection 3 (190/2019). This Act enters into force on 1 December 2019. See also Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi (HE 88/2018) 37.

38 *Ulkomaalaislaki* (301/2004) section 6 subsection 2. An unofficial translation is available at <https://www.finlex.fi/en/laki/kaannokset/2004/en20040301_20101152.pdf> accessed 11 February 2019.

on the Rights of the Child. The Constitution was also mentioned. The decision of the immigration authorities was overturned.[39]

In the field of family law, children have long been allowed independent veto powers in certain matters. Since the first Adoption Act (*laki ottolapsista* 208/1925), mature children have had a right to refuse adoption. According to the current provisions, consent of children over 12 years is required for adoption unless they are unable to express their opinion. Younger children may refuse if they are considered sufficiently mature.[40]

Children also have veto power when decisions on parental responsibility are enforced. Currently, the age limit is 12. Also here, younger children may be able to refuse the enforcement if they are considered sufficiently mature.[41] In a recent legislative reform, it was added that in assessing the effects of a refusal, the motivation and independence of the opinion are to be taken into account.[42] In the case of *C. v Finland* (2006), ECtHR criticised the Finnish Supreme Court for giving an impression that 12 and 14 year old children could determine the outcome of a parental responsibility case.[43]

> The children's mother had deceased. The Supreme Court ordered parental responsibility to her partner instead of the children's father, stating that a differing decision could not be enforced because of the opposition from children in light of their ages. The children's opinions had been assessed by social authorities and experts.[44]

Legislation on *health care* also gives children wide rights to participate in decision-making on their treatment. No age limit is stated here, which allows room for individual considerations. Children's opinions on treatment measures have to be assessed if that is possible with regard to their age or level of development. Minor children have to be cared for in mutual understanding

39 KHO 2017:81.

40 Adoption Act 12/2012 (adoptiolaki) section 10.

41 Laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta 619/1996, section 2.

42 Laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta (191/2019) section 2 subsection 2. See also HE 88/2018 (n 37) 67–68. A similar interpretation was suggested in the early literature. Matti Savolainen, *Lapsen huolto ja tapaamisoikeus* (Suomen Lakimiesliiton kustannus 1984) 98.

43 *C. v Finland* App no 18249/02 (ECtHR, 9 May 2006) para 58. A breach of the father's article 8 rights was found. On the case see also Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009) 299.

44 KKO 2001:110.

with them if they are able to decide on the treatment in light to their age and development. Such children also have a right to forbid that information on their health is given to the guardian.[45] Interpretations of these provisions have been critically discussed. Concerns have been voiced on giving young children rights to independent decision-making and privacy from parents.[46] The discussion has moved between everyday practicalities – such as keeping appointments, if the parents cannot access the computer system on behalf of their children – and more serious matters, such as the parents' knowledge on treatment that is given to their children.[47] When the public health care officials set an age limitation for an effective consent for a vaccination that was offered at schools, the parliamentary ombudsman criticised the interpretation for not sufficiently taking into account individual differences in development.[48]

Children's consent and refusal after a certain age is also given weight in some other personal matters. The name of a child may only be changed with his or her consent, if the child has reached the age of 12. Younger children's names cannot be changed against their opinion if the child is considered sufficiently mature.[49] According to the legislation on freedom of religion, a child above 15 years may join or leave a religious community if the holders of parental responsibility give their consent. A lower age limitation is set to 12, after which age a child's consent is required for these changes.[50]

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45 Act on the Status and Rights of Patients (laki potilaan asemasta ja oikeuksista 785/1992) section 7; section 9 subsection 2. An unofficial translation is available at <https://www.finlex.fi/en/laki/kaannokset/1992/en19920785_20120690.pdf> accessed 11 February 2019.

46 See Kirsi Pollari and Mirva Lohiniva-Kerkelä, 'Ketä kuullaan – kuka päättää?: Alaikäisen osallisuus ja itsemääräämisoikeus terveyden- ja sairaanhoidossa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton kustannus 2013) 292.

47 At the time, parents cannot access information on children over the age of 10. According to a recent bulletin on the Ministry of Social Affairs and Health website, a more individual approach will be adopted in the future. Sosiaali- ja terveysministeriö, Tiedote 19.12.2018. *Jatkossa huoltajat voivat asioida Omakannassa laajemmin lastensa puolesta – terveydenhuollon ammattihenkilöiden arvioitava lapsen kypsyys päättää omasta hoidostaan*. Available at <https://stm.fi/artikkeli/-/asset_publisher/jatkossa-huoltajat-voivat-asioida-omakannassa-laajemmin-lastensa-puolesta-terveydenhuollon-ammattihenkiloiden-arvioitava-lapsen-kypsyys-paattaa-omasta> accessed 31 January 2019. As an example on the discussion see also a recent interview in a Finnish journal for medical professionals by Mari Heikkilä, 'Milloin yli 10-vuotiaan tiedot näkee Kannasta?' (2018) 38 Suomen Lääkärilehti 2062.

48 *Eduskunnan oikeusasiamies* 11.6.2015 Dnro 5294/2/13.

49 *Etu- ja sukunimilaki* (946/2017) section 44 subsection 2. Consent is not needed, for instance, if the child is unable to express his or her will.

50 *Uskonnonvapauslaki* (453/2003) section 3 subsection 3.

3 On Children's Participatory Rights in Court Proceedings

In order to understand the Finnish approach to children's participation in court proceedings that concern them, it is helpful to make a distinction between different aspects of procedural participation that are acknowledged in the legislation. These aspects can broadly be divided in *formal* and *personal* participation. In formal participation, the rights to conduct proceedings as a party (*'party rights'*) are central. Here, one can further distinguish between children's own *rights to conduct proceedings* and their formal *procedural representation* by adults, either by near relatives or other persons appointed to the task. In the personal aspect of participation, the focus is on children's oral hearings or other discussions with them, either directly with the decision-maker or indirectly with someone else, for instance a social worker.[51]

In the following, children's participation in court proceedings is discussed in light of three aspects:

– Children's separate, independent exercise of party rights,
– Children's procedural representation by adults, and
– Hearing children in person.

Some examples of each of these aspects will be given in light of the Finnish legislation, discussing how they relate to the constitutional and international standards on participation and how they may affect children's actual possibilities to participate. The main focus is in proceedings that concern children's family relations, such as parental responsibility and child protection.

3.1 *Independent Exercise of Party Rights*

Children may independently exercise procedural right to be heard (*puhevalta, talerätt*) in court and administrative proceedings *that concern their person.* There are age limitations for these rights. In civil, administrative or criminal

51 As a third, separate aspect it is possible to distinguish children's right to determine the material outcome of certain proceedings, which was discussed above. I have more thoroughly discussed these aspects in light of Finnish parental responsibility and child protection proceedings in Hannele Tolonen, *Lapsi, perhe ja tuomioistuin: Lapsen prosessuaalinen asema huolto- ja huostaanotto-oikeudenkäynneissä* (Suomalainen Lakimiesyhdistys 2015) 36, 122 and 260. On a more general take on children's participation in light of the Finnish legislation, see Pajulammi (n 17) 144, where the concept of participation is seen to encompass the procedural right to be heard (*puhevalta*), formal and informal hearing the child, finding out the opinion of the child, giving the child an opportunity to present his or her views, and taking the views into account. In light of public law, see Mäntylä (n 28) 23, where the right to appeal to the court is also discussed among the aspects of participation.

proceedings, children who have turned 15 years have a right to be formally heard by courts, when they are parties in proceedings.[52] In child protection proceedings, this right begins at 12 years.[53] In cases that do not concern children's person – for example, in matters that concern their property – the right to independently exercise party rights begins as a rule at the age of 18.

> In civil law cases, parties generally are the plaintiff and the defendant, who is named in the application for a summons. Many family proceedings are initiated by a written application instead of an application for a summons. In the legislation, it is precised who can bring such an application to the court and who is to be heard as a participant in the case (*kuultava*).[54] In criminal law cases, the private parties are the defendant and the injured parties. Criminal responsibility starts at the age of 15.[55]

It is important to note that these age limitations concern a formal, 'procedural' aspect of participation. Generally, the persons who exercise party rights are served the documents of the case and given a chance to comment them in writing. They may be able to initiate proceedings and instruct a lawyer. The possibility of an oral hearing depends on the general procedural rules, which will be discussed soon.

In proceedings that concern parental responsibility, children are not considered to have a standing as a party. In the Custody Act, children are not mentioned among the applicants or the parties that are formally heard on an application. According to the preparatory works, such a role would not be in accordance with their best interests.[56]

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52 On civil and criminal proceedings, see Code of Judicial Procedure, chapter 12 section 1, subsection 2 (oikeudenkäymiskaari). An unofficial translation is available at <https://www.finlex.fi/en/laki/kaannokset/1734/en17340004_20150732.pdf> accessed 11 February 2019. On administrative proceedings, see Administrative Judicial Proceedings Act, section 18, subsection 3 (hallintolainkäyttölaki). A similar provision is in a newly approved Act on Administrative Judicial Proceedings (laki oikeudenkäynnistä hallintoasioissa 808/2019), section 25, subsection 2. The Act will come to force in 2020.

53 Child Welfare Act, section 21. An unofficial translation is at <https://www.finlex.fi/fi/laki/kaannokset/2007/en20070417.pdf> accessed 11 February 2019.

54 These *hakemusasiat* have been translated as 'non-contentious civil cases', but they may be contested by the participants. The provisions on these proceedings are in the Code of Judicial Procedure (768/2002) chapter 8. See also Dan Frände and others, *Prosessioikeus* (Alma Talent 2017) 420 (Juha Lappalainen and Tuomas Hupli).

55 In more detail, see Frände and others (n 54) 432–433 (Dan Frände) and 448 (Jaakko Rautio).

56 Hallituksen esitys eduskunnalle laeiksi lapsen huollosta ja tapaamisoikeudesta ja holhouslain muuttamisesta ja niihin liittyvien lakien muuttamisesta (HE 224/1982) 6.

These standpoints were tested in a Supreme Court case from 2012, where a child of 16 years requested a change on parental responsibility after she had moved from one parent to another. All the court instances stated that she could not initiate the proceedings in light of the Custody Act. The child argued that the provision was in conflict with the Constitution, ECHR and CRC. The Supreme Court disagreed, referring to the preparatory works for the constitutional reform, where exercise of children's rights by others (*puhevallan käyttö*) was mentioned.[57] According to the Court, there was no conflict with ECHR article 6, as the purpose of the Custody Act was to ensure the best interests of children, nor with CRC article 12, which leaves room for domestic legislation. It was also stated that the CECR does not apply in parental responsibility proceedings.[58]

In the domestic literature, the case has been discussed in light of the best interests principle, CRC, Constitution and ECHR articles 6 and 8.[59] In the preparatory works of a recent reform of the Custody Act, a reference is made to the case, stating that this standpoint is not to change.[60]

3.2 *Procedural Representation by Adults*

Another aspect of procedural participation is children's *procedural representation,* where their rights in proceedings are exercised by adults. As a rule, a child who has a standing as party in judicial proceedings has to be represented until the age of 18. Generally, this task falls to the *holders of parental authority*.[61] Children who are old enough to exercise party rights act independently from their representatives. In 2016, the Supreme Court stated in a criminal case that

57 HE 309/1993 (n 17).

58 KKO 2012:95. On ECtHR case law, the Supreme Court referred to *Giusto, Bornacin and V. v Italy* App no 38972/06 (ECtHR, 15 May 2007). In the case, the relationship between the adults and a 10-year-old child was not considered to form family life in the meaning of article 8.

59 On these viewpoints, see Sanna Koulu, *Lapsen huolto ja tapaamissopimukset: Oikeuden rakenteet ja sopivat perheet* (Lakimiesliiton kustannus 2014) 269; Pajulammi (n 17) 389; Tolonen (n 51) 255.

60 HE 88/2018 (n 37) 59.

61 On personal matters, see Custody Act, section 4, subsection 3 (From 1 December 2019, subsection 4). In economic matters, children are represented by their guardians (*edunvalvoja*), but generally the holders of parental authority also act as guardians. Guardianship Services Act 442/1999 (*laki holhoustoimesta*) section 4, subsection 1. An unofficial translation can be found at <https://www.finlex.fi/fi/laki/kaannokset/1999/en19990442.pdf> accessed 11 February 2019. In some types of family proceedings, for example, concerning parental responsibility and paternity, social authorities may also initiate and conduct proceedings.

an opposing opinion of a 15-year-old child did not prevent his representative from making claims on his behalf.[62]

The general legislative framework for representation is set in the *Guardianship Services Act*. According to its provisions, a substitute guardian (*edunvalvojan sijainen*) may be appointed, for example, if the guardian has a standing in a matter or there is a conflict of the interests for another reason.[63] If interests conflict, a court handling a case may also appoint a guardian for the purposes of the proceedings.[64]

The Guardianship Services Act mainly concerns economic matters.[65] In the matters that concern children's person, the provisions on representation have been vaguer and varying.[66] If either or both of the holders of parental authority have a standing as a party in the proceedings, substitute representation in some situations – but not always – is required. In a recent legislative reform, general provisions on substitute representation in personal matters were added to the Custody Act. According to the provision, a representative (*edunvalvoja*) may be appointed, for instance, if there is a conflict of interest between the holder of parental responsibility and the child. In addition, it is required that the appointment is needed to ensure the investigation of the case or the child's best interests.[67]

In some fields, there are specific provisions on children's substitute representation. In child protection proceedings, a representative (*edunvalvoja*) has to be appointed if the holders of parental responsibility cannot impartially represent the interests of the child and this is needed to ensure the investigation of the case or the child's best interests.[68] A broadly similar provision applies in criminal proceedings, where a representative (*edunvalvoja*) may be appointed to an injured underage party during the investigation and continue in the task during an eventual trial.[69]

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62 KKO 2016:24.

63 Guardianship Services Act, section 32 (649/2007) and section 11. See also Pertti Välimäki, *Edunvalvontaoikeus* (Alma Talent 2013) 98–102.

64 Code of Judicial Procedure, chapter 12 section 4a; Administrative Judicial Procedure Act, section 19a.

65 See Guardianship Services Act, section 29.

66 See also Välimäki (n 63) 251.

67 Custody Act (190/2019) section 5c.

68 Child Welfare Act, section 22. In the unofficial translation (n 53), 'a guardian to deputise for a custodian'.

69 Criminal Investigation Act 805/2011 (*esitutkintalaki*) chapter 4 section 8. In the unofficial translation, the word 'trustee' is used <https://www.finlex.fi/en/laki/kaannokset/2011/en20110805_20150736.pdf> accessed 11 February 2019. Examples on such provisions can also be found in social welfare, paternity, and adoption legislation.

The role of these representatives (*edunvalvoja*) is to ensure the interests of the child. When one is appointed, it seems that the task is often entrusted to a lawyer.[70] A separate role in judicial proceedings is a *legal advisor* (*oikeudenkäyntiavustaja*), which a party may also have. Legal advisors take instructions from their clients.[71] In practice, it may be that neither is appointed.[72]

In the matters concerning *parental responsibility*, attitudes towards children's representation have traditionally been wary, motivated by their lack of formal standing as a party.[73] In the Supreme Court case that was discussed above, the teenager who was attempting to start the proceedings also requested for an appointment of a representative (*edunvalvoja*). The request was not granted. Instead, the Supreme Court stated that such an appointment may be made in child protection cases.[74]

The recent reform of the Custody Act does not aim to change this. On parental responsibility proceedings, it is specifically stated in the preparatory works that a child is not a party nor may a representative (*edunvalvoja*) be appointed for the proceedings. Children's opinions will be primarily assessed by social authorities, who may also be heard in the court.[75]

Here, ECtHR has taken an interestingly differing approach, emphasising the quality of children's procedural representation in a fairly recent case that concerned parental responsibility. In the case of *N. Ts. and others v Georgia* (2016),

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70 On observation in child protection proceedings see Virve-Maria de Godzinsky, *Huostaanottoasiat hallinto-oikeuksissa: Tutkimus tahdonvastaisten huostaanottojen päätöksentekomenettelystä* (Oikeuspoliittinen tutkimuslaitos 2012) 102–103. On observation in criminal investigations see Hannele Tolonen, 'Kuka asiani omistaa? Alaikäinen läheisasianomistaja ja oikeus kieltäytyä todistamasta' in Juhana Riekkinen (ed), *Oikeutta oikeudenkäynnistä täytäntöönpanoon: Juhlajulkaisu Tuula Linna 1957 –25/9 – 2017* (Alma Talent 2017) 395, 399.

71 On attorneys and counsels see Code of Judicial Procedure chapter 15. In child protection proceedings, the court may appoint a legal advisor for the child on request or its own accord. Child Welfare Act, section 87. On criminal proceedings, it has been discussed whether the same person may act as a representative and a legal advisor for the child. See Välimäki (n 63) 257–259, where this is generally seen acceptable.

72 See, for example, Supreme Administrative Court case KHO 2018:159 on child protection, where a disabled teenager was represented by the holders of parental responsibility.

73 See, for instance, HE 88/2018 (n 37) 61. However, children may be appointed representatives in adoption proceedings, although they are not among the persons who may initiate the proceedings in the district court or who are to be formally heard. Adoption Act 22/2012 (*adoptiolaki*) sections 51, 54, and 55.

74 KKO 2012:95 (n 58).

75 Custody Act (190/2019) sections 16 and 16a; HE 88/2018 (n 37) 61–64. An expert may be appointed to help the judge in a child's hearing. Section 15a subsection 2 (190/2019).

a breach of children's article 8 rights was found, as their representation was considered flawed and their views not duly heard or presented.

> In the domestic proceedings, the father had requested the return of three sons, who had stayed with the relatives of their deceased mother. The request was granted, but the decision was not enforced, because the children refused to move in with their father. The case was brought to ECtHR by the boys' aunt.

In the case, the domestic court had instructed the social authorities to appoint a representative. This arrangement was not considered to constitute *adequate and meaningful representation.* ECtHR criticised especially the lack of a regular contact with the children and the lack of formal procedural role. According to the description of the case, the representatives drafted reports and attended court hearings in the appeal stage as an 'interested party', meeting the children only a few times. This was not considered sufficient.[76]

In the case, ECtHR assessed the standards for children's representation in light of the CECR, although Georgia had not ratified the convention. A reference was also made to the *Guidelines on child-friendly justice*.[77] From the perspective of Finnish parental responsibility proceedings, it is interesting to note that the CECR was interpreted to set the international standard for children's representation notwithstanding the domestic ratification. It will be interesting to see how the case law on children's participation develops in the future.

3.3 *Hearing Children in Person*

An important aspect of children's procedural participation is the question on hearing them in person. In the Finnish system, personal hearing may take place in several different contexts.

Firstly, an opportunity for a direct contact with the members of the court may arise when a child is old enough to exercise party rights in a case where an *oral hearing* is arranged. Generally, oral hearings are a rule in the provisions

76 *N. Ts. and others v Georgia* App no 71776/12 (ECtHR, 2 February 2016) paras 74–77. On the older case law, see *Nanning v Germany* App no 39741/02 (ECtHR, 12 July 2007), where a breach of a parent's article 8 rights was found in a contact case. Among other factors, an observation was made on the lack of a teenager's independent representation (para 75).

77 On these, see Council or Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2011).

on criminal proceedings and contested civil proceedings.[78] In administrative court proceedings, where, for example, child protection cases belong, the provisions on oral hearings are more flexible. Even if a party requests an oral hearing, the provisions leave the court some discretion.[79]

Secondly, children may personally participate in oral hearings by giving *evidence in the case.* It is possible – although restricted by age – that a child is heard as a witness or gives evidence as a party. According to the general procedural provisions, the restrictions apply to children under the age of 15, whose hearing is left in the court's discretion. A lower age limitation, 12 years, will apply for witnesses in administrative judicial proceedings, when a recently approved new Act comes to force.[80]

In addition to these direct means of participation, children's personal hearing in some proceedings may take place *indirectly* in other authorities – such as social authorities or police – who will then present this material to the court. The materials from these hearings or discussions may be presented in written form – as generally in proceedings on parental responsibility – or by audiovisual means, which is now the general rule in criminal investigation when hearing children who are under 15 years old.[81]

In the recent years, obstacles to children's direct, oral participation have been lowered in court proceedings that concern children's family relations. In the Child Welfare Act (417/2007) and its later modifications, the restrictions on children's personal involvement have been relaxed and the frame of their hearing specified. When a child is under 12, the court may refrain from personal hearing because of the possible negative consequences to child. Hearing is possible outside of the courtroom and with a limited audience.[82] In a recent

78 In a contested civil case, an exception may be made in light of the nature of the case, if none of the parties oppose. Code of Judicial Procedure, chapter 5 section 27a (768/2002). On criminal cases the prerequisites for deciding the case on basis of written material are set in the Criminal Procedure Act, chapter 5a section 1 (243/2006). An unofficial translation is available at <https://www.finlex.fi/en/laki/kaannokset/1997/en19970689_20150733.pdf> accessed 11 February 2019. On these provisions, see also Frände and others (n 54) 1018 (Juha Lappalainen and Tuomas Hupli) and 1383 (Dan Frände).

79 Administrative Judicial Procedure Act, sections 37 and 38. In the recently approved Act on administrative judicial proceedings (808/2019, n 52), the provisions on oral hearing are more detailed but allow discretion.

80 On the recently approved Act (808/2019), see n 52. On the general procedural provisions, see Code of Judicial Procedure, chapter 17 (732/2015) sections 27 and 30. Hearing has to be of essential significance and the child's development should not be harmed. A support person may also be appointed. On the current similar legislation on witnesses in administrative court proceedings, see Administrative Judicial Procedure Act, section 39f.

81 Code of Judicial Procedure, chapter 17 (732/2015) section 24, subsection 3.

82 Child Welfare Act (88/2010) section 86.

reform, similar provisions were adopted in the Custody Act, where the restrictions traditionally have applied to all children to protect them from the conflict between parents.[83] This is a considerable change, arguably towards the direction of the developing international standards.

Easing restrictions on children's personal participation in family proceedings finds support in recent Strasbourg case law. Traditionally, the requirements on children's participation have not been very strict.[84] Instead, ECtHR has focused on adults and their participatory rights.[85] In the recent case law, children's own procedural rights have been examined and found lacking.

Assessing participation in light of *the importance of the case to the child* is visible in *M. and M. v Croatia* (2015), where ECtHR found a breach of a 13-year-old child's article 8 rights in a parental responsibility case, stating that the seriousness and urgency of the situation was not recognised by the domestic courts. It was particularly noted that the child, who was 9 years old when the proceedings began, had not been given a chance to be heard in the proceedings.[86] In *N. Ts. and others v Georgia* (2016), the ECtHR criticised the domestic courts for not considering the possibility of directly involving the oldest child and not giving reasons for not hearing him. The proceedings had begun when the child was about 7 years old and lasted about two years.[87]

From these cases, one can read a narrower view of restrictions to children's rights to procedural participation, in comparison to the earlier case law.[88] This calls for attention at the national level. However, it should be noted that the requirements are not identical to those on adults' participation. In *M. and M.,* the Court notes that children's autonomy is exercised through the right to be consulted and heard.[89] In *Blokhin v Russia* (2016), the Grand Chamber stated

83 Custody Act (190/2019) section 15a. See also HE 88/2018 (n 37). On the earlier restrictions see Custody Act (361/1983) section 15 subsection 2.

84 See also Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 239, where for example *Sahin v Germany* App no 30943/96 (ECtHR, Grand Chamber 8 July 2003) is discussed.

85 See also Fortin (n 43) 238–239.

86 *M. and M. v. Croatia* (n 27) paras 182–187. In the case, parental proceedings were intertwined with criminal investigation against one of the parents.

87 *N. Ts. and others v Georgia* (n 76) para 80. The domestic legislation required hearing children over the age of seven.

88 On the earlier case law where children's personal hearing was not required in light of a parent's article 8 rights, see *Sahin v Germany* (n 84) and *Kajari v Finland* App no 65040/01 (ECtHR, 23 October 2007).

89 *M. and M. v Croatia* (n 27) para 171. See also *N. Ts. and others* (n 76) para 72.

that children may need additional procedural safeguards and that their rights should be secured in adapted, age-appropriate setting.[90]

4 Aspects of Participation and Actual Participation in Court Proceedings

It is not self-evident how the aspects of participation relate to each other and how they affect children's actual possibilities to participate in individual cases that concern them. For example, it is interesting to note that children may be given a substantial input in the material decision despite their lacking standing as a party. It is not an easy task to grasp the interconnections between different aspects of participation, especially when they are interpreted in varying procedural environments.

When children's participation has been discussed in light of the provisions of the CRC, the focus has often been in the possibilities to directly address the decision-maker. In the most recent comments to Finland, the Committee on the Rights of the Child stated that age limitations on participation should be abolished in the domestic law. In the comment, provisions concerning formal, procedural participation are mentioned along those concerning other, more informal means of participation.[91]

However, it should be asked whether the legislative age limitations that are set in different contexts – representing different aspects of participation – have a similar effect on children's participation. In the Finnish procedural reality, such an assumption may not hold. Conducting procedural party rights might not bring a chance to meet the judge, nor does a lack of such formal rights necessarily mean that there are no possibilities for participation. Even if children do not independently conduct formal procedural rights, other means of participation may be available: direct or indirect, or possibly both. On the other hand, an older child who is 'heard' as a party in proceedings that concern his or her person may not necessarily attend an oral hearing.

Children's constitutional right to participate, CRC article 12 and the earlier critical comments from the Committee on the Rights of the Child were discussed by the Constitutional Law Committee of the Parliament when assessing

90 *Blokhin v Russia* (n 23) paras 219–220.

91 CRC/C/FIN/CO/4 (n 4) paras 29–30. See Pajulammi (n 17) 154; Tolonen (n 51) 133. On the critique of age limitations, see Suvianna Hakalehto-Wainio, 'Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton Kustannus 2013) 17, 41.

the proposed rules for children's participation in the Child Welfare Act (417/2007). As a conclusion, the age limitations on conducting procedural rights and oral hearing were set to 12 years, lower than was proposed.[92]

In the recent years, children's participation in child protection proceedings has become a popular topic of study. In several reports, it has been observed that having a legal advisor is in many cases linked to a stronger presence in administrative court proceedings on taking children in public care.[93] For a child, having support from adult parties may also be important. According to a qualitative study by the author of this article, older children who disagreed with the holders of parental responsibility, being 'against the rest of the world' in their opinion, generally contributed little to the proceedings despite having a formal role.[94]

From the observations in child protection cases, it seems that children over 12 have more visibility in the proceedings than younger children.[95] Despite this, it can be asked whether abolishing or lowering the age when children start conducting independent party rights is the most appropriate measure to advance their possibilities to participate. It is doubtful whether very young children would benefit from being served the case documents. It is problematic if the age limit determines participation so that the younger children are left out, but by merely giving them formal party rights, the problem may be far from solved.

When the case material is delicate, questions on protecting children also arise. According to the Child Welfare Act, children who are heard in courts may not be given information that could seriously damage their health or development.[96] The Constitutional Law Committee of the Parliament assessed the provision in light of the Constitution and CRC article 12, finding it acceptable in light of children's best interests and their protection.[97] If all age limitations for children's independent procedural conduct were removed, much more

92 PeVL 58/2006 (n 14) 6–7. In the proposal, the age of 15 was suggested for some measures.

93 On such observations on families' and/or children's legal advisors see Johanna Hiitola and Hanna Heinonen, *Huostaanotto ja oikeudellinen päätöksenteko: Hallinto-oikeuksien ratkaisut huostaanottoasioissa* (Terveyden ja hyvinvoinnin laitos 2009) 39; de Godzinsky (n 70) 78, 88; Tolonen (n 51) 277.

94 Tolonen (n 51) 270. The observation was made from case material that had been collected in one Finnish administrative court.

95 de Godzinsky (n 70) 138; Tolonen (n 51) 274.

96 Child Welfare Act, section 86, subsection 1 (88/2010).

97 Perustuslakivaliokunnan lausunto hallituksen esityksestä laeiksi lastensuojelulain, vankeuslain 4 ja 20 luvun sekä tutkintavankeuslain 2 luvun 5 §:n muuttamisesta (PeVL 30/2009) 3–4.

consideration should be given to the suitability of the material. In practice, alternative means of arranging young children's participation would be needed in addition – or instead – the right to formally conduct the proceedings. The need for alternative, child-friendly proceedings has also been emphasised by the Committee on the Rights of the Child.[98]

Another concern is that giving children a right to conduct procedural rights may place a part of the responsibility on the manner of participation on their own shoulders, especially when arranging an oral hearing depends on the parties' requests or statements. It can be difficult for a child to effectively take part in this conversation. The Finnish word for having a standing in the proceedings – *puhevalta* – can literally be translated as 'power of speech'. Without adequate help, having this power may not amount to much. Support and information throughout the process may be needed to ensure a real opportunity to participate, despite the presence – or the lack – of formal party rights, i.e. legal standing. This idea is expressed in the international instruments. Personal, individual aspects have also been emphasised in the recent ECtHR case law, as is demonstrated in the cases of *N. Ts. and others* and *Blokhin*.[99]

Logically, providing children with more effective means of participation in light of the circumstances of the case has become more central when discussing their representation. As mentioned above, specific provisions on individual assessment of representation apply, for example, in child protection proceedings. Currently, these provisions allow for wide discretion, even when the matter concerns older children or children who stand alone in their opinion. According to observations on taking children in public care, children do not generally have substitute representation or legal assistance in court proceedings.[100] It has been argued that such measures are needed in more cases.[101] Despite the right to receive documents, even teenagers may have problems with understanding or responding accordingly. They should receive help from the social authorities and in the institutions where they are placed. In practice, little information on this help may reach the court.[102] In parental responsibility proceedings, no provisions on children's representation currently

98 CRC/C/FIN/CO/4 (n 4) para 30.

99 *Blokhin v Russia* (n 23) para 206; *N. Ts. and others v Georgia* (n 76) para 75. See also CECR article 10.

100 de Godzinsky (n 70) 101–103; Tolonen (n 51) 274–275 and 365–366.

101 Ibid. See also Virve-Maria Toivonen (de Godzinsky), *Lapsen oikeudet ja oikeusturva: Lastensuojeluasiat hallintotuomioistuimissa* (Alma Talent 2017) 152–154.

102 Tolonen (n 51) 268. The importance of giving information to children is visible for example in CECR article 3. On information in child protection proceedings see also Toivonen (n 101) 160–161.

apply. In *N. Ts. and others*, the flaws in representation were a central factor when assessing children's article 8 rights.[103] Despite differences between the national systems, the developing international standards call for a closer attention to the availability and quality of representation.

These cases also remind the domestic interpreters that it is necessary to look at the proceedings at hand and the system of participation as a whole instead of concentrating in one aspect of participation. This approach is visible in *N. Ts. and others,* where procedural representation and personal participation are observed and discussed in relation to each other.[104] More research is needed on children's procedural participation and its possible obstacles in different proceedings.

In legislation and every step of interpretation, the child's perspective of the procedural reality should be the primary consideration. An example of an individual approach can be found in *Blokhin,* where the Grand Chamber of the ECtHR gives a detailed analysis on the child's specific circumstances, discussing how he must have felt in the unfamiliar situation.[105]

5 Conclusions

In the older discussion on children's participation, the focus was mainly on two areas: material decision-making capacity and formal procedural representation. The latter aspect was voiced in the preparatory works for the constitutional provision on children's participation, which has been interpreted to de-emphasise children's personal role. In the later legislative work and literature, a stronger accentuation on children's own, actual possibilities for procedural participation can be seen to emerge, mirroring the international development in the field. In recent case law, ECtHR has emphasised individual assessment of participation, quality of representation and acknowledging the special needs of children. It is interesting to see how the international standards will develop and how they affect the understanding of participatory rights in the future.

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103 *N. Ts. and others v Georgia* (n 76) paras 77 and 84.

104 *N. Ts. and others v Georgia* (n 76) paras 80 and 84.

105 *Blokhin v Russia* (n 23) para 208: '… the Court considers that the applicant must have felt intimidated and exposed while being held alone at the police station and questioned in an unfamiliar environment'. The case is discussed with regard to Finnish child protection proceedings in Hannele Tolonen, 'Lapsi, rikos ja suojelu: Oikeudenkäynnille asetettavista vaatimuksista EIT:n uuden ratkaisukäytännön valossa' in Suvianna Hakalehto and Virve Toivonen (eds), Lapsen oikeudet lastensuojelussa (Kauppakamari 2016) 342.

Despite the emphasis on children's participation in recent legislation, there is considerable variation between different fields, for example, in the legal framework on formal and personal aspects of procedural participation. The variation in general procedural provisions may lead to different outcomes in participation even when the provisions on participation seem similar. Attention to proceedings as a whole and to interpretations at different levels is needed to assess how the opportunities for participation appear from children's perspective.

References

Berrick JD and others, 'International Perspectives on Child-responsive Courts' (2018) 26(2) Int J of Children's Rights 251.

Choudhry S and Herring J, *European Human Rights and Family Law* (Hart Publishing 2010).

Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe 2011).

Couzens M, 'Child Participation in Local Governance' in Martin D. Ruck, Michele Peterson-Badali, and Michael Freeman (eds), *Handbook on Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017).

Fortin J, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009).

Frände D and others, *Prosessioikeus* (Alma Talent 2017).

de Godzinsky V, *Huostaanottoasiat hallinto-oikeuksissa: Tutkimus tahdonvastaisten huostaanottojen päätöksentekomenettelystä* (Oikeuspoliittinen tutkimuslaitos 2012).

Gottberg E, 'Lapsen subjektiudesta ja osallisuudesta huoltokysymyksissä ja lastensuojelussa' (2008) 3 Defensor Legis 319.

Hallituksen esitys eduskunnalle kuntalaiksi ja eräiksi siihen liittyviksi laeiksi (HE 268/2014).

Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi (HE 88/2018).

Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta (HE 309/1993).

Hallituksen esitys eduskunnalle laeiksi lapsen huollosta ja tapaamisoikeudesta ja holhouslain muuttamisesta ja niihin liittyvien lakien muuttamisesta (HE 224/1982).

Hakalehto-Wainio S, 'Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton Kustannus 2013) 17.

Helander M, 'Utvecklingsbehov i den finländska lagstiftningen om barn' (2018) 1 Nordisk Administrativt Tidsskrift 5.

Helin M, 'Perusoikeuksilla argumentoinnista' in Tero Iire (ed), *Varallisuus, vakuudet ja velkojat: Juhlajulkaisu Jarmo Tuomisto 1952 – 9/6 – 1912* (Turun yliopisto, oikeustieteellinen tiedekunta 2012) 11.

Heikkilä M, 'Milloin yli 10-vuotiaan tiedot näkee Kannasta?' (2018) 38 Suomen Lääkärilehti 2062.

Hiitola J and Heinonen H, *Huostaanotto ja oikeudellinen päätöksenteko: Hallinto-oikeuksien ratkaisut huostaanottoasioissa* (Terveyden ja hyvinvoinnin laitos 2009).

Hirvelä P and Heikkilä S, *Ihmisoikeudet: Käsikirja EIT:n oikeuskäytäntöön* (2 edn, Alma Talent 2017).

Koulu S, *Lapsen huolto ja tapaamissopimukset: Oikeuden rakenteet ja sopivat perheet* (Lakimiesliiton kustannus 2014).

Koulu S, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Länsineva P, 'Perusoikeusliike' In Tatu Hyttinen and Katja Weckström (eds), *Turun yliopiston oikeustieteellinen tiedekunta 50 vuotta* (Turun yliopisto, oikeustieteellinen tiedekunta 2011) 339.

Mäntylä N, 'Lasten ja nuorten osallistumisen oikeudelliset ongelmat' in Niina Mäntylä (ed), *Lapset ja nuoret yhteiskunnan toimijoina* (Vaasan yliopiston julkaisuja 2011) 21.

Nieminen L, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990).

Nieminen L, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013).

Ojanen T and Scheinin M, 'Kansainväliset ihmisoikeussopimukset ja Suomen perusoikeusjärjestelmä' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 171.

Pajulammi H, *Lapsi, oikeus ja osallisuus* (Talentum 2014).

Parkinson P and Cashmore J, *The Voice of a Child in Family Law Disputes* (Oxford University Press 2008).

Pellonpää M and others, *Euroopan ihmisoikeussopimus* (6th edn, Alma Talent 2018).

Perustuslakivaliokunnan lausunto hallituksen esityksestä lastensuojelulaiksi ja eräiksi siihen liittyviksi laeiksi (PeVL 58/2006).

Perustuslakivaliokunnan lausunto hallituksen esityksestä laeiksi lastensuojelulain, vankeuslain 4 ja 20 luvun sekä tutkintavankeuslain 2 luvun 5 §:n muuttamisesta (PeVL 30/2009).

Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (PeVM 25/1994).

Pollari K and Lohiniva-Kerkelä M, 'Ketä kuullaan – kuka päättää? Alaikäisen osallisuus ja itsemääräämisoikeus terveyden- ja sairaanhoidossa' in Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton kustannus 2013) 269.

Savolainen M, *Lapsen huolto ja tapaamisoikeus* (Suomen Lakimiesliiton kustannus 1984).

Sosiaali- ja terveysministeriö, Tiedote 19.12.2018. *Jatkossa huoltajat voivat asioida Omakannassa laajemmin lastensa puolesta – terveydenhuollon ammattihenkilöiden arvioitava lapsen kypsyys päättää omasta hoidostaan*, available at <https://stm.fi/artikkeli/-/asset_publisher/jatkossa-huoltajat-voivat-asioida-omakannassa-laajemmin-lastensa-puolesta-terveydenhuollon-ammattihenkiloiden-arvioitava-lapsen-kypsyys-paattaa-omasta> accessed 31 January 2019.

Toivonen V, *Lapsen oikeudet ja oikeusturva: Lastensuojeluasiat hallintotuomioistuimissa* (Alma Talent 2017).

Tolonen H, 'Kuka asiani omistaa? Alaikäinen läheisasianomistaja ja oikeus kieltäytyä todistamasta' in Juhana Riekkinen (ed), *Oikeutta oikeudenkäynnistä täytäntöönpanoon: Juhlajulkaisu Tuula Linna 1957 –25/9 – 2017* (Alma Talent 2017) 395.

Tolonen H, *Lapsi perhe ja tuomioistuin: Lapsen prosessuaalinen asema huolto-ja huostaanotto-oikeudenkäynneissä* (Suomalainen Lakimiesyhdistys 2015).

Tolonen H, 'Lapsi, rikos ja suojelu: Oikeudenkäynnille asetettavista vaatimuksista EIT:n uuden ratkaisukäytännön valossa' in Suvianna Hakalehto and Virve Toivonen (eds), Lapsen oikeudet lastensuojelussa (Kauppakamari 2016).

UN Committee on the Rights of the Child, *Concluding observations: Finland* (3 August 2011) CRC/C/FIN/CO/4.

UN Committee on the Rights of the Child, *General comment No. 12* (2009) *on the right of the child to be heard* (20 July 2009) CRC/C/GC/12.

Välimäki P, *Edunvalvontaoikeus* (Alma Talent 2013).

Viljanen V, 'Perusoikeuksien merkitys lainsäädäntötyössä' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 833.

Viljanen V, 'Yksityiselämän suoja (PL 10 §)' in Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 389.

White RCA and Ovey C, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010).

CHAPTER 13

Children's Right to Participation in Iceland

Elisabet Gísladóttir

1 Introduction

The Icelandic Constitution states that children should by law be guaranteed the protection and care that is necessary for their well-being.[1] It is clear from the preparatory work on the constitutional provision that it was written with the Convention on the Rights of the Child (CRC) in mind, as it specifically refers to the convention.[2] The wording of the provision plainly reflects the view, embodied in the CRC, that children are a vulnerable group of people requiring special attention. However, the text does not directly mention what has been considered one of the most revolutionary aspects of the CRC, that is, a child's right to participation. Nevertheless, it can be convincingly argued that the right to participation falls within the ambit of the constitutional provision, as it is inextricably linked to the rights to protection and care.

Since the Constitution does not clearly define children's right to participation, the definition of participation in the CRC is of particular importance in an Icelandic legal context. Children's right to participation is defined by article 12 of the CRC. This article is unique for a human rights treaty in many ways, as it addresses both the legal and social status of children.[3] Although children lack the full autonomy of adults, article 12 provides all children, capable of forming their own views, the right to express them freely in all matters affecting them and puts the obligation on States to ensure that due weight is given to the views of children in accordance with their age and maturity.

Section 2 of this chapter will begin by looking closer at arguments for including the right to participation as a constitutional right. The main focus of the chapter will then be to provide a brief overview of how the right to participation in article 12 of the CRC and, by extension, the constitutional provision, is reflected in Icelandic law. Section 3 will focus on children and democracy

1 See section 76, subsection 3 of the Constitution of the Republic of Iceland No. 33/1944 (Stjórnarskrá lýðveldsins Íslands).

2 Alþt. 1994–1995, A-deild, þskj. 389 – issue 297, comments with section 14, subsection 3.

3 UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC 12.

and children's opportunities to participate in public decision-making. Section 4 will then discuss participation in decision-making in individual cases. Questions relating to family life and conflict between parents are undoubtedly among the decisions that affect children and their daily life the most. However, it is also a widespread belief that children need to be shielded from interparental disputes, as they may feel too much pressure to side with one parent or feel responsible for the outcome. Thus, special focus will be given on child participation in decisions about custody, contact and residence in section 5.

2 Is the Right to Participation a Constitutional Right?

Shortly after the CRC was ratified in Iceland in 1992, fundamental changes were made to the human rights chapter of the Icelandic Constitution. The changes, which came into force in 1995, included a new substantive provision about children, making children the only group of individuals to receive specific constitutional protection in Iceland.[4] This provision can be found in the third subsection of section 76. It states as follows: 'for children, the law shall guarantee the protection and care which is necessary for their well-being'.[5] As previously mentioned, the preparatory work on the provision specifically refers to the CRC. It can be concluded from the comments that the constitutional provision was based on article 3 of the then newly ratified CRC.[6]

When the wording of the constitutional provision is compared to the different categories of rights in the CRC, it can be doubted whether the provision protects the right of participation. The CRC is often described as containing three different sub-groups of rights, the so-called 'three Ps'. They are the right to protection, the right to provision and the right to participation.[7] As mentioned above, the constitutional provision covers the 'protection' and 'care' that is necessary for children's 'well-being'. At first sight, the text of the provision indicates that only the right to protection and provision are protected,

4 See Act No. 97/1995 (Stjórnskipunarlög um breytingu á stjórnarskrá lýðveldisins Íslands, nr. 33/1944, með síðari breytingum).

5 See Hrefna Fridriksdottir, 'Protection of Children's Rights in the Icelandic Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) for a more thorough discussion about this Constitutional provision.

6 Alþt. 1994–1995, A-deild, þskj. 389 – issue 297, comments with section 14, subsection 3.

7 See eg Eugeen Verhellen, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective' in Sara Lembrechts, Ellen Desmet and Didier Reynaert (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 49–50.

while the right to participation is left out. The same goes for other constitutional human rights provisions. Even though children's rights are, of course, protected by general human rights principles of the Constitution, e.g. freedom of expression and the right to privacy, no direct reference is made to a child's right to participation. What lies behind this is most probably the early emphasis put on children as a vulnerable group in need of special care and protection from harm and abuse, rather than social actors with the right to be active participants in their own lives, as well as in society.[8] This emphasis can also be seen in section 33 of the Constitution on democratic participation, which states that persons who are 18 years of age or older on the date of an election have the right to vote.

This different emphasis can also be detected in other Constitutions. In general, Constitutions written before the ratification of the CRC are more likely to represent this so-called welfare perspective, while constitutions adopted or revised after the ratification usually have a more holistic approach to children's rights.[9] The change to the Icelandic Constitution was, however, made after the CRC had been ratified by Iceland and the preparatory work refers to it. The question, therefore, arises whether the right to participation is covered by the provision and, if not, why Iceland then seems to be an exception from the trend just mentioned. If the right is not protected, it is difficult to answer why the Icelandic Constitution was an exception in this regard, especially considering that one of the main goals of the constitutional revision in 1995 was to modernise the Constitution, in accordance with international human rights obligations.[10] The office of the Ombudsman for Children in Iceland was established the same year as the revision took place and therefore did not get a real chance to participate in the discussions about this constitutional provision.[11] In the years following the constitutional revision, the views and attitudes towards children and their rights changed significantly. In that regard, it should be mentioned that in a draft Constitution, made by a Constitutional Council and presented to Parliament in 2011, there was new a provision on children's rights based on the general principles of the CRC, which included a child's right

8 See eg Þórhildur Líndal, *Barnasáttmálinn: rit um samning Sameinuðu þjóðanna um réttindi barnsins með vísun í íslenskt lagaumhverfi* (UNICEF 2007) 6.

9 The South African Constitution, which came into effect in 1997, is an example of a Constitution that has a more holistic approach to children's rights. Philip Alston, John Tobin and Mac Darrow, *Laying the Foundation for Children's Rights* (UNICEF Innocenti Research Centre 2005) 21–30.

10 Alþt. 1994–1995, A-deild, þskj. 389 – issue 297, general comments.

11 The Ombudsman for Children Act No. 83/1994 (Lög um umboðsmann barna).

to participation.[12] Although the draft was not adopted, this specific provision was generally welcomed and does not appear to have been disputed.[13]

A few arguments support the conclusion that the right to participation falls within the ambit of the constitutional provision. First, even though the text does not explicitly mention the right, it is framed in a wide and open-ended manner using words like 'protection', 'care' and 'well-being'. There is no indication in the provision or its context that the concepts should be construed in a narrow manner. On the contrary, it is an interpretive rule in Iceland that human rights provisions should be, in cases of doubt, construed extensively.[14] Second, reference is made to article 3 of the CRC, which indicates that the constitutional provision should be interpreted in light of it. Article 3, as is well-known, refers to the best interests of the child which is a general principle. In this regard, it can be pointed out that the Committee on the Rights of the Child has consistently stressed that child participation, in accordance with article 12 of the CRC, is an integral part of determining the best interests of a child.[15] This means that in order to determine what 'protection and care' is needed for children's well-being, it is necessary to consider their views in a meaningful way. On closer inspection, the wording of the constitutional provision mirrors the wording of subsection 2 of article 3. It indicates that whatever falls within that subsection falls within the ambit of the constitutional provision. This subsection of article 3 has been referred to as a comprehensive 'umbrella provision'. It is considered to constitute 'an important reference point in interpreting the general or overall obligations of governments in the light of the more specific obligations contained in the remaining parts of the Convention'.[16] It should be read expansively and in relation to other rights of the Convention, including participation.[17] It is therefore reasonable to understand the constitutional provision as a broad reference to the CRC and not just a reference to specific categories of rights.

12 The Constitutional Council, 'The Constitutional Council hands over the bill for a new Constitution' (29 July 2011) <http://www.stjornlagarad.is/english/> accessed 15 August 2018.

13 See eg Alþt. 2011–2012, A-deild, þskj. 3 – issue 3, All comments made about the Constitutional Council's bill for a new Constitution, No. 140/41.

14 Hafsteinn Dan Kristjánsson, *Að iðka lögfræði: Inngangur að hinni lagalegu aðferð* (Codex 2015) 159 and 161.

15 UN Committee on the Rights of the Child, *General Comment No. 12* (n 1) 15.

16 Philip Alston, 'The Legal framework of the Convention on the Rights of the Child' (1992) Bulletin of Human Rights 9.

17 See eg Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007) 40–41.

Finally, even if it were determined that the constitutional provision was originally not intended to include the right to participation it must be kept in mind that the Constitution has generally been considered a living instrument.[18] When it comes to human rights provisions, it is considered especially important that the interpretation changes over time, to reflect the changing views in society.[19] It should also be borne in mind that even if someone does not accept the arguments above, the CRC has been incorporated into Icelandic law. It is therefore at least a legal obligation and an obligation for Iceland within international law.

In light of this, there are convincing arguments for the conclusion that section 76, subsection 3, of the Constitution should be interpreted in conformity with article 12 of the CRC, making the right to participation an essential part of the constitutional provision. This means that Icelandic law should guarantee all children capable of forming their own view the right to express those views and have them taken into account in accordance with their age and maturity. The following sections will seek to answer whether or not this right is fully protected in Icelandic law and legal practice.

3 Children and Democracy

3.1 *The Right to Participation in Icelandic Law*

Article 12 of the CRC has had a vast impact on Icelandic legislation, legal practice and policy since the ratification of the Convention in 1992. Moreover, the CRC was directly incorporated into law in 2013.[20] Shortly before the CRC became part of the domestic legislation, the four general principles of the CRC were incorporated into the Children Act[21] with an amending bill that came into force in 2013.[22] Section 1, subsection 3 of the Act now states that 'Children are entitled to express their opinions on all matters regarding them; fair considerations shall be given to their opinions in accordance with their age and maturity'. Additionally, the right to participation can be found in several different legislations. The right therefore appears to be quite well protected in general legislation.

18 See eg Björg Thorarensen, *Stjórnskipunarréttur: Mannréttindi* (Codex 2008) 97–99.

19 Róbert R. Spanó, *Breytist stjórnarskráin með tímanum* (Frettablaðið 2012) 13.

20 Act on the Convention on the Right of the Child No. 19/2013 (Lög um samning Sameinuðu þjóðanna um réttindi barnsins).

21 Children Act No. 76/2003 (*Barnalög*).

22 Act No. 61/2012 (lög um breytingar á barnalögum, nr. 76/2003, með síðari breytingum (forsjá og umgengni)).

3.2 *Youth Councils and Other Platforms for Participation in Public Decision-Making*

Children's right to be active participants in a democratic society and influence public decisions has been considered one of the most important aspects of the right to participation, as it recognises children as social actors, instead of just passive recipients of welfare. Along with article 12, articles 13 through 17 make up the so-called democratic or participatory rights of the CRC, which emphasise the fact that children are not only citizens of the future, but citizens in the present, fully capable of making valuable contributions that benefit society. When the right to participation was first introduced in the CRC and Icelandic legislation, it was considered innovative and controversial, and almost impossible to implement.[23] Since then it has become increasingly recognised that is not only vital for the development of children to give them an opportunity to participate, but also an important step in making the best decision possible and therefore beneficial for society as a whole.

As the CRC is part of Icelandic legislation, children's right to participate in society is formally protected by law. The implementation of this rights has, however, not been very consistent. Some positive steps have been taken, most notably the passing of the Youth Act,[24] which has a specific provision on youth councils. According to Section 11, subsection 2 of the Act, local authorities should promote the establishment of youth councils. The role of these councils is to advice the local governments on issues relating to children and youth. According to the preparatory works of the Act, the purpose of this provision was to respond to demands for increased democratic participation of young people. It is also mentioned that although the section does not set any age limits, a common age group for these councils is 13 to 18 years of age. After that, young people can participate in democratic elections and directly influence the choice of local representatives.[25]

The wording of previously mentioned provision of the Youth Act has been criticised, as it does not directly require local authorities to establish youth councils.[26] In 2017, only 58 per cent of the local governments in Iceland had

23 See eg Umboðsmaður barna, 'Embætti umboðsmanns barna 10 ára – 1995–2005' (The Ombudsman for Children in Iceland 2004) 78–79.

24 Youth Act No. 70/2007 (*Æskulýðslög*).

25 Alþt. 2006–2007, A-deild, þskj. 460 – issue 409, comments with section 11.

26 Umboðsmaður barna, *Report of the Ombudsman for Children in Iceland to the UN Committee on the Rights of the Child* (The Ombudsman for Children in Iceland 2010) 5–6.

an active youth council, but a further 24 per cent said they had intentions of establishing one.[27] This means that 42 per cent of local governments have no formal platform for democratic participation of children and 18 per cent of them have no plans to change that in the near future. The larger municipalities are more likely to have youth councils than the smaller ones, which means children in rural areas do not have the same opportunity to participate in their local governments as children in larger towns and the capital area. This was addressed in the latest concluding observation of the Committee on the Rights of the Child from 2012, where the Committee expresses its concern that there is no legal requirement for youth councils and that all children may not have equal opportunities when it comes to participation within the municipalities.[28]

Apart from the youth councils, there are very few platforms available for children to exercise their right to participate in public decisions-making. There are some provisions in the school legislation about participation within the school system, for example, about student associations and student representatives in school councils for children aged 6 to 16.[29] Additionally, there have been several specific measures made to involve children in decision-making and several governmental and non-governmental youth councils are active in public discussion. One example of this is a youth council established in 2018 by the Prime Minister of Iceland about the sustainable development goals.[30] However, there is currently no formal and constant forum for participation on a national level. This has been criticised, as it means important policy decisions that concern children are most often made without the involvement of children.[31]

3.3 *The Right to Vote?*

In recent years there has been a growing discussion on how to increase children's influence in society. This has led to a proposal about suffrage reform that

27 Umboðsmaður barna, 'Staðan á ungmennaráðum sveitarfélaga' (The Ombudsman for Children in Iceland 2017) <https://barn.is/um-embaettid/verkefni/ungmennarad-sveitarfelaga> accessed 19 August 2018.

28 UN Committee on the Rights of the Child, *Concluding Observations: Iceland* (23 January 2012) CRC/C/ISL/CO/3–4.

29 See sections 8 and 10 of the Compulsory School Act No. 91/2008 (*Lög um grunnskóla*).

30 Prime Minister's Office, 'Ungmennaráð Heimsmarkmiða Sameinuðu þjóðanna' (16 January 2018) <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2018/01/16/Ungmennarad-Heimsmarkmida-Sameinudu-thjodanna> accessed 19 August 2018.

31 Umboðsmaður barna, *Helstu áhyggjuefni 2017* (The Ombudsman for Children in Iceland 2017) 20.

would give children from the age of 16 the right to vote in local elections.[32] The Constitution states that only individuals that have reached the age of 18 have the right to vote in parliamentary and presidential elections. The local voting age is, however, determined by general law, cf. section 2 of the Local Government Elections Act.[33] Thus, constitutional amendments would have to be made to change the general voting age, while the voting age in local elections can be changed with a simple legal amendment.

The proposal to lower the voting age in local elections has been met with a lot of support, as well as some harsh criticism. Those in favour of the proposal hope that lowering the voting age would increase the interest of government officials in the views and concerns of children and young people. Many have also pointed out that 16-year-old children have reached an age and maturity where they should be able to make informed decisions.[34] One reason for this is that at the age of 16 children are finishing their compulsory education and, according to the Icelandic national Curriculum Guide for Compulsory Schools, one of the main goals of the school system is to prepare children for active participation in a democratic society.[35] Furthermore, it has been stressed that lowering the voting age is a step in respecting children's evolving capacities and that providing 16-year-old children with the right to vote is consistent with the fact that they are expected to be able to bear many responsibilities at this age when it comes to medical decisions, decisions about work and education and criminal responsibility, amongst others.[36]

On the other side of the debate, some have emphasised that we should 'let children be children' and protect them from the responsibility of voting. They believe it is difficult enough to be a teenager without the added burden of having to form an opinion on politics.[37] Furthermore, some people appear to be worried that children will be easily influenced by politicians or that they will anyway just end up voting like their parents. It is interesting to compare this

32 Alþt. 2017–2018, A-deild, þskj. 40 – issue 40.

33 Government Elections Act No. 5/1998 (*Lög um kosningar til sveitarstjórna*).

34 See eg Alþt. 2017–2018, A-deild, þskj. 40 – issue 40, Comment from the Union of upper-secondary school student in Iceland, No. 148/223.

35 Ministry of Education, Science and Culture, 'The Icelandic National Curriculum Guide for Compulsory Schools – General Section' (2012) <https://www.government.is/library/01-Ministries/Ministry-of-Education/Curriculum/adskr_grsk_ens_2012.pdf> accessed 19 August 2018.

36 See eg Umboðsmaður barna, 'Frumvarp til laga um kosningar til sveitarstjórna, 190. Mál' (The Ombudsman for Children in Iceland 2017) <https://barn.is/umsagnir/2017/05/frumvarp-til-laga-um-kosningar-til-sveitarstjorna> accessed 19 August 2018.

37 See eg Alþt. 2017–2018, B-deild, issue 40, meeting 43 (Inga Sæland).

discussion to the debate about women's suffrage, as it appears that many of the same arguments used against children's right to vote were also used against women's right to vote.[38]

The debate about lowering the voting age in many ways reflects the different attitudes towards children's place in society. On the one hand, you have the view that children should be respected as independent individuals, with evolving capacities to be active participants in society. On the other, you have the emphasis on children as a vulnerable group that needs to be protected and cannot be trusted to make sensible decisions. This highlights the fact that although there has been a significant shift in the view towards children in the recent decades, we still have a long way to go until they will be fully recognised as citizens.

Giving children from the age of 16 the right to vote in local elections would be a positive step towards increasing children's influence in society. But what about the children who would still not have the right to vote? The discussion about children's right to participation in society often leaves out younger children. The efforts that have been made to include children in public discussion, has mostly been aimed at teenagers from the age of 13 to 16, e.g. the youth councils. Even within the school system, it is usually the older children that get a real chance to participate. Although it is consistent with children's evolving capacities to give more weight to the opinions of older children, the Committee on the Rights of the Child has consistently pointed out the importance of younger children being included in decision-making processes in a manner consistent with their age and maturity.[39] One of the main challenges in Iceland is therefore to provide a platform that will enable all children, including younger children, to actively participate in public decisions that concern them.

4 Participation in Decision-Making

The right to participation provides children with the right to exercise some influence over their own lives, making them at least partly autonomous individuals. Nevertheless, it is undisputed that children are not fully autonomous until they reach the age of majority. Thus, parents or other legal guardians of children

38 See eg John Wall, 'Democratising democracy: the road from women's to children's suffrage' (2013) 18:6 The International Journal of Human Rights 646, 653.

39 See eg UN Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7; UN Committee on the Rights of the Child, *General Comment No. 12* (n 1).

are legally responsible for their well-being and should provide them with appropriate direction and guidance in a manner consistent with the evolving capacities of the child, cf. article 5 of the CRC. In accordance with the emphasis on a child's evolving capacities, the right to participate in decision-making is often divided into three levels in Icelandic legislation: The right to be heard (*samráðsréttur*), the right to share in the decision-making (*meðákvörðunarréttur*) and the right to self-determination (*sjálfsákvörðunarréttur*).

The right to be heard is protected in several legislations, including the CRC and the previously mentioned section 1 of the Children Act. Furthermore, there are several specific provisions throughout the legislation, for example, when it comes to decisions regarding custody, contact and residence, child protection, education and health. When this right was first introduced into Icelandic legislation, it was often only guaranteed for children from the age of 12.[40] This has mostly changed, but there are still statutory provisions that only explicitly grant children the right to be heard from the age 12, e.g. the Act on Registered Religious Associations.[41] Another example is the Personal Names Act,[42] which provides children with the right to share in the decision-making with regards to the changing of names from the age of 12 but does not specifically refer to the right of younger children to be heard. Although the rights protected in article 12 of the CRC and section 1 of the Children Act should provide younger children with this right, it does not appear to be the case in practice. For example, when the legal guardians of a child under the age of 12 apply for a name change for a child, the National Registry does not provide the child with a chance to participate in the decision.[43]

Although the right to be heard does generally not have an age limit in Icelandic legislation, the right to share in the decision-making and self-determination usually does. One exception is that even though children do not have financial

40 One example of this is section 34, subsection 4 of the older Children Act No. 20/1992, which said all children from the age of 12 had the right to be heard in a custody case, unless it could be harmful for the child or was considered irrelevant for the case.

41 Act on Registered Religious Associations No. 108/1999 (*Lög um skráð trúfélög og lífsskoðunarfélög*).

42 Personal Names Act No. 45/1996 (*Lög um mannanöfn*).

43 This has been criticized, see e.g. Umboðsmaður barna, 'Skýrsla umboðsmanns barna 2014' (The Ombudsman for Children in Iceland, 2014) 38–39. A bill on a new Act on Personal Names was presented to Parliament in September 2018. The bill includes a subsection providing all children the right to share in the decision making, in accordance with their age and maturity. It remains to be seen whether this proposal, which includes some fundamental changes to the current legislation on names, will be accepted by Parliament. Alþt. 2018–2019, A-deild, þskj. 9 – issue 9.

competence, they have the right to control their own earnings and donations, according to the Act on Legal Competence.[44] The right to share in the decision making is granted to children from the age of 12 in the previously mentioned provision in the Personal Name Act and section 6 of the Adoption Act.[45] At 15, children become independent parties in certain child protection cases and get the right to share in the decision making, cf. section 46, subsection 1 of the Child Protection Act.[46]

Finally, self-determination is most often granted to children from the age of 16. At that age children are entitled to make their own decision about joining or leaving a religious association according to section 8, subsection 1 of the Act on Registered Religious Associations and make their own decisions about health care, cf. section 26 of the Patient's Rights Act.[47] Additionally, according to section 13 of the Act on Counselling and Education regarding Sex and Childbirth and on Abortion and Sterilisation Procedures,[48] girls can apply for an abortion without parental knowledge from the age of 16. When a girl is younger than 16, her parents or legal guardians must make the application with her, unless special circumstances make it inadvisable.[49]

Apart from the previously mentioned legal provisions, Icelandic legislation does not specifically say when children can make their own decisions and when the decision-making power lies with a child's parents. The traditional view is that in absence of a clear law stating otherwise, the parents are the

44 Act on Legal Competence No. 71/1997 (*Lögræðislög*).

45 Adoption Act No. 130/1999 (*Lög um ættleiðingar*).

46 Child Protection Act, No. 80/2002 (*Barnaverndarlög*). Being an independent party to a child protection case means a child who has reached the age of 15 must give consent to measures taken by the child protection authorities, unless a formal ruling is made against the will of the child.

47 Patient's Rights Act, No. 74/1997 (*Lög um réttindi sjúklinga*).

48 Act on Counselling and Education regarding Sex and Childbirth and on Abortion and Sterilisation Procedures, No. 25/1975 (Lög um ráðgjöf og fræðslu varðandi kynlíf og barneignir og um fóstureyðingar og ófrjósemiaðgerðir).

49 A new bill on abortions was presented by the Minister of Health to Parliament in November 2018. If the bill passes, girls of all ages will have the right to self-determination when it comes to the decision on whether or not to have an abortion, see Alþt. 2018–2019, A-deild, þskj. 521 – issue 393. This proposal is a response to criticism about the requirement for parental involvement in the decision about abortion for girls under the age of 16, see eg Umboðsmaður barna, 'Skýrsla umboðsmanns barna 2016' (The Ombudsman for Children in Iceland 2016) 25. It has been pointed out the decision on whether or not to terminate a pregnancy is unique, as it burdens not only the girls right to control her own body but could also have a great impact on her future. Thus, it is considered important to respect girls right to privacy and bodily integrity by not requiring parental notification or consent.

once responsible for making decisions on behalf of a child. In the last few years, however, a greater emphasis has been put on a child's right to autonomy when it comes to certain personal issues, based on their independent right to privacy and participation. Some therefore believe that children should gradually be granted the right to make their own decisions, in accordance with their age and maturity.[50]

5 The Right to Be Heard in Decisions about Custody, Contact and Residence

5.1 *Decisions about Parental Responsibility*

The growing recognition of children's right to participation has in many ways changed the power relations within families and the views towards parental responsibility. This does not mean that the role of a child's parents is considered any less important than it was decades ago. On the contrary, the CRC puts a strong emphasis on the importance of the family, as is reflected in the introduction to the convention, where it says, 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. However, family has in many ways become a more democratic unit. While parents still have the primary responsibility for the upbringing of their children, they are no longer considered to have the absolute power to make all decisions on their behalf. Rather, they should guide them in decisions-making in a manner consistent with their age and maturity, cf. article 5 of the CRC.

In the last few decades, there has been an increased emphasis on shared parental responsibility. This is evident in article 18(1) of the CRC, which states that efforts should be made to 'ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'. Provisions on parental responsibility can be found in the Children Act, as well as the Child Protection Act and the Act on Legal Competence. If parents are married or have registered their cohabitation in the National Register when a child is born, they share custody of the child. If not, the mother has sole custody of the child, unless the parents make an agreement to share

50 See eg Umboðsmaður barna, *Hvenær ráða börn sjálf* (The Ombudsman for Children in Iceland 2015) <https://www.barn.is/frettir/2015/09/hvenaer-rada-boern-sjalf> accessed 19 August 2018.

custody, cf. section 29 of the Children Act. Consistent with the emphasis put on shared parental responsibility, the main principle is that parents continue to share custody of the child after divorce or separation, unless other arrangements are made. It is also stressed that parents should make a joint decision about residence and contact, cf. section 31 of the same Act. The legislation makes it clear that decisions about custody, residence and contact are the responsibility of the parents and not the child. Yet these are decisions that have a great impact on a child's daily life and can potentially influence their future vastly. It is therefore particularly important to respect a child's right to participation before these decisions are made.

5.2 *Participation When Parents Are in Agreement*

Thankfully, most parents are able to co-operate and reach an agreement about custody, residence, and contact.[51] In accordance with a child's right to participation, section 28, subsection 6 of the Children Act states that 'Parents have an obligation to consult their child, according to the child's age and level of maturity, before taking a final decision on the child's affairs. Greater weight shall be given to the child's point of view as the child grows older and becomes more mature'. Although this means children should in fact have some influence on these decisions, it is difficult to determine whether or not this is the case in practice.

An agreement between parents on the custody and residence of a child does not come into effect until it has been approved by the District Commissioner,[52] cf. section 32, subsection 5 of the Children Act. A decision about contact also needs to be approved for it to be legally enforceable, cf. section 46, subsection 5 of the same Act. The Commissioner approves an agreement, unless it is not considered consistent with the best interests and needs of the child. Despite this requirement, the general practice appears to be that the Commissioner does not try to establish whether a child has been consulted before the agreement between parents was made.[53] There is therefore no guarantee that a child's right to participation is respected when these matters are resolved privately.

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51 Alþt. 2011–2012, A-deild, þskj. 328 – issue 290.

52 There are nine District Commissioners around Iceland, which are administrative authorities under the Ministry of Justice, cf. Act No 50/2014 (Lög um framkvæmdavald og stjórnsýslu ríkisins í héraði). The District Commissioner are responsible for a number of administrative responsibilities, including decisions about contact.

53 Ásgerður Fanney Bjarnadóttir, *Réttur barna til að hafa áhrif* (University of Iceland 2017) 96–97.

5.3 *Disputes about Custody, Contact or Residence*

It is generally believed to be in the best interests of a child when parents are able to resolve their disputes outside of the court system. In line with this, a legislative reform, that came into effect in 2013, requires parents to attempt to reach an agreement through mediation before requesting a ruling on custody, residence, or contact, cf. section 33 a. of the Children Act. The aim of the mediation is to help parents reach an agreement that is consistent with the best interests of the child. According to the provisions children who have attained sufficient maturity shall be given an opportunity to express their views in the course of the mediation process unless this can be seen as having a damaging effect on the child or as being irrelevant regarding the resolution of the case. In the preparatory works it is clearly stated that in accordance with article 12 of the CRC, the person constructing the mediation should be able to speak to a child without parental consent.[54] Despite this, there are some examples in practice of children not being allowed to participate during mediation, because it was against the will of one or both parents.[55]

When parents are not able to reach an agreement through mediation, they have to request a formal ruling. If the dispute concerns custody or residence, the issue must be resolved in court, cf. section 34 of the Children Act. If parents only disagree about contact, the dispute will be resolved by the District Commissioner, cf. section 47. In both cases, children's right to express their views are protected in section 43, cf. section 71 of the Children Act. The judge or the District Commissioner can commission an expert to examine the child's point of view. When determining who speaks to the child, it is important to consider what is in their best interests and take into account the age and maturity of the child. Experts with knowledge of child development are often better equipped to speak with younger children, as they have certain techniques to assess to what extent the child is influenced by the parental dispute and evaluate the bond between the child and the parents.[56]

The provision about a child's right to be heard in parental disputes is similar to the previously mentioned provision on mediation. Both provide children 'who have attained sufficient age and maturity' with an opportunity to express their views.[57] The phrasing of these provisions is more limited than the

54 Alþt. 2011–2012 (n 25).

55 Umboðsmaður barna (n 13) 15.

56 Hrefna Friðriksdóttir, *Handbók: barnalögin nr. 76/2003 með síðari breytingum* (Úlfljótur 2013) 164.

57 Similar wording, where the right to participation is granted to children in accordance with their age and maturity, is common in Icelandic legislation. Another example is section 42, subsection 2 of the Child Protection Act, No. 80/2002.

wording article 12 of the CRC, which provides all children 'capable of forming his or her own views with the right to express those views freely'. Unlike in Icelandic legislation, the age and maturity of a child does not affect the right to be heard according to the CRC, only the weight given to a child's views. In Icelandic legal practice, there are recent examples of children up to the age of 8 being considered too young to express their opinion, even though it is difficult to argue that most 8-year-olds are not 'capable of forming his or her own views'.[58] It is therefore apparent that younger children's rights to participation are not fully respected in practice.

5.4 *Exceptions to the Right to Participation?*

The previously mentioned provisions in the Children Act provide children with an opportunity to express their views when decisions are made about custody residence or contact, 'unless this can be seen as possibly having a damaging effect on the child'. This exception was considered important to protect children from having to bear too much responsibility in high-conflict matters.[59] It implies that being directly involved in a dispute between parents can potentially create a loyalty conflict and be both stressful and harmful for a child's well-being. It is difficult to see that this limitation is in accordance with article 12 of the CRC, considering the emphasis the Committee on the Right of the Child has placed on the complementary roles of Article 3 about the best interests of the child and article 12.[60] The best interests of the child or the need to protect the child from harm should not be used to 'trump' a child's right to be heard. Rather, efforts need to be made to support the child and provide conditions and information that enable the child to express their views freely and safely. Additionally, the child has a right to participate, not an obligation.[61] Ultimately, it should be up to the child to determine if they want to participate,

58 Bjarnadóttir (n 26) 99.

59 Friðriksdóttir (n 31) 163.

60 UN Committee on the Rights of the Child, *General Comment No. 12* (n 1); UN Committee on the Rights of the Child, *General Comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration* (29 May 2013) CRC/C/GC/14 11. Emphasis on the complementary role of these two articles can also be found in Icelandic legal practice. One example of this is the first case where the majority of the Supreme Court of Iceland cited the CRC from 23 November 2011, case no 608/2011. In this case, the Court denied parents request to have their 12-year-old daughter returned to the Philippines, on the grounds that she had adjusted well in Iceland and wanted to stay with her foster parents. Although the Court refers only to article 3 of the CRC, the case demonstrates the complementary roles of the two principles.

61 UNCRC General Comment No. 12 (n 1) 8.

not the adult making the final decision. This exception does not appear to be widely used in practice.[62]

The second limitation found in the previously mentioned provisions is if a child's opinion is considered 'as being irrelevant regarding the resolution of the case'. In the preparatory works for the reform of the Children Act, it is mentioned as an example that it could be meaningless for a child to participate when it is obvious what the decision will be, for example, when one parent is clearly unfit to bear parental responsibility.[63] Moreover, this exception has been used in practice to limit young children's right to participation. One example of this is a contact case from 2015, where it was considered irrelevant for a 6-year-old child to be heard, as it would most likely not impact the final decision.[64] Another example of how this exception has been used in practice is a contact case from the same year, where the District Commissioner believed it was irrelevant to speak to a 12-year-old child, as the dispute between the parents was not very deeply rooted. The Ministry of Interior (now Ministry of Justice) overruled this decision.[65]

The CRC does not limit the right to be heard to cases where it is considered relevant for the final decision. In this respect, it is interesting to reflect on the purpose of participation. If the only purpose would be to make 'the right decisions' it could be justifiable to neglect talking to a child when it is self-evident that the child's opinion could in no way impact the decision being made. However, child participation is not only important to determine what decision is in the best interests of a child, it is also meant to empower the child. Having the opportunity to be heard makes children more likely to accept the decision made and encourages children to speak out in the future. Furthermore, it is believed to support a child's development and their sense of autonomy, independence and social competence.[66] Some might consider it an added burden on children to ask them to express their opinion, if it is already clear what the decision will be. On the other hand, the decision maker could explain in a child friendly manner why a specific decision will most likely be made and still give the child the possibility to comment.

The limitations to the right to participation in the Children Act mean that younger children often do not get heard in cases that concern them. Additionally,

62 Bjarnadóttir (n 26) 116.
63 Friðriksdóttir (n 31) 163.
64 Bjarnadóttir (n 26) 91.
65 Bjarnadóttir (n 26) 102.
66 Geris Lansdown, *Can you hear me?: the right of young children to participate in decisions affecting them. Working Paper 36* (Bernard van Leer Foundation 2005) 7–9.

older children can possibly be excluded from having a say if the decision maker believes it is irrelevant for the final decisions or possibly harmful for their well-being. Despite these limitations, Icelandic decision makers appear to be gradually putting a greater emphasis on a child's right to be heard. In a landmark Supreme Court case from November 2017,[67] a temporary judgment about a 10-year-old child's legal residence and contact was referred back to the District Court on the basis that the child had not received an opportunity to participate in the decision. In its ruling, the Court refers to article 12 of the CRC and states that it the legal right of children to express their views in all matters that affect them. On the other hand, it also mentions that it can be justifiable in exceptional circumstances to depart from the right to participation and refers to the limitations mentioned in the provisions of the Children Act. The Court therefore appears to have taken a somewhat clear stand on the right to participation, but it also recognises the legitimacy of the limitations to the right. It will be interesting to see if this judgment will influence how the provisions of the Children Act are interpreted in practice, especially when it comes to younger children.

6 Conclusion

Section 76, subsection 3, of the Icelandic Constitution does not explicitly mention the right to participation. Nonetheless, convincing arguments can be given for the conclusion that it falls within the ambit of the provision. Participation should, therefore, be considered an essential part of the constitutional provision about children's right to protection and care. It follows that children have a constitutional right that legislation guarantees their right to participation, as defined by article 12 of the CRC. As the CRC has been directly incorporated into law, Icelandic legislation formally protects children's right to be heard and have their views respected in accordance with their age and maturity. This right does, however, not always fully translate into practice.

When it comes to participation in public decisions, an emphasis has been put on strengthening youth councils and interesting proposals have been put forward about lowering the voting age to 16 in local elections. Such measures would undoubtedly be a positive step towards increasing children's possibility to influence their local communities. Notably absent from this discussion, however, is the participatory rights of younger children, who appear to have very few opportunities to be heard and have an impact on public decisions in

67 Supreme Court of Iceland, case 703/2017.

Icelandic society. Greater understanding is needed about the fact that child participation is not about giving a select few children the role of representing all other children but providing children of all ages with a real opportunity to be listened to and respected.

Regarding the right of individual children to participate in decisions that affect them, Icelandic legislation reflects the emphasis the CRC puts on the evolving capacities of children. All children formally have the right to be heard, and when they reach a certain age they are granted the right to directly share in the decision making or even the right to self-determination. However, as a legal principle, the right to participation does not always appear to translate into practice. One area where this is evident is decisions about custody, residence and contact. There is no guarantee that children get a real chance to be heard when parents come to an agreement about these issues, as the District Commissioner generally does not give a child the chance to participate before approving a contract between parents. Moreover, provisions in the Children Act both limit the right to be heard based on age and maturity and provide an exception to the right when it is considered harmful to the child or irrelevant for the case. These limitations, especially the way they have been interpreted and applied in practice, do not correspond with the right of participation enshrined in article 12 of CRC, which is arguably protected by the Icelandic Constitution. As when it comes to participation in society, these limitations appear to mostly affect younger children. Icelandic legislation and legal practice, hence, does not fully protect younger children's right to be heard.

It is clear we still have a long way to go before it can be said that a child's right to participation is fully protected in Iceland. However, there has been a considerable shift when it comes to the views and attitudes towards children in the last few years and participation is becoming increasingly recognised as an integral part of determining what is necessary for a child's well-being. The growing awareness of the right to participation will hopefully mean that the provisions limiting the right to participation will be reviewed and the right interpreted in a way consistent with children's fundamental human right to be heard and respected.

References

Alþt. 1994–1995, A-deild, þskj. 389 – issue 297.

Alþt. 2006–2007, A-deild, þskj. 460 – issue 409.

Alþt. 2011–2012, A-deild, þskj. 328 – issue 290.

Alþt. 2011–2012, A-deild, þskj. 3 – issue 3, All comments made about the Constitutional Council's bill for a new Constitution, No. 140/41.

Alþt. 2017–2018, A-deild, þskj. 40 – issue 40, Comment from the Union of upper-secondary school student in Iceland, No. 148/223.

Alþt. 2017–2018, B-deild,þskj 40 – issue 40, meeting 43.

Alþt. 2018–2019, A-deild, þskj. 9 – issue 9.

Alþt. 2018–2019, A-deild, þskj. 521 – issue 393.

Alston P, 'The Legal framework of the Convention on the Rights of the Child' (1992) Bulletin of Human Rights 9.

Alston P, Tobin J and Darrow M, *Laying the Foundation for Children's Rights* (UNICEF Innocenti Research Centre 2005).

Bjarnadóttir ÁF, *Réttur barna til að hafa áhrif* (University of Iceland 2017).

The Constitutional Council, 'The Constitutional Council hands over the bill for a new Constitution' (29 July 2011) <http://www.stjornlagarad.is/english/> accessed15 August 2018.

Friðriksdóttir H, *Handbók: barnalögin nr. 76/2003 með síðari breytingum* (Úlfljótur 2013).

Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007).

Kristjánsson HD, *Að iðka lögfræði: Inngangur að hinni lagalegu aðferð* (Codex 2015).

Lansdown G, *Can you hear me?: the right of young children to participate in decisions affecting them. Working Paper 36* (Bernard van Leer Foundation 2005).

Líndal Þ, *Barnasáttmálinn: rit um samning Sameinuðu þjóðanna um réttindi barnsins með vísun í íslenskt lagaumhverfi* (UNICEF 2007).

Ministry of Education, Science and Culture, 'The Icelandic National Curriculum Guide for Compulsory Schools – General Section' (2012) <https://www.government.is/library/01-Ministries/Ministry-of-Education/Curriculum/adskr_grsk_ens_2012.pdf> accessed 19 August 2018.

Prime Minister's Office, 'Ungmennaráð Heimsmarkmiða Sameinuðu þjóðanna' (16 January 2018) <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2018/01/16/Ungmennarad-Heimsmarkmida-Sameinudu-thjodanna> accessed 19 August 2018.

Spanó RR, *Breytist stjórnarskráin með tímanum* (Frettablaðið 2012).

Thorarensen B, *Stjórnskipunarréttur: Mannréttindi* (Codex 2008).

Umboðsmaður barna, 'Embætti umboðsmanns barna 10 ára – 1995–2005' (The Ombudsman for Children in Iceland 2004).

Umboðsmaður barna, *Report of the Ombudsman for Children in Iceland to the UN Committee on the Rights of the Child* (The Ombudsman for Children in Iceland 2010).

Umboðsmaður barna, 'Skýrsla umboðsmanns barna 2014' (The Ombudsman for Children in Iceland 2014).

Umboðsmaður barna, *Hvenær ráða börn sjálf* (The Ombudsman for Children in Iceland, 2 September 2015) <https://www.barn.is/frettir/2015/09/hvenaer-rada-boern-sjalf> accessed 19 August 2018.

Umboðsmaður barna, 'Skýrsla umboðsmanns barna 2016' (The Ombudsman for Children in Iceland 2016).

Umboðsmaður barna, 'Staðan á ungmennaráðum sveitarfélaga' (The Ombudsman for Children in Iceland 2017) <https://barn.is/um-embaettid/verkefni/ungmennarad-sveitarfelaga> accessed 19 August 2018.

Umboðsmaður barna, 'Frumvarp til laga um kosningar til sveitarstjórna, 190. Mál' (The Ombudsman for Children in Iceland 2017) <https://barn.is/umsagnir/2017/05/frumvarp-til-laga-um-kosningar-til-sveitarstjorna> accessed 19 August 2018.

Umboðsmaður barna, *Helstu áhyggjuefni 2017* (The Ombudsman for Children in Iceland 2017).

UN Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7.

UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC 12.

UN Committee on the Rights of the Child, *Concluding Observations: Iceland* (23 January 2012) CRC/C/ISL/CO/3–4.

UN Committee on the Rights of the Child, *General Comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration* (29 May 2013) CRC/C/GC/14.

Verhellen E, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective' in Sara Lembrechts, Ellen Desmet and Didier Reynaert (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015).

Wall J, 'Democratising democracy: the road from women's to children's suffrage' (2013) 18:6 The International Journal of Human Rights 646.

CHAPTER 14

Voice but No Choice—Children's Right to Participation in Sweden

Pernilla Leviner

1 Introduction

This chapter will deal with what role children's right to participation plays in Swedish law and the connection between this right and the Instrument of Government (*Regeringsformen,* 1974:152), which is one of four statutes with constitutional status in Sweden.[1] Two aspects of children's right to participation are analysed. First participation for children from a 'democracy perspective', or in other words participation as a *collective* right for children to influence public decision-making – here specifically the right to vote, and secondly children's right to be heard in the Swedish child protection system, which can be seen as an example on how the right to participation has been implemented into national Swedish law affecting children in *individual* cases.

There are other examples of both collective rights, also including children, to participate in public decision-making, see for example freedom of expression, information, assembly and the freedom to demonstrate,[2] partly discussed by Titti Mattsson in this volume,[3] and also other areas of law in which children have the right to be heard in individual cases, for example family law and migration law. The reason to focus here specifically on the *right to vote* and the *right to be heard as implemented in child protection* regulations are partly pragmatic and out of interest, but these specific rights can be argued to be 'two sides of the same coin'. The right to vote can be claimed to be the most basic political

1 I want to thank Titti Mattsson and Johanna Schiratzki, authors of the othter chapters on Sweden in this book, Aoife Daly and Vera Yllner for their valuable comments as to previous drafts. Thanks are also given to the editors of this book and the anonymous reviewer for helpful comments. Any errors or mistakes remaining however are clearly my own.

2 These rights are protected by the Instrument of Government chapter 2, section 1 and the Freedom of the Press Act (Tryckfrihetsförordning, 1949:105) and the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen, 1991:1469). See also the UN Convention on the Rights of the Child, articles 13–15.

3 Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

right of all and therefore an important example of a *collective* participatory right, whereas the right for children to be heard in child protection cases deals with decisions of clear, even life-changing, importance for the *individual* child.

When talking about children's right to participation, article 12 of the UN Convention on the Rights of the Child (the CRC),[4] often referred to as *the participation article,* is a natural starting-point. According to the UN Committee on the Rights of the Child (the UN Committee), article 12 establishes the following:

> … the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.[5]

The CRC also stipulates what can be described as more general collective participation rights in articles 13–15, emphasising children's right to freedom of expression, freedom of thought, conscience and religion as well as freedom of association and peaceful assembly.[6]

It can be noted that efforts have been made in Sweden to emphasise children's rights generally on the constitutional level. The Swedish Instrument of Government was reformed in 2011 to include a goal-oriented provision in chapter 1, section 2 stating that public institutions have a specific responsibility to safeguard children's rights, but participation is not specifically

4 Article 12 reads as follows: *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

5 UN Committee on the Rights of the Child, *General comment no. 12: The right of the child to be heard* (1 July 2009) CRC/C/GC/12 para 15.

6 See for international discussion for example Aoife Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and Peaceful Assembly* (Brill Nijhofff 2016).

mentioned.[7] In June 2018, the Swedish parliament decided to incorporate the CRC into Swedish law and the need to strengthen children's right to participation was emphasised in the legislative bill.[8] However, incorporation will be done without giving the convention constitutional status or protection and what effects incorporation will have, both in general and when it comes to children's right to participation more specifically, remains to be seen.[9] Apart from the reform of the Instrument of Government and the incorporation of the CRC, several statutes, such as the Social Services Act and the Parental Code, have been reformed with the specific aim being to strengthen children's right to participation in line with the CRC.[10] However, although having the overall aim to strengthen children's right to participation, it can be concluded that it has not been clear what these reforms have actually wanted to achieve, and at what cost in the sense how specific children's rights would need to be balanced to other interests and rights. This can be said to be a general problem when it comes to implementing children's rights in Sweden, but perhaps especially relevant when it comes to the right to participation, which has proven difficult to implement in many jurisdictions.[11]

The UN Committee on the Rights of the child emphasised, in its Concluding observations on Sweden from 2015, notes that article 12 is insufficiently implemented in practice, in particular as concerns custody, residence and visitation,

7 In the Legislative Bill to this reform, it was explicitly stated that the emphasis on children's rights in the Instrument of Government was seen as an important commitment in line with, and in order to fulfil the obligations in the CRC. Legislative Bill, Prop. 2009/10:80 *En reformerad grundlag* (8 December 2009) 188.

8 Legislative Bill, Prop. 2017/18:186 Inkorporering av FN:s konvention om barnets rättigheter (15 March 2018) 61 and 73.

9 See Mattsson, 'Constitutional Rights for Children in Sweden' (n 3) for further discussion and also Pernilla Leviner, 'Barnkonventionen som svensk lag: En diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter' (2018) Förvaltningsrättslig tidskrift 287.

10 See Legislative Bills – Prop. 1994/95:224 *Barns rätt att komma till tals* (4 May 1995), Prop. 1996/97:124 *Ändring i socialtjänstlagen* (6 March 1997), Prop. 2002/03:53 *Stärkt skydd för barn i utsatta situationer* (20 February 2003), Prop. 2005/06:99 *Nya vårdnadsregler* (16 March 2006), Prop. 2006/07:129 *Utveckling av den sociala barn- och ungdomsvården m.m.* (20 June 2007), Prop. 2009/10:192 *Umgängesstöd och socialtjänstens förutsättningar att tala med barn* (14 April 2010) and Prop. 2012/13:10 *Stärkt stöd och skydd för barn och unga* (13 September 2012).

11 This is concluded by, for example, Kay Tisdall, 'Children and young people's participation: A critical consideration of Article 12' in Wouter Vandenhole and others (eds), *Routledghe International Handbook of Children's Rights Studies* (Routledge 2015) and Titti Mattsson, 'Some reflections on a dialogical approach to the recognition of children in the decision-making process' in Kerstin Nordlöf and Farhad Malekian (eds), *The sovereignty of children in law* (Cambridge Scholars Publishing 2012).

asylum procedure and social services investigations.[12] In the same concluding observations the committee also noted the following:

> In the light of its general comment No. 12 (2009) on the right of the child to be heard, the Committee recommends that the State party take measures to strengthen that right in accordance with article 12 of the Convention and to ensure the effective implementation of legislation recognizing the right of the child to be heard in relevant legal proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle.[13]

It can be concluded that in the Swedish context, it has not been clarified in what ways children are to be guaranteed participation in public decision-making and it is also unclear what participation in individual cases is actually supposed to mean.

The overall aim in this chapter is to examine and discuss child participation with focus on the above described perspectives and themes – which can be labelled broadly as *collective* and *individual* – and to discuss whether reasonable conditions for participation and for children's wishes and views to be given due weight are given in Sweden today. The legal analysis, which is based on legal sources such as statutes, preparatory works, court cases and legal doctrine, both Swedish and international, is 'critical' in that it is trying to unveil not only legal uncertainties, contradictions and gaps, but also underlying norms, values and logics that affect the realisation of children's right to participation in practice. As mentioned above, article 12 of the CRC is a starting point, but, as will be made clear, there are reasons also to critically analyse the foundation of which children's right to participation according to the CRC is based on. Michael Freeman has pointed out that the CRC is a 'convenient benchmark' that contributes to fundamental improvements in the life of children all over the world, but considering that the convention is a 'beginning rather than the final word on children's rights', it is important to also reflect on its limitations.[14] The view taken, with inspiration from Reynaert et al. and Vanderhole et al.,[15]

12 UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of Sweden* (6 March 2015) CRC/C/SWE/CO/5 para 19.

13 CRC/C/SWE/CO/05 (n 11) para 20.

14 Micheal Freeman, 'Children's Rights as Human Rights: Reading the UNCRC' in Jens Qvortrup, William A. Corsaro and Michael-Sebastian Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave Macmillan 2009) 15.

15 Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between 'believers' and 'opponents': Critical discussions on children's rights' (2012) 20 International Journal of

is that the question is not only how to best implement children's right to participation, but also to analyse and question what children's right to participation can and/or should mean.[16] The close connection between participation and autonomy, and the dichotomy between childhood and adulthood, having self-determination and not, will be discussed. It will be emphasised that trying to strengthen participatory rights for children, without dealing with questions relating to what decisions children should actually be able to make, risks being counterproductive, and perhaps even patronising. An overall conclusion is that, although children's rights – not least participatory rights – are on the political agenda, and in spite of the fact that children are increasingly given voice in line with article 12 of the CRC, they are not given much decision-making power, and certainly not the vote in political elections. In order for children's participatory rights to become something more than a problematic reinforcement of children's weaker position and subordination, the conclusion is that there is a need to rethink – or at least to clarify – what children's right to participation is supposed to mean in practice in Sweden today and in the future.[17]

2 Collective Participatory Rights for Children—Possibilities to Influence Public Decision-Making through Right to Vote and Other Means

When it comes to collective participatory rights for children and their possibilities to influence public decision-making, mention should be made to provisions in the goal-oriented chapter 1, section 2 in the Instrument of Government, referred to above. Apart from the specific provision on children's rights, it is also stated herein that public power 'shall be exercised with respect for the equal worth of *all* and the liberty and dignity of the *individual*' and that public institutions 'shall promote the opportunity for *all* to attain participation

Children's Rights 155; Wouter Vandenhole and others (eds), *The Routledge International Handbook of Children's Rights Studies* (Routledge International 2015).

16 The project has been approved by the Regional Ethical Review Board in Stockholm, see registration number 2018/704–31/5, 2018-05-17.

17 This chapter should be read together with the other chapters in this volume looking at Sweden – especially Mattsson, Constitutional Rights for Children in Sweden' (n 3) giving an overall understanding of on Children's constitutional rights in Sweden, and Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' (n 53) on the principle of the best interest of the child. This principle is closely linked to children's right to be heard in individual cases as children's subjective perspective is to be included in the assessment of what is in the best interest of the child.

and equality in society …'.[18] The Instrument of Government also establishes in chapter 1, section 1 that 'all public power in Sweden proceeds from the *people*', and that 'Swedish democracy is founded on the free formation of opinion and on universal and *equal* suffrage'.[19] Children are not excluded from the 'all' or the 'people' and children and young people are also included in important 'democracy participatory rights', such as freedom of expression, information, assembly and the right to demonstrate (Instrument of Government, chapter 2, section 1).[20] However, there are to my knowledge no studies having looked into how children in Sweden in fact use these rights or how efficient the participatory rights through such means is in Sweden today.

2.1 *Children's Right to Vote*

Although the Swedish constitution does *not directly exclude* children from political participation, children are *clearly not included* in the most important political participation right since children do not have the right to vote or to stand for election. Chapter 3, section 4 of the Instrument of government reads as follows:

> Every Swedish citizen who is currently domiciled within the Realm or who has ever been domiciled within the Realm, and who has reached the age of eighteen, is entitled to vote in an election to the Riksdag. Only a person who is entitled to vote may be a member or alternate member of the Riksdag.

Thus, the right to vote in Sweden, as in most other countries, is linked to age of majority, i.e. legal age at which an individual becomes an adult in the legal sense, which is 18 in Sweden (Parental Code, chapter 9, section 1). Although the right to vote over the past century and a half in most countries, has been extended to other groups than men with certain income or status, including ethnic minorities and women, minors are still excluded. Denying children the most basic political right of all is, as will be described further below, in general little discussed and rarely questioned. It is probably rather assumed to be correct based on the view that children lack sufficient capacities and competence.

According to John Wall, professor of Philosophy, Religion and Childhood Studies at Rutgers University in the United States, these assumptions, which seem to influence at least 'Western' democracies, draw on thinking and writing

18 Emphasis added.
19 Emphasis added.
20 See also the CRC Articles 13–15.

by Locke, Rousseau and Kant, assuming that children, in contrast to adults, lack autonomy.[21] Wall also notes that even though the notion of children's rights now enjoys wide acceptance, theorists of the twentieth century, such as Rawls and Habermas, also accept and promote that suffrage should belong only to adults and that children do not possess the communicative competence to engage in political procedures of reciprocal perspective thinking.[22] This is also the view taken in the International Covenant on Civil and Political Rights from 1966. Article 25 in this convention states that there should not be any 'unreasonable restrictions' on the right to vote in elections, but the comments adjoined to this convention establishes that mental incapacity as well as setting a minimum age for the vote is reasonable and constitutes legitimate grounds for exclusion.[23]

Even though not widely discussed, children's lack of right to vote and the 18-year-old limit can be, and has been, challenged.[24] Swedish political scientist Ludvig Beckman, Sweden, notes that the criteria on who to exclude and include in the 'demos', i.e. the people on which a democracy is based, is reasonable only by virtue of the reasons behind it.[25] When the legitimacy of denying children the right to vote is challenged in the literature and debate internationally two main solutions seem to be presented. One being that all individuals should have the right to vote from birth, exercised by guardians until a certain age, and the other that age-limits should be lowered to be more reasonable and in coherence with other legal age-limits.

As for age-limits it should first of all be noted that it has been lowered before in Sweden. From being 23 years old it was lowered first in 1945 to 21,

21 John Wall, 'Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage' (2014) 24 Children, Youth and Environments 108.

22 See Wall (n 18) with reference to John Rawls, *Political Liberalism* (Columbia Univeristy Press 1996) 245 and Jurgen Habermas, *Justification and application: remarks on discourse ethics* (The MIT Press 1993) 64.

23 UN Human Rights Committee, *CCPR General Comment No. 25: Article 25* (*Participation in Public Affairs and the Right to Vote*), *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (12 July 1996) CCPR/C/21/Rev.1/Add.7.

24 See Wall (n 18) and Ludvig Beckman, *The frontiers of democracy: The right to vote and its limits* (Palgrave Macmillan 2009) for more on the arguments and debate. See also Aoife Daly, 'Free and fair elections for some? The potential for voting rights for under-18s' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012).

25 It should be noted here that Beckman (n 21) concludes that, in his view, extending the vote to children is not to the benefit of children. The basis for this view is that suffrage entails responsibilities that are not in the child's best interests.

to 20 in 1965, 19 in 1970 and then lastly to 18 in 1974.[26] Today it can be argued for instance that the right to vote should be in line with the age of criminal responsibility, which in Sweden is 15. Overall, the assumption that people under 18 do not have capacity and competence is problematic as this is not a criterion for the right to vote for anyone else in the Swedish system. No adult must prove their competence to vote, even though it might be clear that the capacity to assess information and taking a stand in political questions can be questioned due to intellectual disabilities, dementia etc.[27] If we are denying children the right to vote based on the argument that they do not have the capacity and competence, is it right to give adults this right without testing their capabilities and competence? If nothing else, as John Wall notes, 'it is clear that political competence does not suddenly spring into being upon a person turning 18 years old',[28] and therefore, it would perhaps be better to have a flexible age limit and for capacity to be tested. It can be argued that this would be practically difficult and expensive, but are bureaucratic and economic arguments enough to deny a large number of citizens the right to vote?[29] If so, at least it should be clearly stated that these are in fact the arguments, not an overall assessment that all individuals under 18 years old lack capacity to vote.

When it comes to proposals on extending the right to vote to all people from birth, Wall proposes what he calls a 'proxy-claim vote', meaning that all citizens should be granted a right to vote at birth, being exercised by a parent or guardian proxy until the child claims the right to vote by him/herself by registering to vote. Wall notes the following:

> While a proxy vote may seem undemocratic through the eyes of the modernist ideal of the autonomous citizen, and while a claim for the vote in childhood challenges modernity's adult-only premises, the proposal is the best way to realise the postmodern democratic ideal of maximum inclusion of the people's lived experiences of difference.[30]

26 Kristina Engwall and Ingrid Söderlind, 'Barn och demokrati i ett historiskt perspektiv' in Christer Jönsson (ed), *Rösträtten 80 år: Forskarantologi* (Justitiedepartementet 2001).

27 For detailed consideration of these points, see Daly, 'Free and fair elections for some?' (n 21).

28 Wall (n 18).

29 It should be noted here that I am not arguing here that people with intellectual disabilities should not have the right to vote, this is a discussion about the legitimacy of denying children the right to vote.

30 Wall (n 18).

The proposal raises many questions, perhaps as many as it resolves, one being if the right to vote should also be combined with the ability to run for office and how this would be balanced with the right not to work and right to education. Wall also raises the question of which parent would exercise the proxy vote if parents disagree and how the registration for voting would be handled, if schools should be involved etc.

It is very clear that children's right to vote is not an easy question to resolve, but it is hard not to agree with Wall in that it is undemocratic to exclude all people under 18 from voting without significantly more compelling reasons for doing so.[31] Therefore, it is perhaps surprising that in a child-friendly society as Sweden, with a long tradition of emphasising democratic values and equal treatment, the right to vote for children has not been on the political agenda. There has been some discussion, mostly driven by youth organisations, whether to lower the voting age, first of all in local elections.[32] A proposal to do so in national elections was also raised in the Parliament by *Miljöpartiet* (Green Party) in 2017,[33] but this proposal was turned downed.[34] In the 1980s an initiative led by the Swedish Paediatrics Association argued, quite in line with the ideas presented by Wall (see above), that children should have the right to vote from when they are born, but that this right would be exercised by a parent or other guardian acting by proxy until the child turns 18. This proposal, which as far as I know was not discussed broadly or well-known to the public, has been described and analysed by Gunnel Gustafsson, Swedish professor of Political Science.[35] She concludes that a proxy-right to vote for children most probably would mean that our society would be more child- and parent-friendly, but that there are undoubtedly easier and more efficient ways to achieve this and she argues that a lowered

31 Wall (n 18).

32 SOU 2016:5 *Låt fler forma framtiden!* (January 2016) 552. This is already the case when it comes to elections for the governing body of the Church of Sweden, in which the voting age was lowered in to 16 in 1999, see chapter 33, section 2 in *Kyrkoordningen* (The Church Order).

33 Proposal to the Parliament, Motion till riksdagen, 2017/18:2117, *Sänkt rösträttsålder till 16 år – ge de unga större inflytande* (3 October 2017). The proposal was to lower the voting age to 16 years old.

34 A proposal to lower the voting age has also been raised by Sveriges ungdomsorganisationer, The National Council of Swedish Youth Organisations, see Sveriges Ungdomsorgnaisationer, LSU, *För frihet senare i livet: En rapport från Sveriges ungdomsrepresentanter i EU*.

35 Gunnel Gustafsson, 'Rösträtten och barnen' in Christer Jönsson (ed), *Rösträtten 80 år: Forskarantologi* (Justitiedepartementet 2001).

age-limit is to prefer as this is more in line with the current system with individual voting.[36]

2.2 *Compensatory Measures for Children's Participation*

Children and young people do clearly not have the right to vote in Sweden today. But there are other mechanisms that can be viewed as a compensation aiming at giving children the possibility to participate in public decision-making. First of all, as has been noted above children are not excluded from the 'all' or the 'people' having the right to for example freedom of expression etc. (Instrument of government, chapter 2, section 1).[37] However, as already mentioned, there are to my knowledge no studies having analysed these rights from a child perspective in Sweden.

Another democracy mechanism, having been described as an important instrument to encourage more people, young people and children in particular, to engage in local and regional decision-making is 'citizen proposals' (*medborgarförslag*), which, since 2002, is regulated in the Local Government Act, 2017:725, (*kommunallagen*), chapter 8, section 1.[38] This mechanism includes a right for all individuals registered in a municipality to submit proposals and to have these considered by the local government councils. As important as it could be, it has been noted that its success depends on how local governments responds to proposals,[39] and there are to my knowledge few studies on how children and young people in fact use and perceive this possibility.[40]

Perhaps more important, but also without being properly evaluated in Sweden, are the different forms of child and youth forums and youth parliaments.[41] Another overall prerequisite of high importance for children being able to participate in public decision-making is for the school system to take on the responsibility to teach democratic processes. The responsibility of the school system will not be further discussed here, but it can be concluded that

36 One argument for lowering the age-limit pointed out by Gustafsson (n 32) is the need for renewing the democracy as voter participation is low and that young people to a large extent are turning their backs to organisation in traditional political parties.

37 See also the CRC articles 13–15.

38 SOU 2016:5 (n 29) 490.

39 SOU 2016:5 (n 29) 495; Rebecca Thorburn-Stern, *Participation, Power and Attitude: Implementing Article 12 of the Convention on the Rights of the Child*, vol II (Martinus Nijhoff Publishers 2017) 146.

40 See however report from the Swedish Agency for Youth and Civil Society, Ungdomsstyrelsen, *Unga med attityd 2013* (Ungdomsstyrelsens skriftserie 2013:3, 2013).

41 Thorburn-Stern (n 36) 147.

also in this aspect, there is a need for further research, both legal and within other fields of science.[42]

2.3 *Concluding Observations on Children's Collective Right to Participation in Public Decision-Making*

To conclude, except for the right to vote which individuals under 18-years-old do clearly not have, children are not excluded from the more general participatory rights in the Swedish Constitution, and there are some compensatory mechanisms with the aim to include children in public decision-making. However, we simply do not know if this in fact results in children feeling more included and empowered. Swedish historians Engwall and Söderlind conclude that through emphasising children's right to participation, a notion of children setting the political agenda might be created, but that there is a risk that children's views are only used as an argument when in line with what adults want to achieve nevertheless.[43] Borrowing the words of Kay Tisdall, Professor of Childhood policy, University of Edinburgh, there are *child-focused* (and probably child-friendly) mechanisms for children to be involved in public decision-making in place in Sweden today, but it can be questioned if they are *child-inclusive*.[44] Overall, there are reasons to reflect on if the current possibilities for children to influence public decision-making are effective and reasonable from children's perspective or if they are mainly symbolic. In some respect, the collective participation mechanisms might even be counterproductive. Children are involved but adults are deciding, sometimes perhaps even with children's views and wishes as an argument and trump card, without having children's needs and interests at the fore. In this context, it is interesting to note that the initiative taken by Greta Thunfjäll, probably known by most - a Swedish 16 year old environmental activist - took to school striking as a way to get politicians and others to listen. This can be seen as a reaction to no other ways being accesible for children and young people to have their voices heard.

So what could be done to strengthen collective participatory rights for children? Is a proxy-claim vote in line with what has been proposed by Wall described above a legitimate solution when it comes to the right to vote? Perhaps, but it can be argued that in such a system the right to vote is equally,

42 See for a historical perspective on this theme Engwall and Söderlind (n 23) 187.

43 Engwall and Söderlind (n 23) 188. This is concluded with reference to Anne-Li Lindgren and Gunilla Halldén, 'Individuella rättigheter; autonomi och beroende: Olika synsätt på barn i relation till FN:s barnkonvention' (2001) 10 Utbildning & Demokrati 65.

44 See Kay Tisdall, 'Subjects with agency? Children's participation in family law proceedings' (2016) 38 Journal of Social Welfare and Family Law 1.

but differently, disempowering for those children not yet having claimed their right to vote, as parents might 'use' their right to vote. What if children, when they can claim their vote, find out that their parents have used their vote in a way which is not in line with their views and interests.

In my view, a lowered age for voting is to prefer even though the legitimacy of denying younger children the right to vote can be challenged. In the current system a reasonable age-limit could be 15 years, as this is the age for criminal responsibility, or perhaps 16 as this is the age when children can enter into contracts, etc. This also corresponds with the age when children in Sweden do no longer have a duty to go to school (*skolplikt*), which can be interpreted as a statement that nine years of school is sufficient. It can be noted that Aoife Daly, senior lecturer and child rights expert, Liverpool University, have argued that children should be permitted the right to vote from at least 12 years, as this is the age at which there is broad agreement that abstract thought becomes sophisticated.[45]

When it comes to other types of mechanisms for children to influence public decision-making there is a need for further research on how citizen proposals, youth parliaments etc. work and how children in Sweden themselves perceive their opportunities to influence local, national, regional and international politics and public decision-making. There are reasons to believe that children are both interested and capable of deciding more in our society and that this would have positive effects on our democracy. As has been noted by Aoife Daly, 'Children are an excluded group whose agency and experiences have been undervalued by the dominant group – adults. Such exclusion can breed resentment and further the apathy that contributes to low voter turnout'.[46] Many would agree that we live in a time where resentment and apathy are a real danger to democracy.

3 Children's Right to Participation in Individual Cases Involving and Affecting Children—Child Protection as an Example

3.1 *Overall on Children's Rights and Parental Responsibilities*

When it comes to children's right to participation in individual cases involving and affecting children, it should first of all be emphasised that children are also included in the above-mentioned provisions on 'the liberty and dignity of the individual', reflecting an overall fundamental right for *everyone*

45 Daly, *Free and fair elections for some?* (n 21).

46 Daly, *Free and fair elections for some?* (n 21).

to self-determination and autonomy. However, it is made clear in chapter 6, section 2 of the Swedish Parental Code (*föräldrabalken,* 1949:381) that children are, indirectly but clearly, excluded from the right to decide in matters concerning themselves, as they are under the responsibility of their custodians (*vårdnadshavare*), in most cases the parents. Parental responsibility for custodians includes the right and obligation to make decisions concerning the child's personal affairs. In doing so the custodian shall increasingly take the child's views and wishes into account as the child becomes older (chapter 6, section 11), i.e. gain more co- and self-determination, but the ultimate decisional-power lies with the custodians. For example, teenagers can be deemed mature enough to decide in questions relating to reproductive health issues without involving parents,[47] but when it comes to support from the Social Services, the possibilities for children and young people to receive such help without the consent of parents/custodians is much more limited.[48] It is the responsibility of health care professionals, social workers, teachers and others meeting children and young people to assess children's maturity and decisional-capacity, and it can be concluded that this is done without much official guidance.[49]

The exclusion from autonomy and self-determination and the fact that children are under parental responsibility is probably in principle viewed as both necessary and reasonable, and the right to be heard according to article 12 of the CRC can in light of this non-self-determination, be seen as a rational compensation. But is it self-evident that people under the age of 18 should not have the right to self-determination in decisions very much affecting themselves? And is the right to be heard in article 12 of the CRC a reasonable compensation for non-self-determination or are the ideas underpinning this article in fact an example of an unreasonable reinforcement of a problematic distrust of children's abilities and capabilities?

47 SOSFS 2009:15 *Socialstyrelsens föreskrifter om abort.*

48 Pernilla Leviner, 'Socialtjänstens ansvar för barn och unga' in Therése Fridström Montoya (ed), *Juridik i socialt arbete: En introduktion* (3 edn, Gleerups förlag 2018) 126; Johanna Schiratzki, *Barnrättens grunder* (7 edn, Studentlitteratur 2017) 98; Anna Singer, *Barns rätt* (Iustus 2017) 89.

49 The National Board of Health and Welfare (*Socialstyrelsen*) has published a handbook with the aim to support the Social Services and the health care sector in assessing children's maturity. However, it can be questioned how much concrete guiding this handbook actually gives. See Socialstyrelsen, *Bedöma barns mognad för delaktighet: Kunskapsstöd för socialtjänsten, hälso- och sjukvården samt tandvården* (2015).

3.2 *The Right to Be Heard in the Swedish Child Protection System—Child-Friendly Aim but Limited Child-Inclusion Outcome*[50]

3.2.1 The Legal Landscape—What Ought to Be

To begin with, children's right to participation in line with article 12 of the CRC is emphasised as specifically important in child protection cases by the UN Committee on the Rights of the Child in its General Comment no. 12 on participation. It is stated that in such cases, the view of the child must be taken into account in order to determine the best interests of the child.[51] The Committee notes that the child's right to be heard in such cases is not always taken into account by States parties and has recommended that it is to be ensured, through legislation, regulation and policy directives, that the child's views are solicited and considered.[52] This is important not the least for the decision-maker to be able to determine the best interests of the child.[53]

In the case of Sweden, two main laws regulate the child protection system: the Social Services Act (*socialtjänstlagen*, 2001:453) and the Care of Young Persons Act (*lag med särskilda bestämmelser om vård av unga*, 1990:52). These acts are both based on the principle of voluntariness, and the absolute primary rule is that the parents are best suited to care for and represent the child (Parental Code, chapter 6). When a situation is so serious that a child or young person cannot remain with his or her parents but instead need protection and/or specific care services, actions can be taken against the will of parents to place the child in out-of-home care. Prerequisites for such actions is regulated in the Care of Young Persons Act and can only be taken as a result of serious issues in the home, or as a result of the child's or adolescent's own destructive behaviour (section 2–3).

In the last decades, several reforms have been carried out in the child protection system to include what at a first glance can be viewed as a clear responsibility for the Social Services and Administrative Courts to hear children before making decisions in which the best interests of the child should be the primary

50 This section builds on Pernilla Leviner, 'Child participation in the Swedish child protection system: Child-friendly focus but limited child influence on outcomes' (2018) 26 International Journal of Children's Rights 136.

51 CRC/C/GC/12 (n 4) para 53.

52 CRC/C/GC/12 (n 4) para 54.

53 Focus here is mostly on the right to be involved, informed and the due weight aspect of children's participation, and less so on the best-interest-assessment that is dealt with in Johanna Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

consideration.[54] The starting point for these reforms has been article 12 of the CRC with the formulation in both the Social Services Act and the Care of Young Persons Act,[55] which are identical, being clearly influenced by the convention.

Just how these section in the two acts should be applied is however not entirely clear. Guidelines from the National Board of Health and Welfare (*Socialstyrelsen*) emphasise that it is important for the Social Services to meet and talk with children involved in child protection cases, both alone and in the company of the parents, so that it is possible to assess the child's needs and best interests.[56] Meetings and interviews with older children can in line with the Parental Code (chapter 6, section 11), be held without the consent of parents. Since a reform in 2013 the Social Services Act includes (chapter 11, section 10) a possibility for social workers to meet and talk also to younger children without the custodian's consent and without him/her being present.[57] This reform was explicitly driven by an aim to guarantee children the right to participation, but the possibility to talk to children without the consent of their parents is clearly an exception to the main rule that child protection investigations is to be conducted in line with the principle of voluntariness.[58] It has been noted that the reform and the introduction of this new possibility lacks clarity on how to handle situations when parents in fact do oppose the Social Services talking to their children.[59]

Closely connected to children's right to be heard and to participate in individual cases is of course the possibility for children to be legally represented by a representative who can express the child's specific interests and needs, and who can also act on behalf of the child with respect to measures to be taken, appeals etc. This is also emphasised in article 12 of the CRC where it is stated that children shall be given the opportunity to be heard, directly or

54 See, for example, Legislative Bills, Prop. 1994/95:224 Prop. 1996/97:124, Prop. 2002/03:53, Prop. 2006/07:129, Prop. 2009/10:192 and Prop. 2012/13:10 (n 9). In June 2015, a Legislative Inquiry, SOU 2015:71 *Barns och ungas rätt vid tvångsvård: Förslag till ny LVU* was presented which also includes proposals to strengthen children's rights and perspectives. This has not yet led to a Legislative Bill and reform.

55 The Social Services Act, chapter 11, section 10 and the Care of Young Persons Act, section 36.

56 SOSFS 2014:6 *Socialstyrelsens allmänna råd om handläggning av ärenden som gäller barn och unga*.

57 There are no specific age limits connected to this possibility, and it is for the Social Services to assess and decide – without more than overall guidelines indicating that age, maturity and the questions at hand is to be considered – when interviews can and should be held without parental consent.

58 See Legislative Bill, Prop. 2009/10:192 (n 9) 19. It should be noted that it can never be acceptable to force a child to meet and talk to the Social Services.

59 See further in Leviner, 'Socialtjänstens ansvar för barn och unga' (n 45).

through a representative.[60] According to Swedish child protection regulations, both children and parents have the right to be represented by a public representative (*offentligt biträde*) when involuntary internventions according to the Care of Young Persons Act are deemed necessary.[61] Such representatives are publicly financed,[62] and it is the Administrative court (*förvaltningsrätten*) that appoints the specific representative.[63] However, important to note is that a public representative will only be appointed for the child (and his/her parents) if parents do *not* consent to interventions, i.e. only in cases with involuntary interventions according to the Care of Young Persons Act. When out-of-home-placements are in line with what parents want, and provided according to the Social Services Act, children will not have a public representative and thereby possibly less guarantees for participation, even though it might be against the child's wishes and thereby involuntary in that sense.

The role of the public representative for children will differ depending on whether the child is under or over 15 years of age. For children under 15, the public representative, without any special appointment, also serves as the child's guardian (*ställföreträdare*) in questions relating to the care proceedings (the Care of Young Persons Act, section 36). The preparatory works state that the purpose of this under-15-representative is to provide the child with an independent position in the proceedings, and that through the representative, the court shall be able to obtain an 'objective' description of the child's situation.[64] The representative can thereby make decisions on matters related to the investigation, while also supporting the child in the process. In addition

60 The Committee on the Rights of the Child have emphasised in the General Comment no. 12 that in cases where conflicts of interest can arise between children and parents, as is often the case in child protection proceedings, there is reason to appoint a separate representative for the child, see CRC/C/GC/12 (n 4) paras 35–37.

61 The main rule is that the child shall have his or her own representative (the Care of Young Persons Act, Sections 36 and 39), ie not the same representative as the parents.

62 It has been noted, however, that the compensation for this work is far from adequate with respect to the effort that representatives put into (or would want to put into) the job in order to fully carry out the assignment. Sebastian Wejedal and Allison Östlund, *Advokatens roll: Om ändamålsenlig rollfördelning i mål om tvångsvård av barn* (Santérus 2016) 137.

63 As such the court is very influential in deciding who will be appointed, but also in determining the amount of compensation to be given to the representative (Act on Public Representation, 1996:1620, Section 4).

64 Legislative Bill, Prop. 1994/95:224 (n 9) 26 and 44. According to the very same text in the preparatory works, the representative is also duty-bound to ensure the child's right of appeal. With respect to appeals, it should be noted that the Swedish Supreme Administrative Court in case HFD 2014 ref. 38 established that a child under 15 years of age has the right to appeal a decision on placement in care in accordance with the Care

to presenting the client's wishes, the representative for children under 15 shall also arrive at his or her own assessment of the child's best interest. This means that the representative has a problematic contradictory task. The representative will present his or her assessment of the child's best interests to the court, which might well go against what the child expresses as his or her will. There are no guidelines regarding what weight children's own wishes should be given in this assessment, which is especially problematic given that the representatives' assessments seem to play an important role in the courts' final decision.[65] This means that there is a risk that children under 15 have limited possibilities to influence decisions, as their own representatives can present an assessment that goes against their wishes. It should be noted that the 15 year age limit, is high in an international comparison.[66] This can be seen as a result of an overall will in Sweden to protect younger children from involvement, both in the sense of influencing decisions and having to take part in proceedings, which perhaps can be argued to be child-friendly and reasonable in some cases, but it is certainly not child-inclusive.

There are also other problematic aspects of the public representatives' roles and powers. First of all, it can be concluded the authority given to public representatives is rather uncertain and it is not clear what the actual role of the representative is.[67] One specific problem is also late appointments of the public representatives. As a representative is only to be appointed when involuntary interventions are considered, or in practice when deemed necessary, children (and parents) will not receive representation until after already having been placed into out-of-home careon emergency orders, not during the investigative phase.[68] This is problematic as it is questionable that no one except the parents will represent the child during the very time when the child's situation is being investigated – not least when insufficient parental care and risk in the home environment is the reason for the investigation. It can also be noted that even though the UN Committee in General Comment no. 12 emphasise that professionals representing children should possess adequate knowledge of children's rights and should be able to communicate with children on their

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of Young Persons Act, even if the public representative, aslo acting as the child's guardian, is of the opinion that the decision should stand.

65 The National Board of Health and Welfare, Socialstyrelsen, *Barnets rätt och LVU: Om barnet i rättsprocessen* (Socialstyrelsen 2009).

66 See Leviner, *Child participation in the Swedish child protection system* (n 47).

67 See Leviner, *Child participation in the Swedish child protection system* (n 47).

68 See Anna Hollander, 'Att tillvarata barnets rätt och bästa: Om det komplexa uppdraget att företräda barn i rättsliga processer' in Anna Hollander, Rolf Nygren and Lena Olsen (eds), *Barn och rätt* (Iustus 2004).

level of understanding,[69] Swedish law does not place any formal requirements on public representatives' competence.[70]

3.2.2 The Application of the Law—the Aim and the Gap

As has been pointed out above, the regulations of the child protection system set out a responsibility for the Social Services and the courts to fulfil children's rights to participation. However, it can already from an analysis of legal sources be concluded that the regulations are unclear and problematic in many aspects, and of course, this raises questions about how children's right to participation in the child protection system is fulfilled in practice. Do the regulations lead to children being informed, heard and feeling involved? Do children get possibilities to influence decisions made about them?

Unfortunately, research on if and how children are heard in the Swedish child protection system, as well as what weight is given to their wishes is limited, which perhaps says something in itself when it comes to the interest in children's right to participation. Even though studies show that to a greater degree than previously the Social Services meet and speak with children, there are indications that children in the child protection system do not experience being informed and/or provided with possibilities for participation.[71] There are indications that children's wishes and opinions only seem to be clearly presented in the child protection investigations when they correspond to the position already taken by the Social Services, and thereby only influence decisions made when in line with what has been deemed necessary.[72]

Limitations as to children's participation seem to apply, in particular, for children in out-of-home placements, who report often not being informed, heard or listened to.[73] This is definitely problematic, not the least in cases

69 CRC/C/GC/12 (n 4) para 36.

70 See SOU 2015:71 (n 51) 87 and 493.

71 Elin Hultman, *Barnperspektiv i barnavårdsutredningar: Med barns hälsa och upplevelser i fokus* (Linköpings universitet 2013); Pernilla Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (Jure förlag AB 2011); Sofia Enell, *Barnet i utredningen: En uppföljningsstudie om barns ställning i barnavårdsutredningar genomförda i BBIC, FoU-rapport 2009:6* (Luppen Kunskapscentrum 2009).

72 Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (n 68) 287. This has also been noted in international studies, see, for example, Judith Masson, 'Representation of children in England: Protecting children in child protection proceedings' (2000) 34 Family Law Quarterly 467. For an international overview of this issue, see Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, vol II (Martinus Nijhoff Publishers 2018).

73 Barnombudsmannen, *Bakom fasaden: Barn och ungdomar i den sociala barnavården berättar* (Barnombudsmannen 2011) 39.

where children are taken into out-of-home care against the will of their parents and themselves, as in these cases children and young people have a public representative, who in line with what has been described above has the task to guarantee participation for the children that they represent. However, studies having looked at the role and work of such public representatives show that there are several problems in how the system with public representatives in child protection cases work in practice. Late appointments is one. As has been described above, the regulations on public representatives lead to that representatives in most cases will only to be appointed when children have already been placed into out-of-home care on emergency orders, not during the investigative phase.[74] Apart from this overall problem, a report from the The National Board of Health and Welfare (*Socialstyrelsen*) show that even when a representative is appointed, children do not always get to meet with their representative.[75]

In addition to these observations, a study by Wejedal and Östlund from 2016 examining Swedish court judgments in child protection cases concludes that public representatives for children assume a problematic role as the child's 'protector' by asserting their own perception of the child's best interest over the child's subjective will.[76] These results confirm what has been noted by Mattsson that there is a risk that lawyers representing children consciously or unconsciously suppress the information given by the child.[77] Similar problematic results can be found in a student master's thesis from Stockholm University from 2016, also being based on an analysis of court judgments in child protection cases from Swedish administrative courts. It is shown that for children under 15, the judgments often lack information about the child's own opinion and view of their own situation, nor is there evidence in the judgments that the court provides weight to the child's viewpoint and wishes.[78]

74 See Hollander (n 65).

75 Socialstyrelsen, *Barns rätt och LVU* (n 62).

76 Wejedal & Östlund (n 59).

77 Titti Mattsson, *Barnet och rättsprocessen* (Juristförlaget i Lund 2002) 437 and 451.

78 Emma Hawia-Svensson, *Barns rätt att komma till tals i LVU-mål: En studie av rättslig reglering och kammarrättspraxis* (2016). It should be noted that verbal information in these cases might have been submitted in the court hearing, but still not mentioned in the written judgements, although it should reflect everything presented to the court as well as the full basis for the court's decision (Administrative Court Procedure Act, 1971:291, section 30).

3.2.3 Concluding Observations on Child Participation in Individual Child Protection Cases

In conclusion, the Swedish child protection regulations are clear that the Social Services should meet and talk to children. However, as have been described, there are many legal unclarities and, not surprisingly, limitations in how children's participation right is fulfilled in practice. An overall problem is that it is not made clear what is to be achieved by involving and talking to children, especially not when it comes to how the child's own statements should be handled and assessed and what weight children's wishes and views should be given. On this point, the legal sources provide no guidance.

Thus, it can be concluded that even though the right to be heard has been transformed into Swedish child protection regulations, and in spite of many implementation efforts, there are indications that children's participatory rights is not fulfilled. Although perhaps specifically problematic in the child protection system, difficulties to guarantee children's right to participation are not limited to this field of law. As noted in the introduction to this chapter, the UN Committee on the Rights of the child emphasised in its concluding observations on Sweden from 2015 that article 12 is insufficiently implemented in social services investigations.[79] This indicates, borrowing again the words of Kay Tisdall, that even though Swedish child protection authorities seem to be more *child focused* then in previous decades, there are still limitations as to the *child inclusiveness*.[80]

So why is the right to participation so difficult to fulfil in individual cases? Contrary to high hopes voiced by the Swedish Government and child rights organisations in Sweden suggesting that incorporation of the CRC into Swedish Law will make a difference also when it comes to children's right to participation, I think the problem might be connected to the very core of article 12, and therefore also to its previous transformation and definitely remaining after the incorporation of the CRC into Swedish law. There are problematic aspects in the foundation on which child participation in individual cases according to the CRC is built. This risk not only being a poor compensation for self-determination, but also a having counterproductive elements in the sense that children might perceive that they in fact have no possibilities to influence decisions made about them – being given voice but then still no choice.

It can be argued that Swedish law should clarify what article 12 is to mean and what is to be fulfilled in the national context in different fields of law,

79 CRC/C/SWE/CO/5 (n 11) para 19.

80 Tisdall, 'Subjects with agency?' (n 41).

but this has clearly not happened. It has not been made clear what is to be achieved and how children's views and wishes are to be weighed. Aoife Daly has proposed that a 'children's autonomy principle' should guide child participation in decisions in which the best interest of the child is the primary consideration, for example, child protection cases. According to this principle, children should get to choose – if they wish – how they are involved (process autonomy) and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes.[81] This principle can be compared to what has been suggested by Professor Titti Mattsson, when arguing for a dialogical approach to child participation in individual cases and a 'participation veto' that would mean that a child can enter into a decision-making process under a rule demanding participation upon request of the child.[82]

Even in line with the children autonomy principle and participation veto, participation for children is not the same thing as a right to always make autonomous decisions, but it must be emphasised that if authorities and courts make decisions that are not consistent with what the child wants, which, in turn, activates a need and a right for the child to have such decisions adequately explained and to participate in its consequences.[83] If the Swedish legislator as well as courts and authorities considered such approaches to children's participation rights, this would likely help to bring focus to the questions around what we are trying to achieve when we are seeking to implement children's participation rights.

4 Concluding Discussion—Voice but No Choice and Child-Friendly but Not Child-Inclusive

It can be concluded that there are challenges in implementing children's right to participation in Sweden, both on an overall *collective* political participatory level and in hearing children in *individual* child protection cases. Today, there is a risk that children are given voice, but limited choice and definitely no vote. The risk is also that their perspectives and wishes are only included and taken into account when in line with what adults have already decided in individual cases and/or only an argument for what adults want when it comes to public

81 Daly, *Children, Autonomy and the Courts* (n 69).

82 Mattsson, 'Some reflections on a dialogical approach to the recognition of children in the decision-making process' (n 10).

83 This is also emphasised in UN Committee on the Rights of the Child, *General comment no. 12* (n 4) para 45.

decision-making. In other words, we might provide children with political arenas and initiatives, as well as making sure that professionals, such as social workers and judges, meet and talk to children asking them what they want, but then deciding 'over their heads'. This can be seen as counterproductive in the sense that children might perceive themselves having less possibilities to influence decisions made when being given the symbolic arenas to give voice to what they want but not 'sitting at the table', having a real say when decisions are made. Perhaps this counterproductive result of children's right to participation in practice is even more evident in the Nordic overall 'child-friendly' countries. Having become more and more child-friendly is clearly not a guarantee of being child-inclusive.[84]

The aim with this chapter has been to discuss whether reasonable conditions for child political participation and for children's wishes and views to be given due weight in individual cases are given in Sweden today, the overall question being if legal explanations can be found for the problems identified, and consequently what the legal solutions might be. As has been made clear in the analysis in this chapter, there is no constitutional protection for children's right to participation today in Sweden. It has been pointed out both here and in Mattsson's chapter in this volume[85] that the CRC will not be given constitutional status or protection when incorporated into Swedish law in January 2020. Perhaps this would have made a difference, but the overall conclusion is that there is a need to rethink children's right to participation beyond both giving children an arena for being involved in public decision-making and hearing children in individual cases. The way the participation right for children is conceptualised today – both in the CRC and in Swedish law – there is a risk that this right will never develop and transform into actually giving children the possibilities to influence decisions that affects their lives and futures, no matter how much efforts legislators and public authorities put into implementation measures. As has been discussed, there is even a risk that the way children's right to participation is applied in practice today in fact works as a problematic reinforcement of children's weaker position and subordination.

Also, it must be noted as Virginia Morrow, researcher in Childhood studies, University of Oxford, has pointed out that participation is assumed to be a good thing that leads to an increased awareness of choices and also contributes to well-being, but that this is problematic for children given that they are

84 Leviner, 'Child participation in the Swedish child protection system' (n 47).

85 Mattsson, Titti Mattsson, 'Constitutional Rights for Children in Sweden' (n 3).

excluded from one the key markers of citizenship, the right to vote.[86] This illuminates the connection between participation in public decision-making and individual cases such as child protection, and possibly highlights the fact that participation must be seen not as an abstract end in itself, but rather in the context of how children and adults are interconnected, and the ways in which adult structures and institutions constrain children.[87] Children are dependent on adults, both by the internal limitations of childhood (at least for younger children) and by how society and the 'system' is set up (not the least the legal), being established and controlled by adults. Being given the right to participation in this context might seem contradictive.

But there are alternative ways of thinking about child participation and how children can influence decisions affecting them – either their lives and futures as a group, or in individual cases such as decisions made in the child protection system. As has been noted above, Daly has proposed that a 'children's autonomy principle' should guide child participation in decisions in which the best interest of the child is the primary consideration, i.e. individual cases, for example in the child protection system.[88] This is a shift in how to think about child participation, letting self-determination be the main-rule instead of seeing the right to participation as compensation for incapacity and non-self-determination. Such a children's autonomy principle could also guide children's participation in public decision-making and perhaps this should be emphasised on the constitutional level, strengthening the above-mentioned goal-oriented provision in chapter 1, section 2 in our Instrument of Government. If making clear here that a children's autonomy principle should guide Swedish law on matters affecting children could be a shift in how to think about children's rights. Although participation in line with this principle does not mean that children always are to be given the possibility to make autonomous decisions, I truly believe that it would increasingly empower and avoid unnecessarily excluding children from making decisions that they are well equipped to make.

There is a need to ask why participation for children is so difficult to achieve. At present, there is an obvious risk that 'in the name of their best interests'

86 Virginia Morrow, 'Dilemmas in Children's Participation in England' in Antonella Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage Publications 2008).

87 Morrow (n 82).

88 Daly, *Children, Autonomy and the Courts* (n 69). According to this principle children should get to choose – if they wish – how they are involved (process autonomy) and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes.

we protect children by not involving them, but it might be that the real reason is that we want to protect the system from change. The resistance might be connected to a fear of what strengthened rights for children would mean to society. I strongly believe that now is the time to re-think and reformulate children's involvement in decisions affecting them in order to move away *from* symbolic approaches *to* substantial child participation.

References

Barnombudsmannen, *Bakom fasaden: Barn och ungdomar i den sociala barnavården berättar* (Barnombudsmannen 2011).

Beckman L, *The frontiers of democracy: The right to vote and its limits* (Palgrave Macmillan 2009).

Daly A, 'Free and fair elections for some? The potential for voting rights for under-18s' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012).

Daly A, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and Peaceful Assembly* (Brill Nijhofff 2016).

Daly A, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, vol 11 (Martinus Nijhoff Publishers 2018).

Enell S, *Barnet i utredningen: En uppföljningsstudie om barns ställning i barnavårdsutredningar genomförda i BBIC, FoU-rapport 2009:6* (Luppen Kunskapscentrum 2009).

Engwall K and Söderlind I, 'Barn och demokrati i ett historiskt perspektiv' in C Jönsson (ed), *Rösträtten 80 år: Forskarantologi* (Justitiedepartementet 2001).

Freeman M, 'Children's Rights as Human Rights: Reading the UNCRC' in Jens Qvortrup, William A. Corsaro and Michael-Sebastian Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave Macmillan 2009).

Gustafsson G, 'Rösträtten och barnen' in Christer Jönsson (ed), *Rösträtten 80 år: Forskarantologi* (Justitiedepartementet 2001).

Habermas J, Justification and application: remarks on discourse ethics (The MIT Press 1993).

Hawia-Svensson E, *Barns rätt att komma till tals i LVU-mål: En studie av rättslig reglering och kammarrättspraxis* (2016).

Hollander A, 'Att tillvarata barnets rätt och bästa: Om det komplexa uppdraget att företräda barn i rättsliga processer' in Anna Hollander, Rolf Nygren and Lena Olsen (eds), *Barn och rätt* (Iustus 2004).

Hultman E, *Barnperspektiv i barnavårdsutredningar: Med barns hälsa och upplevelser i fokus* (Linköpings universitet 2013).

Leviner P, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (Jure förlag AB 2011).

Leviner P, 'Barnkonventionen som svensk lag: En diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter' [2018] Förvaltningsrättslig tidskrift 287.

Leviner P, 'Child participation in the Swedish child protection system: Child-friendly focus but limited child influence on outcomes' (2018) 26 International Journal of Children's Rights 136.

Leviner P, Socialtjänstens ansvar för barn och unga' in Montoya Therese Fridström (ed), *Juridik i socialt arbete: En introduktion* (3 edn, Gleerups förlag 2018).

Lindgren A-L and Halldén G, 'Individuella rättigheter; autonomi och beroende: Olika synsätt på barn i relation till FN:s barnkonvention' (2001) 10 Utbildning & Demokrati 65.

Masson J, 'Representation of children in England: protecting children in child protection proceedings' (2000) 34 Family Law Quarterly 467.

Mattsson T, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Mattsson T, *Barnet och rättsprocessen* (Juristförlaget i Lund 2002).

Mattsson T, 'Some reflections on a dialogical approach to the recognition of children in the decision-making process' in Kerstin Nordlöf and Farhad Malekian (eds), *The sovereignty of children in law* (Cambridge Scholars Publishing 2012).

Morrow V, 'Dilemmas in Children's Participation in England' in Antonella Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage Publications 2008).

Motion till riksdagen, 2017/18:2117, Sänkt rösträttsålder till 16 år – ge de unga större inflytande (3 October 2017).

Prop. 1994/95:224 Barns rätt att komma till tals (4 May 1995).

Prop. 1996/97:124 Ändring i socialtjänstlagen (6 March 1997).

Prop. 2002/03:53 Stärkt skydd för barn i utsatta situationer (20 February 2003).

Prop. 2005/06:99 Nya vårdnadsregler (16 March 2006).

Prop. 2006/07:129 Utveckling av den sociala barn- och ungdomsvården m.m. (20 June 2007).

Prop. 2009/10:80 En reformerad grundlag (8 December 2009).

Prop. 2009/10:192 Umgängesstöd och socialtjänstens förutsättningar att tala med barn (14 April 2010).

Prop. 2012/13:10 Stärkt stöd och skydd för barn och unga (13 September 2012).

Prop. 2017/18:186 Inkorporering av FN:s konvention om barnets rättigheter (15 March 2018).

Rawls J, *Political Liberalism* (Columbia Univeristy Press 1996).

Reynaert D, Bouverne-De Bie M and Vandevelde S, 'Between 'believers' and 'opponents': Critical discussions on children's rights' (2012) 20 International Journal of Children's Rights 155.

Schiratzki J, *Barnrättens grunder* (7 edn, Studentlitteratur 2017).

Schiratzki J, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Singer A, *Barns rätt* (Iustus 2017).

Socialstyrelsen, *Barnets rätt och LVU: Om barnet i rättsprocessen* (Socialstyrelsen 2009).

Socialstyrelsen, *Bedöma barns mognad för delaktighet: Kunskapsstöd för socialtjänsten, hälso- och sjukvården samt tandvården* (2015).

SOU 2016:5 Låt fler forma framtiden!.

SOU 2015:71 Barns och ungas rätt vid tvångsvård: Förslag till ny LVU.

Sveriges Ungdomsorgnaisationer L, *För frihet senare i livet: En rapport från Sveriges ungdomsrepresentanter i EU* (2017).

Thorburn-Stern R, *Participation, Power and Attitude: Implementing Article 12 of the Convention on the Rights of the Child, vol II* (Martinus Nijhoff Publishers 2017).

Tisdall K, 'Children and young people's participation: A critical consideration of Article 12' in Wouter Vandenhole and others (eds), *Routledghe International Handbook of Children's Rights Studies* (Routledge 2015).

Tisdall K, 'Subjects with agency? Children's participation in family law proceedings' (2016) 38 Journal of Social Welfare & Family Law 1.

UN Committee on the Rights of the Child, General comment No. 12: The right of the child to be heard (1 July 2009) CRC/C/GC/12.

UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of Sweden* (6 March 2015) CRC/C/SWE/CO/5.

UN Human Rights Committee, *CCPR General Comment no. 25: Article 25* (*Participation in Public Affairs and the Right to Vote*)*, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (12 July 1996) CCPR/C/21/Rev.1/Add.7.

Ungdomsstyrelsen, *Unga med attityd 2013* (Ungdomsstyrelsens skriftserie 20133, 2013).

Vandenhole W and others (eds), *The Routledge International Handbook of Children's Rights Studies* (Routledge International 2015).

Wall J, 'Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage' (2014) 24 Children, Youth and Environments 108.

Wejedal S and Östlund A, *Advokatens roll: Om ändamålsenlig rollfördelning i mål om tvångsvård av barn* (Santérus 2016).

CHAPTER 15

Children's Right to Participation in Denmark: What Is the Difference between Hearing, Co-Determination and Self-Determination?

Hanne Hartoft

1 Introduction

The view of children changes continuously in our society. This is reflected in the fact that children are referred to as *citizens* with individual rights – or in terms that children are *subjects* and *actors* rather than *objects*.[1] This includes that children's *integrity* and *autonomy* are respected. Denmark has ratified both The Convention on the Rights of the Child (CRC) and the associated protocols, and has accepted The Children's Rights Committee as an appeal board.[2] However, principles from the CRC, for instance, children's rights to be heard is not incorporated into the Danish Constitution.[3] The CRC is not even incorporated as a law, but by norm-harmony. This will be developed further below, but raises the question whether Denmark takes children's rights seriously and makes it interesting to analyse how children's rights to be heard and participate is actually protected and realised in Danish legislation.

Seeing children as rights-holders is supported by article 12 of the CRC, which obliges the State to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'

1 Kirsten Ketcher, 'Børns menneskerettigheder: Om FN's børnekonvention i dansk ret' in Ketcher and others (eds), *Nye retlige design: Dansk ret under konkurrence* (Jurist- og Økonomforbundets Forlag 2003) 8. See also Caroline Adolphsen, *Mindreåriges retsstilling i relation til behandling* (Jurist- og Økonomforbundets Forlag 2013) 37; Hanne Hartoft, *Magtanvendelse over for anbragte børn og unge* (Jurist- og Økonomforbundets Forlag 2016) 94; Idamarie Leth-Svendsen, *"Der er faresignaler her …" Om ret og heuristik i det almindelige kommunale tilsyn med børn og unge* (Roskilde Universitet 2015) 20.

2 The Government made a reservation about not being obliged to follow the decisions from the Committee on the Rights of the Child.

3 Caroline Adolphsen, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019). The Constitutional Act of Denmark of 5 June 1953 no. 169, (Grundloven), is available in an official translation, at <https://www.thedanishparliament.dk/en/publications> accessed 18 January 2019.

and 'the opportunity to be heard in any judicial and administrative proceedings'. The wording of article 12 makes it visible that a modern view of children is closely linked to the understanding of 'hearing'.[4] Even if the word *participation* is not mentioned in CRC article 12, it is often used in connection to this provision.[5] In many recent Danish law reforms concerning children and adolescents, the legislator has emphasised the importance of *involving* the child in his or her own case in accordance with the principle of article 12.[6] This is, for instance, seen in family, social and school law, and have also been an issue in health law. The development in the terminology from hearing to participation shows a tendency to more influence. However, several Danish reports show that many children have the feeling that they are not involved in their cases, for instance, when their parents' divorce or when they are in the hospital.[7] This could indicate that even if the legislator emphasise the importance of involving children, this is not always realised in practice. The question is why? Is the law not clear? Do the case workers know the law? Or is it maybe because children and adolescents have wrong expectations of their rights of influence? Answering these questions require both a legal dogmatic analysis and a legal sociological approach.[8] My approach is the legal dogmatic method. I will focus on the substance in the legislation but refer to a few sociological studies.

In CRC article 12 it is said that the views of the child have to be given 'due weight in accordance with the age and maturity of the child'. This is also stated

4 Hanne Hartoft, 'Et retssikkerhedsperspektiv på barnets inddragelse' in Carsten Munk-Hansen and Trine Schultz (eds), *Retssikkerhed i konkurrence med andre hensyn* (Jurist- og økonomforbundets forlag 2012) 129–150.

5 For instance, UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12.

6 See amendments to the Social Services Act of 24 of June 2005 no 573 (Lov om social service) now in Consolidation act of 30 August 2018 no 1114 with amendments; The placement reform of 22 December 2004 no 1442 (*Anbringelsesreformen*); The children's reform of 11 June 2010 no 628 (Barnets reform); The law-package about protection children against abuse and neglect of 21 May 2013 no 496 (*Overgrebspakken*). See also the Act on Adult Responsibility to Children in out of home placement of 8 June 2016 no 619 with amendments, now in Consolidation act of 2 may 2017 with amendments (*Voksenansvarsloven*); Act on Parental Responsibility of 6 June 2007 no 499 (*Forældreansvarsloven*); Act of the Family-law-house of 27 December 2018 no 1702 (*Lov om Familieretshuset*).

7 See Birgitte Schjær Jensen, *Inddragelse af udsatte børn og unge i social arbejde: reel inddragelse eller symbolsk retorik?* (Aalborg Universitetsforlag 2014); professional reports: *Anbragte børn og unges trivsel* (SFI The Danish National Centre for Social Research 2016) and *Ret til inddragelse* (Børns Vilkår og TrygFonden 2017). See also Anne Dorthe Hestbæk, 'The Rights of Children Placed in Out-of-Home Care' in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in child Protection* (Palgrave Macmillan 2018) 129–143.

8 Leth Svendsen (note 1).

in several Danish laws. However, at the same time, the legislation also contains many specific age limits that govern children's rights. It is not possible to find a mutual logic.[9] Thus, what age and maturity can justify depends on the concrete situation, and this assessment can be difficult. Traditionally, a legal distinction is made between three different levels of participation: *hearing, co-determination* and *self-determination*. Even if these distinctions seem quite clear, it has been problematized that Danish legislation concerning children rights to participation is difficult to realise, among other things, because the rules of participation do not relate to the fact that children are subject to parental responsibility.[10] This makes it is interesting to clarify what the term 'participation' actually means nowadays in Danish legislation. This leads to the research question guiding this chapter: what is the difference between self-determination, co-determination and hearing in Danish legislation concerning children and adolescents.

The statement is delimited to children and adolescents under 18 (in this chapter often referred to as children). Focus is on family-, social-, and health law, as this legislation cover most of the cases in which children and adolescents are involved and has an *individual* perspective on the child and his or her family. Additionally, the Constitution and the regulation of public schools is treated, as this regulation has a *group* perspective on participation.

The purpose of this chapter is to give an impression of how children's right to participation is expressed in Danish legislation. The overall idea is to use children and adolescent's everyday life as the starting point for the analysis and include both *a group* and an *individual* perspective. Other topics – for example, criminal proceedings or refugee law – are left out for space reasons, even if these subjects would bring other angles of participation forward.

In the following (section 2), the legal problems related to the Danish methods of implementing CRC is addressed. The next part (section 3) clarify that the principles of custody mean that self-determination is not the starting point for children's legal status. In section 4, there is a discussion concerning the voting age, as this is critical for the whole group of children and adolescents and their access to influence in the society. This is followed by examples of access to be heard at the group level in the school, kindergarten and leisure associations. The next parts (sections 5–7) focus on participation in individual case-work within family, social and health law, as the regulation is based on different rationales. In the end (section 5), conclusions are made.

9 Inger Dübeck, *Personers rettigheder: Om individets fysiske og psykiske integritet, selvbestemmelsesret og identitet* (Jurist- og Økonomforbundets Forlag 1997) 93.

10 Leth-Svendsen (n 1) 79, 175.

2 Does it Matter that CRC is Incorporated by Norm-Harmony?

The purpose of this introduction is briefly to present the ongoing Danish discussion on incorporation of CRC. The question is whether incorporation by law instead of by norm-harmony will strengthen children's rights – including the rights to participation – and what disadvantages will follow.

In 1991, Denmark joined the Convention on the Rights of the Child.[11] This ratification means that Denmark, due to public international law, is obliged to comply with the convention.[12] The ratification of CRC had a broad political acceptance, as seems to exist today. However, the convention is not incorporated into Danish legislation by law. This means that the convention is not a part of Danish national legislation.[13] However, the convention is incorporated by norm-harmony, because the Parliament assumed that Danish law was already in conformity with CRC.[14] Since norm-harmony is recognised as an incorporation method for fulfilling international obligations, the CRC is a legal source. This source contribute to the interpretation of Danish law, and the Danish courts relates to whether the convention is violated.[15] This is also seen in referendums from the Ombudsman – parties may invoke rights under CRC, and authorities must follow the CRC.[16] If some regulation in the Danish legislation occur to be in contrast to the convention, these conflicts usually is solved by using the principles for interpretation international legal sources.[17] However, the fact that CRC is not incorporated as a law has the consequence that if a Danish law is clearly contrary to CRC, this law will not be set aside.[18]

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11 Proposal for parliamentary resolution 31 January 1991 no 22, followed by order of 16 January 1992 no 6 of the UN Convention of 20 November 1989 about the Rights of the Child (Bekendtgørelse af FN-konvention af 20. november 1989 om Barnets Rettigheder). Denmark made a reservation against art 40, section 2 (b).

12 Anne Mørk Pedersen, *Børns processuelle rettigheder i tvangsanbringelsessager* (Jurist-og Økonomforbundets forlag 2019) 58–66.

13 Pedersen (n 12); Ministry of Justice report no 1407/2001 *betænkning om inkorporering af menneskerettighedskonventioner i dansk ret* (report on incorporation of human rights convention in Danish legislation) and report no 1546 /2014 *betænkning om inkorporering m.v inden for menneskeretsområdet* (incorporation etc at the area of human rights).

14 See the Proposal (n 11) section C.

15 Pedersen (n 12) 62.

16 For instance, statement of 10 April 2014, dok no 13/05229-11/CLA, *Planlagte besparelser på anbringelsesområdet i Guldborgsund Kommune* (Planned savings in the area of children's out of home placement in the Municipality of Guldborgsund).

17 Jens Elo Rytter, *Individets grundlæggende rettigheder* (Karnov Group 2019) 62–64.

18 Rytter (n 17).

Another problem is that CRC article 12, requires *States* to ensure that a child is involved in all decisions in their lives. The State's responsibility also applies to all other authorities, for example, regions, municipalities, courts, police, etc. Thus, the Danish Ombudsman has become aware of a legal problem in relation to some private schools (*De frie grundskoler*).[19] They do not always hear the pupils before they are expelled. As a result, he recommended that the government take initiative to change the law concerning these schools to secure that the principle of article 12 is followed also in the private schools when they manage individual cases. For the time being, the government has not followed the advice. Thus, there is some situations where the way of implementation raises legal problems. The issue of making CRC national law has been addressed several times at official level.[20]

3 Children as Subjects of Protection—Parental Custody

As already said in chapter 7, the Danish Constitution applies to children and adolescents, but they were not in focus when the Constitution was written. However, regulation of children's rights has a long history in Danish legislation.[21] Today, children's legal position is a result of different and often conflicting considerations. The legislation tries to balance the interests between society-at-large, parents and the child. The aim is to secure children are protected from abuse, neglect and maltreatment. In addition, the regulation intends to counteract crime. Therefore, it is essential to mention the starting point – the fundamental principle in Danish law that children are subject to parental custody. This implies that children have limited legal capacity. While the starting point for adults is *self-determination*, it is clear that the starting point for children differs from that. In the following, this will be examined in more detail.

Custody contain two elements, the duty to take care of the child and the right to make decisions for the child. In the Act of Parental Responsibility, it is stated that parents 'have the right to make decisions in all private subjects

19 News from the Danish Ombudsmann of 28 december 2016 *Lovgivning bør overvejes for at sikre, at privatskoleelever bliver hørt* (Legislation should be considered to ensure that private school students are heard).

20 Pedersen (n 12).

21 Trine Shultz and others, *Socialret, børn og unge* (Jurist- og økonomforbundets forlag 2017) 34ff; Anette Faye Jacobsen, *Stat og Civilsamfund i nye relationer: FN's børnekonventions historie i Danmark* (2015) 5(10) Tidsskrift for historie.

concerning the child'.[22] This closely is related to the duty of the custody-holder to give the child a safe childhood, and to the principle of the best interests of the child, as must be followed.[23] Another starting point is that parents are free to educate their children in the way the feel are best. This means that they take all vital decisions for the child for instance name, residence, school, spare-time activities, health-care,[24] and so on. The parents also decide the house rules in the home and the everyday education, what to eat, and how to dress. However, at the same time, it is stated in the Parental Responsibility Act that in all decision-making, the child's own views must be taken into account according to age and maturity.[25] This seems to apply to CRC. The wording of CRC article 12, is 'to ensure that a child is *involved* in all decisions in their own lives'. This is to be aware of the *child's perspective*, but more than that.[26] Awareness is not enough, as the child's point of view has also to be taken into account. Even if the word *participation* is not incorporated in article 12, it has been the term used most often to describe what article 12 concerns. Nevertheless, participation is a broad term with no clear meaning. It is necessary to clarify the terms. *Hearing* is the right to be consulted without a right to decision-making. The right of *co-determination* is decision-making together with others (typically the custody-holder), or, in other words, having influence at the decision. *Self-determination* is the right to make decisions on your own. In this position, citizens have legal capacity to give consent and to choose or reject an attorney or another representative and to sue and be sued.

In a Danish report the child's perspective is formulated (in my translation) as 'the perspective that derives from and is formed through the child's overall life situation and life story. It is the whole child's life as the child experiences it. Specifically, it is about how the world looks from the child's point of view and what the child knows, sees, hears, experiences and feels in certain situations. This perspective changes as the child develops and is influenced by the changes in the child's environment.'[27] In my opinion, it is more precise to talk about *the* child's own perspective. This, of course, is about how the child's looks at the

22 Act of Parental Responsibility section 2.

23 Act of Parental Responsibility section 4, and Caroline Adolphsen, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

24 In health-care issues the parents decide up to the child is 15. See section 7.

25 The Act of Parental Responsibility section 5.

26 Due to UN Committee on the Rights of the Child, *General Comment No. 20 in the rights of the child during adolescence* (6 December 2012) CRC/C/GC/20, section 23–25.

27 Rep no 1475/2006, Betænkning fra Udvalg om forældremyndighed og samvær, *Barnets perspektiv* (Committee on custody and contact, report on child perspective).

situation. Another perspective is 'adult's perspective on children'. This is the perspective from others on what is a good life for children. Parents, caseworkers and other professionals normally represents this perspective. Previously, article 12 in Danish legislation was mostly understood as a right to hearing, thus understood as a *procedural* right. In this understanding, hearing is the right for the citizen (the child) who is involved in a case to get informed about the case material and to give a statement. The purpose is to be sure that the citizen is informed about what is going on, and also to give the citizen an option to correct eventually mistakes in the material. Hearing is also the citizen's opportunity to give his or her views on the case. Today, it is clearer that article 12 has both a procedural and a *material* perspective. This means that it is not only a formality to find out what is the child's view. The child's view on a specific matter is a part of the information in the case, as leads to the correct decision as the child's view is taken into account.

It is worth mentioning that already in 1964 children's right to express an opinion was secured in a Danish law about out-of-home placement. The child was given the right to give a personal statement. This was a right to be heard. In other legislation, children were given a right to consent.[28] This was a right to self-determination. Thus, in 1991, the legal basis for considering children as rights-holders was discussed in a report that led to a new look at the relationship between, parents and children – especially in social-law cases[29] However, even if the development in our society clearly shows a tendency of giving children more influence, they still are excluded from the nation-wide political level. The purpose of the next section is to get a little closer to how children and adolescents, seen as a group, are heard and get influence on their lives.

4 Voting Rules—the Ultimate Exclusion from Influence—and Ways to Compensate

The ultimate right to participate in a democracy is expressed by voting rights.[30] Giving someone a right to vote is one way of realising *hearing*. The right to vote is a right to be consulted at the group level without a right to decision-making.

28 For instance, the Adoption Act, The Names Act, and the Act of the ordinary Church.

29 Rep no 1212/1990, *Betænkning fra Udvalget om de retlige rammer for indsatsen over for børn og unge* (Committee on the legal framework for measures for children and adolescents).

30 For a short history review according to Danish law see Caroline Adolphsen, 'Constitutional Rights for Danish Children' (n 3).

Children and adolescents are not allowed to vote for the Parliament, the Regional Council or the Municipal Council. Neither are they allowed to vote for the EU Parliament. The right to vote is obtained at the age of 18.[31] This electoral age has been in force since 1978.[32] It is stated in the Parliamentary Election Act[33] to which section 29 in the Constitution refers. The electoral age (the right to vote) coincides with the age of eligibility (the age for being elected) to the Parliament, The Regional Council and the Municipal Council. This also coincides with the age of majority.[34]

The voting age has been discussed several times in the Parliament and, most recently, in 2015–2016.[35] The proposal was that the voting age should be reduced to 16. This was motivated by the need to engage more young people in democracy and strengthen the participation of young people in elections. They are referred to in the report from the Electoral Commission. The debate in Parliament showed a large majority *against* changing the age of voting. The main argument was a reference to the age of majority and that it makes good sense that this age and the voting age is the same. In contrast to this is the fact that, in Austria, the electoral age is 18 years, although the voting age is 16 years. An argument against reducing the electoral age may be the assumption that the young voters vote more extensively than the rest of the electorate. However, experience from Austria, which reduced the voting age in 2007 from 18 to 16, does not confirm this.[36] An international survey among students in the eighth grade shows that Danish adolescents are in the first place when it comes to knowledge about democracy, politics and social relations.[37] Nevertheless, students do not show the same interest in the democracy as they did years ago – as they rarely vote when there are elections.[38] Lately, a number of

31 Parliamentary Election Act of 13 May 1987 with amendments in consolidation act of 8 December 2017 no 1426 with amendments (Lov om valg til Folketinget).

32 Parliamentary Election Act of 13 May 1987.

33 No 1426/2017 (n 31) s 1.

34 Act on Parental Responsibility s 1.

35 On the basis of B130, FT 2015–16, proposal for parliamentary resolution no 130 from 2015–2016.

36 Signe Rugholt Carlsen, *Østrig har success med de 16-åriges stemmer* (12 September 2009), Information, referring to analyses from SORA (Institute for Social Research and Analyses), Austria.

37 Jens Bruun, Jonas Lieberkind and Heidi Bay Schunck, *Udvalgte hovedresultater* (DPU Aarhus Universitet 2016). See also Niels-Henrik M. Hansen and Niels Ulrik Sørensen, *Unges motivation for politisk deltagelse* (Center for Ungdomsforskning 2014).

38 Valgretskommissionens betænkning, *Demokrati for Fremtiden* (DUF- Dansk Ungdoms Fællesråd 2011). DUF is a service and interest-organisation for nationwide children's and youth organisations. The goal of the association is to educate, engage and train young people to become good democratic citizens.

ideas was presented that would make young people more interested in politics. One was *school elections.* The Parliament and the Ministry of Education organise these school elections. By these elections, the students can vote for the political parties that run for the real parliamentary elections. It is a course of education aimed at students in the seventh, eighth and ninth grades. The Prime Minister announces the school election in January, and three weeks later, the students have the opportunity to vote. During the course, students should prepare campaigns, select brand cases and meet youth politicians. The school elections have been organised since 2015 – every second year. According to the evaluation, students' political *self-esteem* is going up, which, in the long term, will lead to more active and competent democratic citizens.[39] Even if this election is symbolic, it is a kind of consultation, as the politicians are interested in knowing what the next generation of voters think.

Another approach is seen on the local political level. Approximately two-thirds of the municipalities have a Youth Council.[40] However, there are differences in organisation and focus. In a big city as Århus, the Youth City Council conduct seven city council meetings a year and have an annual dialogue meeting with the politicians in Aarhus' City Council. The Youth City Council is autonomous regarding which subjects and problems they discuss. The topics are extremely varied, from the desire for a better world, to healthier food in schools, and to the establishment of a skating lane. The Youth City Council have the right to put forward four suggestions a year, which the Aarhus City Council is obligated to discuss.

After having looked into children's and adolescents` rights to be heard about questions at the national and local political level in society follows an analysis of their access to influence in their near environment.

5 How Hearing Is Realised in School, Kindergarten and Leisure Activities

According to the regulation of public schools, the purpose of the school is – together with the parents – to manage and prepare students to live in a society

39 Jonas Hedegaard Hansen, *Skolevalg 2017: Undersøgelse af elevernes oplevelse med og udbytte af Skolevalg* (Centre for voting and parties 2017) Working Paper Series 19ff.

40 This is an estimate made by Netværket af Ungdomsråd NAU (NAU is a umbrella-organisation for youth counsels). See <http://www.nau.dk/ungdomsraad/> accessed 18 January 2019. Denmark is divided into 98 municipalities (and Greenland and The Faroe Islands), and approximately 65 have a youth council.

with *freedom* and *democracy* as well as to develop and strengthen the students' *democratic formation* and their knowledge and respect for *fundamental freedoms and human rights, including gender equality*.[41] The local council in each municipality has the responsibility for the overall framework for the school's operation, but all schools also have a *board*, where the master of the school, teachers, practical staff, parents and *students* are represented.[42] The students are parties in the board at the same level as all others. The school board does not go into individual cases, but draws up general principles and budgets and may be involved when hiring new staff. It has been criticised that the influence the students have is not real and the concept of 'pseudo-influence' has been used. The criticism is that the children are represented only in organs where they have no real power and where there is no real dialogue.[43] However, the crucial aspect is that the students have the right to vote on equal terms with the other members – they are heard. But this criticism is some way central, as it precisely reflects the challenge of the right of hearing (consultation) – namely that it is not a right to decide.

According to the Public Schools Act,[44] all pupils at schools with classes from level 5 or higher have the right to form *Student Councils,* and if they do not establish a council on their own initiative, the school management must encourage the students to do it.[45] Through co-operation with the head of the school, the teachers and other staff groups, the Students Council ensures the students' interests at the school. All pupils can vote and can be elected. It is up to the Student Council to relate to what topics they want to raise. The school provides a meeting room and sometimes a small amount of funding. In the recent years, studies show that children and adolescents are increasingly stressed.[46] Thus, it seems crucial to involve students in discussions about requirements and

41 Adolphsen, 'Constitutional Rights for Danish Children' (n 3), for more information about education-duty. Most pupils go to public schools (77%). Others go to private schools, but these have to apply with the learning targets in the public school. For details see statistics from Ministry of Education (elevtal i grundskolen) <https://uvm.dk/statistik/grundskolen/elever/elevtal-i-grundskolen> accessed 18 January 2018.

42 Primary Education Act s 2 ss 2, and s 42–44.

43 Andreas Brøns Riise, 'Elever mister indflydelse' *Folkekeskolen.dk* (Interview with Pernille Hviid 1 February 2011) <https://www.folkeskolen.dk/66345/elever-mister-indflydelse> (accessed 22 June 2018).

44 Public Schools Act section 46.

45 See also Ministerial order 23 June 2014 no 695 about student councils (elevråd i folkeskolen).

46 Professional rep regarding stress in high school (Stress i gymnasiet, sammenfatning af resultater og anbefalinger) (DPU Aahus Universitet 2017). See also two professional rep regarding children and adolescents in Denmark Mai Heide Ottosen and others, *Børn og*

expectations for school and education, not merely from a rights perspective, but also from a broader welfare perspective.

To be heard is also an issue for very young children. CRC article 12 does not entail any age limit, and the General Comment does advise the nations *against* creation of age limits in national law, as the right to be heard, is a right for everyone.[47] In Denmark, a Children's Council (the Mini Panel) has been established. It currently consists of around 1,000 kindergarten children between four and seven. The children answer a spoken questionnaire via the computer. A study concerning the children's involvement in the day-to-day activities in the kindergarten show that most children have the feeling that the adults are listening to what they have to say. Nonetheless, more than 50% of the children claim that all rules are set by the adults. Daily routines such as lunch, activities outside of the house, and buying new toys are not activities in which the children have the feeling that their point of view counts. At that time of this report, too few children participated to make the investigation statistically valid. However, it shows that participation is a theme that seems to be discussed by professionals at many levels.

It is also relevant to comment on children's access to influence at the structural organisation of their leisure activities. The right to form associations is protected by the Constitution,[48] and Denmark has a widespread union culture. It is not complicated to establish an association, and most leisure activities are organised through private associations. By being a member of a leisure association children and adolescents (and their parents) encounter different democratic processes and have access to influence. However, studies have shown that children normally do not participate in leisure-activities because of the democratic process but rather because the association offers something interesting.[49]

In relation to hear children and adolescents at the *group* level, it is difficult to say anything precise about what difference CRC and especially article 12 has made. An important effect is that CRC has pushed an ongoing tendency to see children and adolescents as citizens and consequently take their perspectives more seriously. According to Danish tradition, it is not surprising that the ratification of CRC has not been reflected in the Constitution. Making CRC a

unge i Danmark: Velfærd og trivsel (SFI The Danish National Centre for Social Research 2014 and 2018).

47 UN Committee on the Rights of the Child, *General Comment No. 12* (n 5) para 21.

48 Constitution, section 78.

49 Bjarne Ibsen and Klaus Levinsen, *Unge foreninger og demokrati* (Syddansk Universitet 2016) 98.

national law would strength children's rights, but has not been a political option. The critical point is the *sectorial* level – and among this the regulation of voting age. It would obviously strengthen children's access to influence if the voting age was lowered. During youth councils, the group of children and adolescents are given a formal platform supporting that they are heard at the local political level. Also, the school legislation supports that students are heard. However, it is quite invisible which tracks this puts into their everyday life.

Other perspectives of being heard is seen at the *individual* level. In this context, the right to be heard often becomes part of the proceedings when authorities make decisions. Especially in cases regarding custody, residence and contact, the child's right to be heard is perhaps sometimes overruled. The following text comments on this issue.

6 Why Do Parents Not Listen?

The simple answer to the headline question of why parents do not always listen is that in some divorce cases the level of conflicts is that high that all reason disappears. In general, it is problematized that children are very much affected by divorce.[50] In Denmark, this is a common problem, as the parents of about every third child are separated or divorced. In respect of the parents' rights to raise their children, the child is not heard if the parents reach an agreement about parental custody, residence and contact. This can be problematic. This is shown in a study made by The National Council for Children (*Børnerådet*) among children in the ninth grade.[51] Almost two-thirds of the children whose parents are divorced expressed that they miss the parent or siblings they do not live with, and many are dissatisfied with the extend of contact to the parent they do not live with. Contrary, a majority of the children who have been involved in the decision about which parent they should live with are satisfied with the decided arrangement. This shows the importance of involving children. This indicates that the legal regulation should ensure that the right to be heard is exercised personally by the child and not through the parents. Also, these results, in my opinion, indicates that the regulation should secure children something more than just being heard. Parental custody is an old term based on a rationale about the child's need for protection. New family patterns have emerged, and the adults have found new partners with the expectation

50 Professional rep, Familieformer og skilsmisse, Panelrapport no 1 (Børnerådet, 2011).
51 National Council for Children, Children's View 3/2016.

that the children enter into new family relationships they have not chosen. It is essential that the child is heard and that the child's own view is a paramount consideration in these situations. Maybe, time has come to give children a right to *co-determination*, as this would secure that the child should not be enforced to do something against his or her will. The idea is that agreements depends on the child's consent. Currently, there is no political support for this. The following discussion informs about the newest legislation in this area.

From April 2019, a new legal system will be implemented.[52] This will make some fundamental changes in the Danish family-law system. The intentions are good. A family-law house will be established regionally, and there must be a children's department to ensure that children are appropriately involved in the process. In the proposal it is said (in my translation), that 'the consideration for the child must be a paramount consideration' and 'the process shall ensure a supportive involvement of the child … recognizing the child's need to be heard'.[53] This seems to set a new standard. The interesting question is, of course, how this will be met in the concrete process. The problem mentioned above will still exist. In some cases, the parents agree about custody, residence and contact and the child is not heard. However, it is recognised in the regulation that also these children may need some help and they are offered to participate in 'children groups' without any visitation. Further, it is stressed that children have a right to ask the children's department to set up a meeting with the parents, if he or she needs help to express him or herself. That is the so-called *initiative right*.[54] An important aim with this reform is to teach parents how to deal with conflicts, and focus more of the needs of the child. Another aim is to avoid enforcements. Today there are a large number of cases where the bailiff's court together with the police enforces relocation of residence or contact-orders. This is problematic, as it can and be traumatic for a child.[55]

In the preparatory works it is stressed that the establishment of the children's department is strengthening the child's voice and the child's participation in the process. This is realised through offering a contact person, information of the right to bring a companion (a person who support without being a legal representative), and ensuring that the child is informed about how the children's department can help.[56]

52 Act no 1702/2018, The Family-house Act.
53 Proposal of 2018–19 no 90 on The Family-house Act.
54 Parental Act s 35, and The Family-house Act s 15 ss 4.
55 (n 61) general comments section 3.3.1.2.
56 (n 61) general comments section 2.

In divorce and separation cases, there is a significant but seemingly insoluble problem: it is politically a very clear starting point that a child is entitled to *both* parents. Politicians in all contexts express this and, no doubt, this a true starting point. However, it seems that this principle has been managed so significantly that it also becomes a duty for the child to have relations with both parents. Only in very rare cases, contact can be denied, for instance, in situations with violence or abuse or a high level of conflict between the parents.[57] Otherwise, children are not allowed to reject contact even for only a shorter period, where they might need a break to get used to the new situation. It may be critical when the child's own perspective is overruled by the adults' perspective of a good childhood. This shows the 'down-side' of hearing – it is problematic when a child is heard, but does not have any influence. When these cases are treated in the administrative system or is brought to court, it is the absolutely the main rule that the child is heard. In the hearing, it is central for the case-worker or the judge to tell the child that he or she is not going to take the decision in the matter whatever it concerns custody, residence or contact. That job is for 'the adult' (case-worker or judge). Sometimes it may be a relief for the child to know this, but not always. Thus, it is a fact that contact and relocation of residence against the child's wish sometimes is affected.[58] In a concrete case, a 13-year-old boy was returned to his mother even though he wanted to stay with his father, with whom he had been for holiday. In other words, the child was heard, but did not get his wishes through. Is this in accordance with his age and maturity? It is interesting to see if the new system will make real changes and listen more to the children. Another area with many concrete decisions as affect children is the social welfare system, as is discussed below.

7 Does a Conversation Make a Difference in Social Work?

The Social Service Act contains different rules that are intended to secure that the child's views should always be taken into account in cases concerning social care.[59] In cases with some complexity, the question is if the child or family can get some intensive support.[60] This depends on whether the child has

57 Ministry of Social and the Interior affairs, Administrative guidelines on contact of 2015 no 11362 point 14 (Vejledning om samvær). See also Ugeskrift for Retsvæsen (2015).465 judgment from Western High Court regarding an unusually high level of conflict as threatening the child's wellbeing.

58 Fuldmægtigen (2016).14 (judgment from Eastern High Court).

59 The Social Service Act s 46 ss 3 and s 50 ss 3.

60 Chapter eleven in the Social Service Act.

a need for 'special measures'. It is not clearly defined when this criterion is fulfilled, but social case-workers have to make an investigation to clarify the situation.[61] This is the Child investigation report (*børnefaglig undersøgelse*). This report is not only based on information from the child and the family, but also from other relevant sources, for instance, the school, health-care persons and other specialists. The child (and the custody-holder) must in this process be offered one or more conversations. Further, a conversation normally should be offered before the case-worker makes a final decision of what measures may be initiated.[62] The Social Service Act contains a provision that clarifies the purpose of giving welfare support to children. In this, it is said that the child's view must always be included and must be given an appropriate weight, based on age and maturity.[63] This provision was incorporated into the Social Service Act to comply with the principles from CRC article 12.[64] A. Mørk systematically reviews all provisions in the Social Service Act and notice that the wording in the provisions differs as both conversation (*samtale*), making a decision (*stillingtagen*) and making a statement (*udtaleret*) is used.[65] However, Mørk conclude that all the provisions is a right to be heard, but often with the broad perspective from article 12. Hearing is a process where the child is going to have the feeling of being respected, and given the strongest possible self-determination.

As said above this norm of giving the child's view a weight due to age and maturity is difficult to describe, as it depends on the concrete situation. It opens up an *assessment*. What weight is given to the child's point of view if the parents agree – or if they disagree? How is the child's view weighted if his or her interests is contrary to a sibling's interests and needs? And what is the situation if the child maybe is abused and is afraid of telling what is going on? In family relationships, there are many interests to take into account. I. Leth Svendsen, who has made both a legal dogmatic and a legal sociological investigation of this legislation, argues that the provisions even if they seems clear are difficult to fulfil, as the criterion of weight due to age and maturity is vague and inaccurate.[66] It can be discussed whether the wording of the law is a problem. The point is that the case-worker has a huge duty to take all

61 The Social Service Act s 50.

62 The Social Service Act s 48.

63 The Social Service Act s 46 ss 3.

64 Proposal of 16 April 1997 no 229, general comments section 2.

65 Mørk (n 12) 187–222.

66 (n 1) 175. This is confirmed by Ditte Andersen and Tea Torbenfeldt Bengtsson, 'Timely care: Rhytms of bureaucracy and everyday life in cases involving youths with complex needs' (2018) Time & Society 1–23.

considerations in account and has to be clear in the argumentation. From a legal perspective, this require good case-work to be able to clearly describe how these considerations are included in the final decision. As pinpointed in General Comments no 12, the right to be heard means that the child should have the feeling that the decision-makers are listening. This also is the intention of the Social Service law. Nevertheless, it is reported that children not always have this experience.[67] Another explanation could be that the social-workers is not used talking with children. This makes it difficult to realise a good conversation. Another explanation could be that the case-workers have too little time. This is crucial. Further, a crucial problem could be that it is not always possible to find solutions that meets what the child wants. As the social service law is quite flexible, this could be a question of money.

In rare situations, the conversation can be omitted. However, the child's attitude must always be sought.[68] Another point is that the child, of course, is not obliged to speak up. It is an offer not a duty.[69]

Adolescents over 15 have a stronger position. They have, as a starting point, to consent to a childcare-investigation and decisions of measurements.[70] If a placement outside of home is to be considered voluntary, it is also necessary that adolescents over 15 give a consent.[71]

This is an example of co-determination as the custody-holder mostly have to consent, too. If the adolescents do not consent moving to an out-of-home placement, the case-worker cannot automatically start up a case of involuntary placement. The legal criterion for involuntary placement demands a very serious situation as maybe is not realised.

In cases concerning involuntary placement outside home (and other drastic measures), children over 12 in addition to the right to be heard in relation to the child investigation report have certain procedural rights.[72] This is a right for free legal assistance, access to the case-files, and the right to express oneself at the Child and Youth Board meeting (the board that takes the decision if the local social service find it is necessary to move the child away from home without consent from the parents). Further, they may appeal to the Appeal board, and if necessary ask the Appeal board to bring the case to the courts.[73]

67 (n 7) and (n 65).

68 The Social Service Act s 48 ss2.

69 Caroline Adolphsen, *Barnets ret til* (*at blive fri for*) *at blive hørt* (2018) Ugeskrift for Retsvæsen 83–90.

70 The Social Service Act s 50 ss 1.

71 The Social Service Act s 52 ss 1.

72 The Social Service Act s 72.

73 The Social Service Act s168 and 169.

These 'party-rights' gives the child a limited right of 'self-determination,' as realisation of these rights does not depend on consent from the custody-holder. The custody holders have the same rights. Mørk argue that it is problematic that children under 12 do not have the same rights, as children has to have this help in all situations where the child and his or her parents maybe conflicts.[74]

As demonstrated above, the Social Service Act has several provisions designed to ensure children's right to be heard. This makes it interesting to investigate the situation if a child is involved in a case but the right to be heard is not regulated. The question is if the child is entitled to derive a right to participating from the inquisitorial system – also known as the principle of investigation (*officialprincippet*). This principle makes the authorities (the case-worker) responsible for the case to be sufficiently clarified. Regarding social matters, the principle is stated in the due process section of the Social Law Act.[75] For other cases, it is applied as a *legal doctrine*, as it generally applies to public administration. In this regard, the Ombudsman already in 1992 said that a duty to obtain an opinion from an older child or adolescents follow from the principle of investigation.[76] Furthermore, he stresses that although there are specific rules saying that children over 12 should be heard, this does not exclude the authorities from involving younger children – and in this connection he also explicitly refers to CRC article 12. Mørk agrees with this argumentation. This point of view has not been earlier highlighted in the children's rights literature but supports children's right to be heard whatever their age is.[77] The following comment is on a different approach as is seen in the Health Act.

8 Self-Determination—an Unusual Right for Children

In the field of health law, children have been formally involved in decision-making concerning their own health with the Patients' Legal Position Act from 1998, when the right of decision-making for young patients was clarified. The approach to *autonomy* has led to the fact that adolescents over 15 have a right to consent or refuse treatment.[78] Also, the parental custody-holder must have

74 See Mørk (n 12).

75 See section 10.

76 FOU 1992.334. Opinion from the Ombudsman in the annual report, 1992 no. 334, commented in Rikke Gottrup, *Officialprincippet og sagsoplysning: mod øget borgerinddragelse?* (Jurist- og Økonomforbundets forlag 2011) 186ff.

77 See Mørk (n 12).

78 See the Health Act s 17 ss 1.

the same information as the adolescent as the decisions can be taken after a joint discussion. This 'process' is not clear from the wording of the provision, but the provision must be interpreted in the light of the preparatory works.[79] A joint discussion is not the same as a joint agreement, and if the parent and the adolescents disagree, the patient makes the decision. In order to avoid unreasonable pressure from parents, adolescents may even oppose access to the hospital room. The age criterion was chosen to avoid health-care persons from making the difficult assessment of what age and maturity could justify. However, there are also studies showing that children feel overlooked and exposed to something they do not want.[80]

9 Conclusion

The fact that children's right to participation is not incorporated into the Constitution it is not a critical problem. The CRC is an important legal source and a driver for developing children's rights. Both private organisations, state councils and the children's office at the Ombudsman's bring children's rights to the political level and often the right to participate is in focus. The right to be heard is incorporated in much legislation, but it is a challenge to step up at the ladder of participation and realise the feeling of being involved. However, Denmark is taking children's rights seriously.

References

Adolphsen C, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Adolphsen C, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Adolphsen C, *Mindreåriges retsstilling i relation til behandling* (Jurist- og økonomforbundets Forlag 2013).

Adolphsen C, *Barnets ret til* (*at blive fri for*) *at blive hørt* (2018) Ugeskrift for Retsvæsen 83–90.

79 See L 15 1997–98, FT 1997-98 A, 2. saml., s. 528, the specific remarks to section 8 in the previously Act on patient's legal status. The rules are supplemented by a notice (no 509 of 13 May 2018). The guidance (No 161 of 16 September1998) is still in force, but not up to date.

80 See professional rep *I'm not my illness* (Jeg er ikke min sygdom) (Børnerådet 2017).

Andersen J, *Socialforvaltningsret* (Jurist- og Økonomforbundets Forlag 2016).

Andersen D and Torbenfeldt Bengtsson T, 'Timely care: Rhytms of bureaucracy and everyday life in cases involving youths with complex needs' (2018) Time & Society 1–23.

Bruun J, Lieberkind J and Bay Schunck H, Udvalgte hovedresultater (DPU Aarhus Universitet 2016).

Dübeck I, *Personers rettigheder: Om individets fysiske og psykiske integritet, selvbestemmelsesret og identitet* (Jurist- og økonomforbundets Forlag 1997).

Faye Jacobsen A, *Stat og Civilsamfund i nye relationer: FN's børnekonventions historie i Danmark* (2015) 5(10) Tidsskrift for historie.

Gottrup R, *Officialprincippet og sagsoplysning: mod øget borgerinddragelse*? (2011) Jurist- og Økonomforbundets forlag.

Hansen M N and Sørensen N E, *Unges motivation for politisk deltagelse* (2014) Center for Ungdomsforskning 2014.

Lausten M and Jørgensen T, *Anbragte børn og unges trivsel* (2016) SFI.

Hansen J H, *Skolevalg 2017: Undersøgelse af elevernes oplevelse med og udbytte af Skolevalg 2* (2017) Centre for Voting and parties, Paper Series.

Hartoft H, 'Et retssikkerhedsperspektiv på barnets inddragelse' in Carsten Munk-Hansen and Trine Schultz (eds), *Retssikkerhed i konkurrence med andre hensyn* (Jurist- og økonomforbundets forlag 2012).

Hartoft H, *Magtanvendelse over for anbragte børn og unge* (Jurist- og økonomforbundets forlag 2016).

Hestbæk D, 'The Rights of Children Placed in Out-of-Home Care' in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in child Protection* (2018) Palgrave Macmillan, open access at <https://www.palgrave.com/de/book/9783319947990> accessed 22 December 2018.

Andreas Brøns Riise, 'Elever mister indflydelse' *Folkeskolen.dk* (1 February 2011) <https://www.folkeskolen.dk/66345/elever-mister-indflydelse> accessed 22 June 2018.

Ibsen B and Levinsen K, *Unge foreninger og demokrati* (Syddansk Universitet 2016).

Justitsministeriet, *betænkning om inkorporering af menneskerettighedskonventioner i dansk ret*, Rep no 1407/2001. (Justitsministeriet 2001).

Justitsministeriet, betænkning om *inkorporering m.v. inden for menneskeretsområdet,* Rep no 1546/2014 (Justitsministeriet 2001).

Ketcher K, 'Børns menneskerettigheder: Om FN's børnekonvention i dansk ret' in Ketcher and others (eds), *Nye retlige design: Dansk ret under konkurrence* (Jurist- og Økonomforbundets Forlag 2003).

Leth-Svendsen I, "*Der er faresignaler her …,": om ret og heuristik i det almindelige kommunale tilsyn med børn og unge* (Roskilde Universitet 2015).

Mørk A, *Børns processuelle rettigheder i tvangsanbringelsessager* (Jurist-og Økonomforbundets forlag 2019).

Ottosen M H and others, *Børn og unge i Danmark: Velfærd og trivsel* (SFI The Danish National Centre for Social Research 2014 and 2018).

Professional rep, *Familieformer og skilsmisse*, Panelrapport no. 1. (Børnerådet, 2011).

Professional rep, *Stress i gymnasiet, sammenfatning af resultater og anbefalinger* (DPU Aahus Universitet 2017).

Professionel rep, *Jeg er ikke min sygdom* (Børnerådet 2017).

Professionel rep, *Ret til inddragelse* (Børns Vilkår og TrygFonden 2017).

Rytter JE, *Individets grundlæggende rettigheder* (Karnov Group 2019).

Schultz T and others, *Socialret, børn og unge* (Jurist- og økonomforbundets forlag 2017).

Schjær Jensen B, *Inddragelse af udsatte børn og unge i socialt arbejde: reel inddragelse eller symbolsk retorik* (Aalborg Universitetsforlag 2014).

Udvalget om de retlige rammer for indsatsen over for børn og unge, *Betænkning*. Rep no 1212/1990 (Commitee on the legal framework for measures for children and adolescents).

Udvalget om Forældremyndighed og samvær, *Barnets Perspektiv*. Rep no 1475/2006, (Familiestyrelsen 2006).

Valgretskommisionen Betænkning *Demokrati for fremtiden* (DUF-Dansk Ungdoms Fællesråd 2011).

UN Committee on the Rights of the Child, *General Comment No. 20 in the rights of the child during adolescence* (6 December 2012) CRC/C/GC/20.

UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12.

Undervisningsministeriet, Statistics (Elevtal i grundskolen) <https://uvm.dk/statistik/grundskolen/elever/elevtal-i-grundskolen> accessed 18 January 2018.

PART 5

Children's Right to Family Life in Nordic Law

CHAPTER 16

Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?

Lena R.L. Bendiksen

1 Introduction

Children`s right to respect for family life is widely recognised in Norwegian law. The specific provision on children's human rights in the Norwegian Constitution, section 104, mentions family. In addition, section 102 states that everyone, including children, have a right to respect for private and family life. The Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR), in article 8, have strongly influenced both provisions. The CRC and the ECHR are both incorporated into Norwegian law, and both have a semi-constitutional status, since they take precedence over conflicting domestic legislative provisions.[1] Children's right to respect for family life is recognised both at a constitutional and a semi-constitutional level. In many specific aspects, domestic statutory law also recognises children's rights in this context.

The aim of this chapter is to introduce and discuss some questions concerning the protection of children's right to respect for family life in Norway. To do this, I will first give a brief overview of some of the legislative protection given. Thereafter, the main objective is to examine whether the constitutional reform in 2014 strengthened the protection children already had through semi-constitutional and domestic statutory law, and to examine whether children's right to family life is given proper attention both in the legislation and case law. I will examine some aspects regarding the establishment of family, children in post-divorce families and children in foster care. Finally, I will discuss the approach the European Court of Human Rights (ECtHR) has assumed in two recent cases concerning children's right to family life in Norway. The aim is not to discuss the notion of family, the protection of family life in general, nor the potential tension between the right to family life versus the right to privacy and private life.

1 Act relating to the strengthening of the status of human rights in Norwegian Law (The Human Rights Act) of 21 May 1999 no. 30 (Menneskerettsloven), sections 2 and 3.

2 An Overview of the Protection of Children's Family Life in Norway

Section 104 of the Norwegian Constitution does not directly protect children's right to respect for family life, even though family is mentioned in the provision.

Section 104, subsection three of the Constitution states: 'Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family'.

According to the last sentence, the main objective of the provision is to ensure the child's development. To do so, the child is entitled to necessary economic, social and health security, 'preferably within their own family'. To protect the child's family or family life is not the particular purpose, but more a means to ensure the child's development through economic, social and health security. This security should, according to section 104, preferably be facilitated within the child's family. By this, the Constitution confirms the family as children's primary caregivers, without defining a family or enshrining a right to family life for children. The discussions in the preparatory works of the Constitution, which are a key tool for interpretation, show that family by intention was not defined.[2] The preparatory works states that the sentence 'preferably within their own family' has to be interpreted in the context of the best interest's principle and the child's right to participate in general.[3] In addition, the preparatory works states: 'preferably within their own family' is not to be read as an assumption of the parents' rights to precede the best interests of the child.[4] Overall, this subsection of section 104, and the discussion in the preparatory works, indicates that the reference to family in section 104 primarily underlines the notion of a family and does not, as such, protect the right to family life. In a similar way to the CRC preamble, the aim seems to be to acknowledge family as the fundamental group of society and the natural environment for the growth and well-being of children. On its own, section 104 of the Constitution does not highlight children's right to respect for family life, nor the more

2 Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (19 December 2011) 194 (Dok. 16). Report from the Human Rights Commission to the Presidium of the Parliament on human rights in the Constitution. The report is available only in Norwegian <https://www.stortinget.no/Global/pdf/Dokumentserien/2011–2012/dok16-201112.pdf> accessed 25 January 2019.

3 Dok. 16 (n 2) 194–195.

4 Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen 31.

specific right to maintain a personal relationship and direct contact with both his or her parents like the CRC article 9, subsection 3, or the EU Charter of Fundamental Rights section 24, subsection 3.

Section 102 of the Norwegian Constitution addresses the right to respect for family and private life as follows: 'Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases. The authorities of the state shall ensure the protection of personal integrity'.

'Everyone', including children, has the right to respect of their family life, and the wording of section 102 is very similar to the ECHR article 8 (1). Still, a difference is that while the constitutional provision seems absolute, ECHR article 8 (2) includes a reservation. As discussed by Haugli, the constitutional preparatory works includes a discussion whether one should include some kind of reservations, but no reservation was in fact included.[5] Still, according to the Supreme Court, the constitutional protection cannot be – and is not – absolute. In accordance with ECHR section 8 (2), any restriction on the constitutional rights and freedoms must be in accordance with the law, must pursue a legitimate aim and must be necessary and proportionate, even if this is not stated explicitly.[6]

Thus, the Norwegian Constitution acknowledges children's right to respect for family life through section 104 combined with section 102.

Sections 102 and 104 in the Constitution are both in conformity with, among others, ECHR article 8 and several articles in the CRC. According to the Supreme Court, both section 102 and 104 must be understood 'in the light of' their international background.[7] Still, this must be done in a way where the responsibility to interpret, clarify and develop the Constitution's human rights provisions in the future, is a national responsibility held by the Norwegian Supreme Court. Case law from the ECtHR and other international bodies, are therefore taken into serious consideration when interpreting and applying the Constitution, at the same time as the Supreme Court has the main responsibility to interpret the Constitution.[8]

5 Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

6 HR-2014-2288-A (28) and HR-2015-206-A (60).

7 HR-2015-206-A (57) and (64).

8 Arnfinn Bårdsen, 'Interpreting the Norwegian Bill of Rights' (Annual Seminar on Comparative Constitutionalism, Oslo, November 2016) <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/Articles/articles-and-speeches-2016/interpreting-the-new-norwegian-bill-of-rights/> (21) accessed 25 January 2019.

The CRC contains a cluster of rights in relation to the integrity of the family unit, and the State's obligation to both support families and provide alternative care where the family environment has failed to function in the best interests of the child. According to the CRC article 7, the child has the right to 'know and be cared for by his or her parents' and, in addition, article 9 states that parties shall ensure 'that a child shall not be separated from his or her parents against their will', except when necessary and in accordance with the law and procedures. No child shall be subjected to 'arbitrary or unlawful interference with his or her privacy, family, home or correspondence', according to article 16. Other articles, such as articles 8 and 9, subsection 3, addresses children's rights to preserve family relations and their rights to maintain personal relations and direct contact with both parents. The Committee on the Rights of the Children has interpreted the term 'family':

> The family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children (preamble of the Convention). The right of the child to family life is protected under the Convention (art 16). The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art 5).[9]

Article 8 of the ECHR also states that everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence. The ECtHR has repeatedly stated that 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.[10] Both the CRC and the ECHR involve rights between a child and his or her family. The rights included in the conventions protect the parents or the family *as* the child's primary caregivers and protects the child *in* the family. In addition, the provisions protect children *from* their family, and gives some kind of protection to children *without* at family. These are some of the international background sections 102 and 104 of the Constitution must be understood in the light of.

9 UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* (29 May 2013) CRC/C/GC/14 para 59.

10 Among others, *Johansen v Norway* (1996) ECLI:CE:ECHR:1996:0807JUD001738390.

3 Constitutionalising—Any Essential Legal Effect?

Sections 102 and 104 stating the constitutional rights pertaining children's family life in Norway represent no innovation. They are more a constitutional confirmation of rights already recognised and given to children throughout international law and to some degree, already expressed and implemented in the Children Act[11] and the Child Welfare Act.[12] For instance, maintaining a close relationship with both parents after a divorce is a key argument in case law concerning custody, residence and contact. Both the Children Act and the Child Welfare Act grant children a right to maintain contact with the non-residential parent or both parents if placed in alternative care, for example, in a foster home.[13] Still, it must be mentioned that the Children Act does not use the term 'family', and the Child Welfare Act barely uses the term.

The recognition of children's rights in the Constitution is important. In my opinion, sections 102 and 104 in the Constitution strengthen the close link between the best interests of the child and the right to respect for family life. By declaring sections 102 and 104 as complementary, the Supreme Court has emphasized the interlinkage between private and family life and the best interests of the child. Furthermore, the Supreme Court have stated that the interests of the child is to be included as an element given considerable emphasise in the proportionality assessment pursuant to section 102 of the Constitution.[14]

In theory, both the constitutionalizing of the right to respect for family life, and the interpretation made by the Supreme Court stating sections 102 and 104 as complementary, could have significant impact. It might cause more focus on children's rights to respect for family life, as opposed to the parents' rights in this matter. In some cases, the child and the parent(s) have a mutual interest in the protection of their shared family life. Still, it is important to highlight the child's interests and rights distinctly. At other times, the child's right to family life is contrary to the parent(s) respective right. In all cases, a stricter scrutiny of whether the child's rights to respect for family life is emphasised enough when the best interests of the child are considered, might be required. It is not

11 Act relating to Children and Parents (The Children Act) of 8 April 1981 no. 7 (Lov om barn og foreldre). An unofficial English translation is available at <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/> accessed 25 January 2019.

12 Act relating to child welfare services (Child Welfare Act) of 17 July no. 100 (Lov om barneverntjenester). An unofficial English translation is available at <https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/> accessed 25 January 2019.

13 The Children Act (n 11) section 42 and Child Welfare Act (n 12) section 4–19.

14 HR-2015-206-A (66).

possible to examine or answer precisely whether the constitutionalizing has had effect in this matter. Still, I will examine some areas of child law, looking for the standing of the child's right to respect for family life, and looking for a possible change or development promoted by the constitutionalizing. The analysis of case law below will partly examine whether the constitutionalizing has had any impact.

4 Establishment of the Child's Family

Neither children nor adults have the right to a family as such. For example, the existence of family life determines the applicability of the ECHR, article 8. Both the positive obligations to secure enjoyment of family life and the negative obligation to refrain from taking action that interferes unjustifiably with family life, rely on the existence of family life. Likewise, the CRC does not give children a right to a family as such. Article 20 of the CRC states that a child temporarily or permanently deprived of his or her family environment, is 'entitled to special protection and assistance provided by the State', but not a new family. Still, the right to know and be cared for by his or her parents and the right to preserve family relations as recognised by law are important for the existence of family life. Hence, the establishment of paternity and maternity for children are important in this matter.

The Children's Act regulates the establishment of paternity and maternity for children. A woman who has given birth to the child is regarded as the mother, while paternity or co-maternity is established through marriage (section 3), declaration (section 4) or judgment (section 9). Regarding the possibility to contest and legally have the paternity changed, the act has been amended several times. The last amendment came in 2016 when, again, the time limits for initiating paternity cases was removed. According to section 6, 'the child, either of the parents and any person who believes that he is the father of a child who already has a father, may at any time bring an action in the courts regarding paternity, established through marriage or declaration'. According to the preparatory works, the rationale for amending the law was that knowing the biological origins of the child is important for both the child and the parents. It might be argued that it is not in the child's best interests nor in accordance with the child's right to respect for family life to have the paternity changed after several years. Still, some efforts have been taken to protect the child. According to section 6a, a child aged 18 or older has the right to obtain information on the identity of his or her biological father, without this involving a contestation of paternity. However, access to information does

not guarantee that the parent will refrain from bringing a paternity action according to section 6.

For assisted reproduction, a person who consents to the mother-to-be being treated is considered the father or co-mother either by marriage, declaration or judgment. The consent then replaces the genetic link. The rule applies only when the assisted reproduction has been conducted in accordance with Norwegian law. According to the Biotechnology Act section 2–7, the child from age 18 has a right to know the sperm donor's identity.[15] Consequently, the Biotechnology Act sections 2–8 and 2–9 states that all sperm donors have to register in a donor register and cannot be anonymous. The child is the only person allowed to receive this information. Neither the parents nor the donors are at any stage allowed to gain information about each other's identity.

Adoption can change both legal paternity and maternity.[16] According to the Adoption Act section 9, an adoption may not be granted without the consent of the child, if the child is aged 12 years or older. Younger children only have the right to express his or her views in this matter. Step-parent adoption is in some occasion allowed, but the step-parent should normally have cared for the child for five years before this could take place, section 16. This to ensure that the adoptive parent actually have acted as a social parent for the child, and with that safeguarding that a step-parent adoption actually combine the social and legal parenthood for the child.

Of course, the child, from the age 18, has an unconditional right to know who his or her originally parents are, and the child will be informed, in writing, by the adoption authority about this right at the age of 18.[17] In the preparatory works it was suggested to decrease the age limit for the child's right to know, from age 18 to age 15. Rationale behind the suggestion was the importance for the development of the child's personality and a wish to get better compliance in the legislation concerning age limits for children.[18] This suggestion was turned down, arguing the strain this may cause children.[19] Even though the adoption act entered into force recently, July 2018, it cannot be said that the constitutionalizing of children's right to respect for family life, have had a

15 Act relating to the application of biotechnology in human medicine, etc of 5 December 2003 no. 100 (Lov om humanmedisinsk bruk av bioteknologi m.m.).

16 Adoption Act 16 of 16 June 2017 no. 48 (Lov om adopsjon).

17 Adoption act (n 16) section 39.

18 NOU 2014:9 Ny adopsjonslov section 23.3.3; Prop.88 L (2016–2017) Lov om adopsjon (adopsjonsloven) section 20.5.

19 Innst.359 L (2016–2017) Innstilling fra familie- og kulturkomiteen om Lov om adopsjon (adopsjonsloven) 10–11.

significant impact on the new legislation. This aspect of children's rights is neither a dominant argument in the preparatory works, nor in the new legislation.

5 Children's Right to Family Life with Both Parents in Post-Divorce Families

For some years, there has been an ongoing discussion about equality in parenthood, and the child's right to both his or her parents in post-divorce families in Norway. The agenda has been obvious: more equality between parents. I would like to argue that these discussions have been focusing more about the rights of the parents than children's rights. This does not only occur in the political debates, in media, etc. but also when it comes to legislation. I will look into some of the latest amendments to substantiate my arguments.

Under the heading 'equal parenting' some amendments in the Children's Act entered into force in January 2018. In section 30, it is explicitly mentioned that parents shall exercise joint parental responsibility by making decisions jointly. This amendment only represents a codification, but still the goal is to highlight equal parenting even more. In addition, amendments have been made to section 36, so joint custody in the wording is mentioned as an alternative before sole custody, not after. This holds in reality no substantive change, but is an additional attempt to emphasize equal parenting. The time limit for the duty to notify the other parent of intentions to relocate with the child was changed from six weeks to three months prior to moving.[20] The duty to notify applies when contact has been agreed or determined, and the aim is to get parents to discuss and make arrangements concerning contact after the relocation as well. The most controversial change is made in section 35. Current law states that the mother has sole custody if the parents are not married or cohabiting. After the amendment enters into force, all parents, will have joint parental responsibility for children regardless of marriage or cohabitation. Parents who do not wish to have joint custody have to register within a year after the child was born. Otherwise, they will automatically have joint custody. The changes to section 35 have not entered into force yet, and it is not decided when it will.

It is questionable whether these recent amendments are influenced, or reasoned by, the constitutionalizing of children's right to respect for family life. The preparatory works do not mention children's right to respect for family life

20 The Children Act (n 11) section 42.

at all.[21] Section 104 of the Constitution is barely mentioned, and then only focusing on the child's best interests and their right to participation in decision-making. Section 102 of the Constitution is not mentioned. The only CRC article mentioned explicitly is 12, but it is also stated that the best interests of the child is the guiding principle of the CRC. The starting point of the Government bill is, however, that children have a right to two parents. This statement is not supported by the Constitution, the CRC or other conventions. The only reference given is to the the political platform for the (current) Norwegian Government, stating that the government will try to equate parents as caregivers, with the same rights, and, at the same time, ensuring the best interests of the child in matters of child custody and access.[22] This is supported in part 2.1 of the Government bill, where it is argued that equal parenting implies equal opportunities, and the feeling of equivalence. The preparatory works contain no direct references to children's right to family life in general. Thus, improving children's rights was not a driving force for the amendments. Rather, the main rationale seems to be to enhance the equality between parents.

One may argue that parents, mediators, lawyers or even judges can hardly be expected to consider children's right to respect for family life in depth, if the law and the legislator does not emphasise the duty to do so, particularly, when the laws are amended and new laws enacted.

Still, there might be some positive changes in the writing of conclusions in judgments. Even though the Children's Act have a specific provision stating the *child's* right to contact with both parents, section 42, the most common way to write a conclusion on this matter, is by stating that the *parent* has a right to contact with the child in a specific way. This is done even though section 42 is mentioned, but seldom discussed, in the decision. Some examples are examined below.

In HR-2007-1101-A, the question presented by the Supreme Court in the judgment paragraph 1 was that 'the case concerns the question of right to access for the father to his nine-year-old daughter'. The unanimous conclusion was in section 46 written in the terms of 'B (the father) has the right to access to his daughter as stated in this judgment'.

In a similar way the question presented by the Supreme Court in HR-2010-304-A paragraph 1, was whether the parent who does not live with his daughter should have contact with her. The unanimous conclusion was written in

21 Prop.161 L (2015–2016) Endringer i barnelova mv. (likestilt foreldreskap) and Innst.195 L (2016–2017) Innstilling fra familie- og kulturkomiteen om Endringer i barnelova mv. (likestilt foreldreskap).

22 Prop.161 L (2015–2016) Endringer i barnelova mv. (likestilt foreldreskap) 5.

the terms of 'A (the father) shall have the right to contact with C as follows', paragraph 52.[23]

It might be argued that this is a consequence of children's lack of legal and de facto autonomy and, in particular, lack of participation rights in court proceedings. I would argue that because of this, it is even more important that the court decision highlight the rights children have in this matter. Making sure that the child's right is mentioned in the conclusion, ('the child and the mother/father have the right to contact as stated below'), could cause a more in-depth examination of the child's rights in this matter. In my opinion, it is not enough to mention the Children's Act section 42, this must be discussed in light of the present case, and in the light of the Constitution and the CRC.

Reading some decisions from the Court of Appeal (*Lagmannsretten*) might show a positive development. In some cases, the decision is now written in terms of either stating which right the child has to contact with the parents or by stating the child and the parents right to contact with each other.[24] Still, this is by no means consistently done.

6 Right to Family Life for Children in Foster Care

Children's right to respect for family life within the child welfare system in Norway could be discussed from many different points of views. I will only discuss a few.

Children's right, when separated from one or both parents, to maintain personal relations and direct contact with their parents on a regular basis could be discussed based on the amount of contact often decided in childcare cases. One side of this is the contact between the child and persons other than his or her parents. According to The Child Welfare Act section 4–19, contact between the child and relatives or other persons to whom the child is closely attached, may only be decided if one or both of the parents is/are dead, or if it is decided that there should be no or very limited contact between the child and one or both parents. No or 'very limited contact' with parents is a precondition to be able to grant a child under public care the right to contact with for instance siblings, grandparents or former foster parents. It might well be argued that this is contradictory to the child's right to respect for family life. As mentioned The Committee on the Rights of the Children has stated that the term 'family'

23 For other examples, see HR-2011-2244-A and HR-2005-853-A.

24 See, eg, LF-2018–24631 and LE-2017–180000.

must be interpreted in a broad sense, and, in addition, that the right to maintain personal relations and direct contact 'also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship'.[25]

A 2016 government report on reform of the Child Welfare Act, explicitly discussed the child's right to respect for family life in this matter.[26] In the report, it is argued that the limitations on the possibility to grant the child contact with the extended family is hardly in accordance with section 102 in the Constitution, ECHR article 8 and CRC article 16. The report recommends that the child should be given a right to contact with parents, siblings and others closely related to the child. The reasoning behind this being that a change like suggested would bring The Child Welfare Act in better compliance with the right to family life according to the Constitution, CRC and ECHR.[27] The constitutionalizing of children's right to family life was a part of the reasoning for the recommendation, but so was the CRC and ECHR as well.

Another question concerning contact between the child and people other than the parents is the interpretation of 'very limited' contact. As mentioned, contact between the child and people other than the parents can only be granted if one or both of the parents are dead or the contact between the child and the parents are denied or 'very limited'. The Supreme Court has, in two judgments, discussed what should be regarded as 'very limited' contact between parents and children after foster placement.

In HR-2011-2269-A it is stated that a former foster mother's claim to have contact with the former foster child was admissible. The contact between the child and mother was set to two hours, three times a year, and this was regarded as 'very limited'. In HR-2015-964-A, a child's grandmother wanted contact with her grandchild placed in foster care. The Supreme Court stated that contact between parent and child, regulated to two or three hours, four times a year, was not regarded 'very limited'. Contact between a child and his or her parents is, accordingly, looked upon as very limited if it is two hours, three times a year, but not if it is two hours, four times a year. I would like to argue that contact between a child and a parent, or someone else close to the child, for eight hours a year hardly can be understood as anything but very limited.

25 Committee on the rights of the child, *General comment No. 14* (n 9) section 60.

26 NOU 2016:16 Ny barnevernslov. Sikring av barnets rett til omsorg og beskyttelse (NOU 2016:16) 181–182.

27 NOU 2016:16 (n 26) 188.

Still, the contact between a child in foster care and his or her parents are often limited. The Supreme Court often set the contact in cases regarded as long-term placements, to three to six times a year and only a few hours each time.[28] It could be asked what kind of respect for family life, meeting your parents around ten hours per year is? It cannot be said that the constitutionalizing of the right to family life has made a notable impact on decisions in this matter. On the other hand, the 2016 government report on reform of the Child Welfare Act recommended changes here as well. The report thoroughly discusses the limited contact often set in these cases. It is recommended that the system for contact is changed from 'giving contact rights' to a system where restrictions in contact must be reasoned. The starting point being giving children a general right to contact with parents, siblings and other close to the child. In addition, restrictions may be set, if necessary and in the best interests of the child.[29] The recommendations are still under discussion, and no amendments to the act has been made in this matter. It is expected that amendments or a brand new Child Welfare Act will be suggested in 2019.

In the same way as mentioned about children's rights in post-divorce families, it could be discussed if children's rights are the focus or even a focus when contact rights are discussed in these cases. I would argue that this is normally not the case. The most common way to write conclusions in judgments concerning contact between a child and his or her parents is still by stating that the parent has a right to contact with the child, still this is not consistently done. Some examples could be examined.

The conclusion in the Court of Appeals judgment LA-2018–6934 is written in terms of A and B shall have contact with C four times a year, C being the child, A and B the parents. The judgment has no mention of the term 'family life' and the Constitution, in sections 102 and 104, is not mentioned. On the other hand, the conclusion in LB-2018–53823 is written in terms of C had the right to contact with A and B four times a year, two hours each time. C being the child, A and B the parents. 'Family life' or the Constitution, section 102 is not mentioned in the judgment. The court mentions the Constitution, in section 104, when arguing that foster placement is in the child's best interests, but not when arguing the right to contact.

The Supreme Court judgment in HR-2017-2015-A should be mentioned as well. The question was whether all contact between parents and child should be denied. The parents had exposed the baby boy to serious violence before

28 NOU 2016:16 (n 26) 185.

29 NOU 2016:16 (n 26) 188–189.

the care order was made. The judgment is discussed by Sandberg.[30] The Supreme Court decided in favour of supervised contact one hour, once a year between the boy and his parents. Many elements of this judgment could be discussed. I concur with Sandberg that the abuse of the child formed exceptional circumstances and reasoning to deny all contact. Another question is whether contact one hour each year by any means could be called family life. Still, I would like to point out that the approach in the judgment represents, in my view, a good development, even though the conclusion hardly is. When discussing the contact between a three-and-a-half-year-old boy living in a foster home and his parents, the Supreme Court argues based on the child's right to family life, not only the parents' rights. This is an approach seldom seen in this kind of judgments. The Supreme Court argues that the boy has a right to family life, and both the Constitution, ECHR and different articles in CRC are mentioned in this matter. Both sections 102 and 104 in the Constitution are discussed, and, in particular, the connection between these sections are taken into account. The approach in the judgment represents, in my opinion, a good development, and even though the judgment includes discussions of sections 102 and 104 in the Constitution, it is not possible to give the constitutionalizing alone the credit for the approach. To do so, all judgment should have been more consistent in this matter. It might still be argued that the constitutionalizing did have an impact.

Other aspects of children in foster care and their right to family life could also be discussed. For instance, it could be argued that children's right to respect for family life in their new foster family is not given proper attention when the Child Welfare Act does not have an opening for long-term placements. A foster home placement is legally always regarded as a temporary measure in Norway. According to the Child Welfare Act, section 4–21 there are still exceptions.

> The county social welfare board shall revoke a care order when it is highly probable that the parents will be able to provide the child with proper care. The decision shall nonetheless not be revoked if the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her.[31]

30 Kirsten Sandberg, 'Best interests of the child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

31 Child Welfare Act (n 12).

The 2016 government report on reform of the Child Welfare Act recommended no substantial changes to this provision.[32] Children's right to respect for family life, according to the Constitution or the conventions, was not argued in this matter in the government report. Adoption is now, and probably in the coming recommendation of amendments to the Child Welfare Law, the only long-term placement possibility. Still, many children actually live their whole childhood in a foster home without adoption for different reasons being an admissible option. Formally, the care order is regarded a temporary measure, but, in reality, the care orders are in many cases planned to be a long-term placement of the child.

Adoption as a measure in the child care system raises a lot of questions. In Norway, adoption without the consent of the parents is an option for some children living in foster homes, according to the Child Welfare Act, section 4–20. Firstly, the parents must be deprived of all parental responsibility. The adoption consent could then be given if the care order is regarded as permanent, adoption is in the child's best interests and the adoption applicants have been acting as and showed themselves fit to bring up the child as their own. In addition, the conditions under the Adoption Act must be satisfied. According to the Child Welfare Act section 4–20 a, contact visits between the child and his or her biological parents after adoption could be set. This could be regarded as safeguarding children's right to respect for family life in these cases. On the other hand, contact visits after the adoption can in accordance with section 4–20 a, only be considered if the adoption applicants consent to such contact. In addition, if contacts visits are decided, but does not take place after the adoption, neither the parents nor the child are given any possibility to make the contact happen. If this gives the child a meaningful right could be discussed. I will not discuss adoption of foster children as such, even though I would like to argue that the child's right to family life does not seem to be an essential argument when adoption of foster children is discussed or decided upon. On the other hand, adoption may be regarded as a way of creating a new legal family for the child.

The last three years several applications against Norway have been lodged with the ECtHR in child welfare cases. The main questions in several of the cases communicated, concerns care orders, contact and adoption. Some of the cases have been decided, and I find two of them interesting when discussing children's right to respect for family life.

32 NOU 2016:16 (n 26) 157–159.

7 Norwegian Children's Family Life Discussed in Two Judgments by the ECtHR

In a recent case, *Jansen v Norway*, the ECtHR concluded that there had been a violation of article 8 of the ECHR.[33]

The girl A was born in 2011, and the applicant is her mother. The relationship between A's mother and father ended before A was born, and when A was born her mother lived with her parents who are Norwegian Roma. The mother and child moved back and forth between the mother's family and a parent-child institution, because of threats and violence from the applicant's father – the child's grandfather. The Child Welfare Service then applied for a care order, and then issued an emergency care order to place A in an emergency foster home at a secret address. After three months, A was moved from the emergency foster home to her current foster home, and contact with her mother and father was restricted to supervised contact one-hour per month in suitable premises and with police assistance. The reasoning to both the moving of A, and the contact restrictions, were the risk of child abduction. After a year, the City Court ordered that neither the mother nor the father was entitled to have contact with A. The parents appealed to the Court of Appeals who dismissed the appeal and stated that the main reason for refusing contact was the risk of abduction, but, in addition, the applicant father's serious offences on his criminal record, his threatening to kidnap the child, and death threats against the child's father. Both parents appealed to the Supreme Court. The case was then reheard by the Court of Appeal with the same conclusion and then refused leave to appeal to the Supreme Court.

The mother then complained under article 8 of the ECHR that the domestic authorities had violated her right to respect for her family life by refusing her contact rights with A, since this was neither necessary nor proportionate in the circumstances. Moreover, it effectively prevented A from getting to know her Roma heritage and language. The ECtHR unanimously held that there had been a violation of article 8 of the Convention.

The question examined by the ECtHR was whether refusing the applicant contact with A were 'necessary in a democratic society'. Firstly, the ECtHR stated the best interests of the child as a general principle in paragraph 91. In addition, the court stated how the best interests of the child both must include the child's right to family life, but, at the same time, ensure his or her development in a sound environment.[34] With references to the court's case law, it was stated

33 *Jansen v Norway* (2018) ECLI:CE:ECHR:2018:0906JUD000282216.

34 *Jansen v Norway* (n 33) para 92.

that measures totally deprive an applicant of his or her family life with the child and are inconsistent with the aim of reuniting them should 'only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests'.[35]

Applying the general principles to the present case, the court highlighted the dilemma between the alleged danger of abduction and its implications for the contact sessions, versus the potential negative long-term consequences for the relationship between the child and her mother. As to the procedure, the court found the decision-making process comprehensive and that the applicant was sufficiently involved. Regarding the in-depth examination of the case and especially the consideration of the child's best interests, the court in paragraph 100 concluded: 'In the Court's view, there are no grounds for contesting that the domestic authorities carried out a sufficiently in-depth examination of the case or that the decision was taken based on what was considered to be in A's best interests'.

On the one hand, this seems like the ending statement, but the court then asks if the interpretation and application of the notion of the 'best interests of the child' was compatible with the Court's jurisprudence. In addition, if the guiding principle whereby a care order should be regarded as a temporary measure and the positive duty to take measures to facilitate family reunification were taken into account. The right to respect for family life was then discussed in paragraph 103.

> Furthermore, the decision complained of entailed the danger that family relations between the applicant and A were effectively curtailed (see paragraph 90 above). In its decision the High Court did not explicitly mention that the applicant and A had not seen each other for three years – subsequent to the few contact sessions that took place after the 'car incident' (see paragraph 12 above). Moreover, the High Court's decision did not focus on reuniting A and the applicant (see paragraph 93 above) or on preparing for reunification in the near future, but rather on protecting A from a potential abduction and its consequences. Taking into account the circumstances of the present case, the Court considers that there was a risk that A could completely lose contact with her mother. According to the Court's jurisprudence it is imperative to consider also the long-term effects which a permanent separation of a child from her natural mother might have (see, *mutatis mutandis, Görgülü v*

35 *Jansen v Norway* (n 33) para 93.

> *Germany*, no. 74969/01). This is all the more so as the separation of A from her mother could also lead to an alienation of A from her Roma identity.

While it was held in paragraph 100 that the Norwegian authorities carried out a sufficiently in-depth examination of the best interests of the girl, paragraph 103 emphasises the girls right to family life, and the court stresses that the girl could lose contact with her mother, and this could cause long-term effects. The girl's right to family life is clearly visible in the conclusion as well, in paragraphs 104 and 105.

> In conclusion, although the Court accepts that the decisions of the national authorities were made in what they considered to be the best interests of the child and bears in mind that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another (see paragraph 95 above), the Court holds that in the instant case, the potential negative long-term consequences of losing contact with her mother for A and the positive duty to take measures to facilitate family reunification as soon as reasonably feasible were not sufficiently weighed in the balancing exercise.
>
> In the light of the above, the Court concludes that there has been a violation of Article 8 of the Convention.

Some might argue that the court first accepts that the Norwegian judgments were based on the best interests of the child and that this examination was done sufficiently, and then in a way sets aside the best interests of the child in favour of the parent's interests. I would, however, argue that this judgment is an example of the ECtHR emphasising the child's right to respect for family life, and the fact that this was not sufficiently discussed or weighed in the Norwegian judgments. In my point of view, the approach taken by the ECtHR highlights the importance of taking children's right to family life into account. ECtHR did not conclude that the Norwegian courts decisions was not based on the child's best interests, they concluded that the examination was incomplete.

The other case I would like to mention is *Strand Lobben and others v Norway*.[36] In this case, the court held, by four votes to three, that there had been no violation of article 8. The case was referred to and heard by the Grand Chamber on 17 October 2018. The Grand Chambers ruling in the case have not been made. The judgment discussed below is, therefore, not final.

36 *Strand Lobben and others v Norway* (2017) ECLI:CE:ECHR:2017:1130JUD003728313.

The mother in this case turned to the child welfare authorities during pregnancy because she was in a difficult situation, and she applied for a late abortion in her sixth month pregnancy. When the child, X, was born September 2008, she agreed to stay in a mother and baby care unit. When she withdrew her consent to stay at the care unit, the child welfare authorities decided to take X into immediate compulsory care and place him in a foster home on an emergency basis. After the placement, the first applicant had weekly half-hour visits with X. The County Social Welfare Board then granted a care order. The mother appealed the decision to the City Court, who overturned the decision. The child welfare authorities appealed to the Court of Appeal and the decision was again overturned. The care order was upheld and the mother did not appeal.

In July 2011, the child welfare authorities requested the County Social Welfare Board to deprive the mother of her parental responsibility for X, and to grant the foster parents' permission to adopt him. The mother then applied for termination of the care order or, alternatively, extended contact rights with X. The foster parents got permission by the County Social Welfare Board to adopt the boy. The mother appealed and the City Court upheld the decision on adoption. Further appeals were denied. The question at stake in the ECtHR assessments was whether the impugned measure was 'necessary in a democratic society'. The majority of the judges summed up their view in paragraphs 129 and 130, and concluded that there had been no violation of article 8 of the Convention.

Three judges had a joint dissenting opinion. After establishing some general principles under article 8 of the ECHR in relation to child placement and adoption, they argued that it had not been demonstrated that these standards had been met in the present case. The minority argued that the majority relied too much on the *Aune v Norway* case,[37] when there are fundamental differences between the cases. In addition, the minority gave several statements with context to the child's right to respect for family life. In paragraph 24 (2) the minority stated the adoption put an end to the legal ties between the mother and the child. The minority finds it extraordinary that the 'foster parents' willingness to contemplate contact 'if the child so wished' is factored into the legal assessment given that this willingness had no legally binding force.

In paragraph 24 (4) it is added the following:

> Nowhere in the file does it emerge clearly that the domestic authorities considered the long-term effects on the child of the permanent and

37 *Aune v Norway* (2010) ECLI:CE:ECHR:2010:1028JUD005250207.

> irreversible cutting of de facto and legal ties with his biological mother.[26] The Court has repeatedly held that severing such ties cuts a child off from its roots, which is a measure which can be justified only in exceptional circumstances.

And in paragraph 24 (5) the child's siblings and other family are mentioned, 'In the individual assessment required and the balancing of the interests of the child and the biological parent, nowhere does the severing of X's ties with his other sibling (and subsequently a second sibling) or his grandparents appear to feature'.

In the conclusion, the minority focuses on the need to respect existing jurisprudential standards. They emphasise that standards like exceptional circumstances and to apply stricter scrutiny when breaking of *de facto* and *de jure* ties are standards with legal meaning and legal consequences. They then criticise the majority arguing, 'the majority takes cognizance of these legal standards in an abstract manner but only partly applies them to the circumstances of the present case'. In paragraph 28, the minority concludes by addressing and criticising the procedural focus taken.

> The general principles outlined in Section III reflect the case-law as it stands and clearly point to procedural and substantive requirements which must be met in a case like this. Once it comes to the concrete application of those principles to the circumstances of the individual case, it would appear that the focus becomes almost exclusively procedural. However, an excessive focus on procedures risks rendering banal what are far-reaching intrusions in family and private life. In addition, the Court's general principles when read in the abstract risk providing false hopes of reunification which, as this case demonstrates, are unlikely to be fulfilled once a child has been taken into care, access rights have been significantly limited, time has passed and domestic proceedings formally meet Article 8 procedural standards.

The Grand Chamber heard the Strand Lobben case in October 2018. It will be interesting to see the approach the Grand chamber takes, and to what extent the allegation about an 'almost exclusively procedural' focus in these cases will be discussed.

As I read *Strand Lobben v Norway*, the discordance between the majority and the minority is not about parental rights versus child rights, or biological parents versus psychological parents. It is more about how to apply principles to the circumstances of individual cases and about to what extend the ECtHR

should assess substantive requirements. I believe both the majority and the minority emphasise the best interests of the child, but the minority highlights the child's right to respect for family life more explicitly.

The Jansen case and the minority in the Strand Lobben case sends, in my opinion, a clear statement. Children's right to family life must be given proper attention when deciding questions concerning among others contact, adoption and care orders. The Grand Chambers ruling in the last case will, of course, be interesting in this matter. Anyway, it is not possible to argue that the judgment and the minority statement in these cases are noticeably influenced by the Norwegian constitutionalizing of children's right to respect for family life. Sections 102 and 104 of the Constitution are both mentioned as part of the relevant domestic law, but are naturally not discussed any further.

8 Concluding Remarks

As shown, children's right to respect for family life is protected in a number of different sets of rules on a constitutional and semi-constitutional level, and, in addition, on a statutory law level. Still, children's right to family life is not always explicitly discussed or given proper attention in the legislation, in the reasoning of the law or in case law. I do believe the constitutionalizing, and, in particular, the interpretation that sections 102 and 104 are interlinked and must be interpreted in the light of each other has the potential to strengthen children's rights in this matter. As discussed, it is not possible to argue that the constitutionalizing has had an essential legal effect, up to now. Still, some positive elements can be found, but this is not at all consistent. The ECtHR judgment in the Janson case, and the minority dissenting opinion in the Strand Lobben case, highlights the need for Norwegian case law to give proper attention to children's right to family life. In-depth examination of the child's best interests is not enough. Children's rights to respect for family life must also be examined and sufficiently weighed. If this is consistently done, I guess it does not matter if the change is influenced or caused by the constitutionalizing or not.

References

Arnfinn Bårdsen, 'Interpreting the Norwegian Bill of Rights' (Annual Seminar on Comparative Constitutionalism, Oslo, November 2016) <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/Articles/articles-and-speeches-2016/interpreting-the-new-norwegian-bill-of-rights/> accessed 25 January 2019.

Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, (Dok. 16). <https://www.stortinget.no/Global/pdf/Dokumentserien/2011–2012/dok16-201112.pdf> accessed 25 January 2019.

Haugli T, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen.

Innst.195 L (2016–2017) Innstilling fra familie- og kulturkomiteen om Endringer i barnelova mv. (likestilt foreldreskap).

Innst.359 L (2016–2017) Innstilling fra familie- og kulturkomiteen om Lov om adopsjon (adopsjonsloven).

NOU 2014:9 Ny adopsjonslov.

NOU 2016:16 Ny barnevernslov. Sikring av barnets rett til omsorg og beskyttelse.

Prop.88 L (2016–2017) Lov om adopsjon (adopsjonsloven).

Prop.161 L (2015–2016) Endringer i barnelova mv. (likestilt foreldreskap).

Sandberg K, 'Best interests of the child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

UN Committee on the rights of the child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art 3, para 1) (29 May 2013) CRC/C/GC/14.

CHAPTER 17

Children's Right to Family Life in Finland: a Constitutional Right or a Side Effect of the "Normal Family"?

Sanna Koulu

1 Introduction

The protection of private and family life is an essential element of constitutional rights and human rights in late modern society. The right to private and family life involves a balancing act. The sphere of private and family life should be protected from outside interference, but, at the same time, we need to account for vulnerability and relationality within that sphere.[1] This balancing act is especially pertinent for children, as young children, in particular, are highly dependent on their families and caregivers.

The protection of private and family life is affirmed in article 8 of the European Convention on Human Rights (ECHR), which also calls attention to the inherent balancing acts involved in safeguarding this right. According to article 8(1), everyone has the right to respect for their private and family life, their home and their correspondence, while 8(2) lays out the criteria for limiting this right. Specifically, any interference with, for example, the respect for family life needs to be in accordance with the law as well as necessary in a democratic society 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. The text of the article applies only to interference made by public authorities specifically, but the European Court of Human Rights (ECtHR) has noted early on that States also have positive obligations to protect family life from interference by others in the context of private and family life.[2]

1 See eg John Eekelaar, *Family Law and Personal Life* (OUP 2009) 85.

2 See eg cases of *Hokkanen v Finland* App no 19823/92 (ECtHR, 23 September 1994) para 55, and *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994) para 49. For further discussion, see eg Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 9–10.

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Similarly, the United Nations Convention on the Rights of the Child (CRC) starts out from the importance of family relations for children's well-being. Some of the key provisions expressing this importance are found in article 9(1), which states the obligation for State parties to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child', and article 9(3), about respecting the right of the child to maintain contact with his or her parents on a regular basis.

Finland implemented the ECHR relatively late, in 1990, which meant that the 1990s saw the entry into force of both the ECHR and the CRC. Finland ascribes to a dualistic model with regard to international treaties, so both treaties have been implemented by means of national legislation. Since the implementation of the treaties a shift has been taking place in legal reasoning and decision-making, as treaty obligations and ECtHR case law are given increasing weight in legal decision-making as well as in legislative work. This shift affects national law in individual cases, for example, in Supreme Court cases where the reasoning is based on the interpretation of the conventions, and also more generally in the legislative drafting process and in the work of the parliamentary Constitutional Law Committee (*perustuslakivaliokunta*) that oversees the constitutionality of new legislation.[3]

In this chapter, I focus on children's right to family life specifically in the Finnish context.[4] In families that are doing well, the children's constitutional rights align with those of the parents, and it may seem somewhat pointless to try and determine what protection is due to children in particular. However, there are many cases where children's right to family life may need to be traced out specifically. In cases where there is neglect or abuse in the family, it can be hard for the children to be heard and for them to get the support and help that the CRC decrees. Even then, the child's right to family life does not suddenly disappear just because her right to protection and her best interests need to take precedence at a given moment.

3 See eg the Constitutional Law Committee's memorandum on the reform of constitutional rights (Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten.muuttamisesta (PeVM 25/1994) 4–5), where the Committee emphasises the harmonisation of constitutional and human rights by means of interpretation.

4 It is worth noting that children's right to *private* life is a crucial constitutional right especially with regard to technological and social advances; however, the topic would demand a more focused and thorough examination than is possible here.

To try to trace out children's right to family life, in particular, I examine first whether the protection of family life is extended fully to children as well as adults, also considering what other constitutional or treaty-based provisions there are that aim at protecting children's family ties specifically. Second, I analyse how children's right to family life is realised in key legislation in Finland, such as in provisions on parenthood and adoption, child custody and contact as well as child welfare services, and how that right is implemented (or not) in relevant case law. Third, I discuss some difficulties in implementing children's right to family life: for example, the aforementioned tension between the best interests of the child and her right to family life, as well as the challenges involved in separating a child's right to family life from that of other family members.

2 The Finnish Context and the Current Constitutional Provisions on Family Life

The current constitutional rights provisions in Finland are based on a significant reform that took place in 1995, just a few years after the entry into force of ECHR. The reform was preceded by carefully considered preparatory works[5] and had the goal of modernising the constitutional rights provisions that were then in force as well as that of broadening the personal and substantive scope of constitutional rights. The new provisions have been well received in jurisprudence[6] and can be considered quite successful. Thus, it is noteworthy and at first glance quite surprising that there are two significant omissions in them as well.

Firstly, the constitutional rights provisions do not include any provisions specifically on the rights of the child even though the CRC had entered into force just a few years earlier. The logic here is rather sound, though as the preparatory works are clear that constitutional rights belong to children equally with adults except when otherwise noted.[7] The preparatory works actually discuss whether to include a section specifically on the rights of the child, but

5 Government proposal HE 309/1993 vp. For some of the discussion on the reform, see eg Liisa Nieminen, 'Perusoikeuksien yksilöllisyys ja perhekäsitykset perusoikeusjärjestelmässä' (1996) 5–6 Lakimies 909–929, as well as the other articles in the same issue of the Lakimies journal.

6 See eg Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 34–36.

7 Such a note exists eg with regard to political participation, where the corresponding provision (section 14) specifically restricts the right to vote based on age.

the idea was abandoned in order to highlight the fundamentally equal rights of children and adults. Thus, the current Constitution of Finland[8] specifically provides for equal treatment of children in the same provision, section 6, that lays out the principles of equality and non-discrimination in general. According to the section, everyone is equal before the law, and discriminatory treatment prohibited. Section 6, subsection 3 concerns children, in particular:

> 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.

Secondly, there is a curious omission in the definition of private and family life as the Finnish Constitution does not mention family life at all. Section 10 on the right to privacy only mentions private life, honour and the sanctity of the home alongside the secrecy of correspondence, and family life is omitted from the text. Section 10, subsection 1 reads as follows:

> Section 10 – The right to privacy
>
> Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act.
>
> [...]

While family life is not mentioned in the section itself, the preparatory works make it clear that the concept of private life is meant to cover maintaining and enjoying family ties as well.[9] It is somewhat unclear as to why family life was not mentioned specifically, since the intent of the provision was to include it in any case. The preparatory works refer briefly and cryptically to the 'problematic nature' of the concept of the family, as well as difficulties in defining families.[10]

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8 Constitution of Finland 731/1999 (*Suomen perustuslaki*). The full unofficial translation of the Constitution is available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731_20111112.pdf> accessed 26 February 2019.

9 Government proposal HE 309/1993 vp (n 5) 53. The government proposal refers to the difficulty of defining the concept of a family and notes that family life is in any case part of the protected sphere of the right to privacy.

10 See HE 309/1993 vp (n 5) 53. It is, of course, true that defining the protected sphere of family life can be quite difficult and even politically charged; see eg Liisa Nieminen, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013) 115–122 and Päivi Hirvelä and Satu Heikkilä *Ihmisoikeudet: Käsikirja EIT:n oikeuskäytäntöön* (Alma Talent 2017) 747–755 on the case

In addition to sections 6 and 10, children are specifically mentioned in a few other sections of the Constitution. With regard to family life the third relevant provision is in section 19, which deals with right to social security and, among other things, guarantees the right to basic subsistence in the event of unemployment, illness, and disability. With regard to family life, section 19, subsection 3 provides as follows:

> The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children.

This provision is grounded on the conception of the family as the natural environment for the child to live and grow up in. According to the preparatory works, the 'chief responsibility for a child's development and upbringing belongs to the family, in particular to the child's parents or other persons that are responsible for his or her custody according law'[11] The preparatory works here also refer to the CRC as a part of the normative framework, though the mention is somewhat vague.

In addition to the Constitution and the key provisions in ECHR and CRC, there are, of course, also other treaty obligations that are relevant for children's family ties. The EU Charter of Fundamental Rights provides for the protection of family life and the role of parents in several articles, such as article 7 on respect for private and family life, article 14 on the right to education, and article 33 on family and professional life. Article 24 on the rights of the child specifically decrees that every child 'shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests', thus echoing the provisions of the CRC.

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law of the ECtHR on applicability of the right to family life, and Dorota Gozdecka and Sanna Koulu, 'What to do with the Other in Human Rights Law? Ethics of Alterity versus Ethics of Care' in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds), *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections*. (Routledge 2016) 171–190 on a discussion of the ethical dimensions of defining families in law. However, similar difficulties also attach to the concept of private life, so singling out family life in particular may not provide the kind of clarity that was presumably the goal.

11 See HE 309/1993 vp (n 5).

While the role of the family and the protection of family life are well established on constitutional and human rights levels, their scope and weight in legal decision-making can be surprisingly hard to pin down. It is as if the importance of family ties and family life is often taken as given in the sense that it does not require in-depth examination or analysis. Here, one example can be found in the national implementation of the 1996 European Convention on the Exercise of Children's Rights, which was incorporated into domestic law in 2010.[12] Curiously enough, neither the text of the convention nor the national incorporating legislation refers specifically to the right to family life even though many of the issues are highly pertinent.[13]

3 The Role of Case Law in Developing the Constitutional Protection of Family Life

In the previous section I noted that the current Constitution of Finland does not explicitly mention the protection of 'family life' in its list of constitutional rights, though family life is implicitly included in the scope of 'private life'. Here, it is worth highlighting the role of the Finnish Supreme Court (in Finnish, *korkein oikeus*), as the court has taken up the challenge of elaborating on the right to privacy and examining the interplay between constitutional provisions and ECHR obligations in several published decisions.

The inclusion of family life within the concept of private life was addressed specifically in the Supreme Court decision KKO 2011:11 on compensation for emotional suffering due to child abduction. The case concerned the possibility of awarding damages on the basis of emotional suffering, as the relevant provision (Tort Liability Act, 412/1975, chapter 5, section 6)[14] requires an

12 The implementation took place by act 906/2010, based on government proposal HE 66/2010 vp.

13 For comparison, see *Handbook on European Law Relating to the Rights of the Child* (European Union Agency for Fundamental Rights and Council of Europe 2015) 85. The handbook is available online at <https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf> accessed 15 October 2018.

14 In Finnish *vahingonkorvauslaki*. An unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/1974/en19740412_19990061.pdf> accessed 31 August 2018, but it is rather out of date at this point in time. However, the relevant part of the section is factually similar in that it refers to 'anguish arising from an offence against liberty, honour or the domestic peace or from another comparable offence'.

infringement of specific constitutional rights such as the right to privacy. The Supreme Court noted that child abduction involves interference with family life and that in the circumstances of the case this comprised a violation of the rights safeguarded by section 10 of the Constitution even though family life was not expressly mentioned in the provision. Thus the court awarded the damages that were sought.

The relation between ECHR obligations and the Constitution was examined in the landmark decision KKO 2012:11 on the establishment of paternity. In this rare and significant plenary decision, the court considered whether a legislative choice made in the Paternity Act of 1975[15] had to be overturned due to its lack of compliance with constitutional and human rights provisions. The original implementation of the 1975 Paternity Act had placed a rather restrictive time limit of five years from its entry into force on a child's right to bring a paternity case to court. This meant that some children born out of wedlock before 1976 lost their chance to establish paternity without ever having had the legal competence to bring action. The time limit had been ruled to be in violation of article 8 of ECHR in several ECtHR judgments against Finland, most notably in cases Grönmark v Finland[16] and Backlund v Finland[17] in 2010. In 2012, the Supreme Court noted that in examining the constitutionality of national legislation on the basis of the authorisation given to it in section 106 of the Constitution, it had to account for the provisions of ECHR and the case law of ECtHR as well. In effect, the decision meant including the human rights obligation to protect private and family life in the scope of constitutional protection. The court set aside the time limit that had been established almost forty years earlier and upheld the decision of the lower court that had established paternity.[18]

Moving on from the constitutional level, case law is also important in developing the protection of family life through applying substantive legislation. Many of the key provisions that help realise a child's right to family life can be found in the legislation on parenthood and adoption, custody and contact, child welfare services and care orders, and asylum and migration. These pieces of legislation have somewhat different aims and goals, though, and thus they emphasise different aspects of the right to family life.

15 Paternity Act 700/1975 (*isyyslaki*).

16 *Grönmark v Finland* App no 17038/04 (ECtHR, 6 July 2010).

17 *Backlund v Finland* App no 36498/05 (ECtHR, 6 July 2010).

18 The decision also reaffirmed the inclusion of family life within the concept of private life, echoing the preparatory works of the constitutional rights reform and the decision in KKO 2011:11.

A note on case law in Finland

The case law on child law has a few notable features in the Finnish context. In brief, the published case law of the Finnish Supreme Court (in Finnish, *korkein oikeus*) on family and child law does not comprise that many decisions per year, but the reasoning and the grounds that are examined in each decision have an important role in developing the law. Meanwhile, quite a few of the published cases consist of what Finnish jurisprudence loosely terms 'precedents giving instructions for reasoning',[19] reflecting the difficulties in presenting firm rules on the nuanced and complicated subject matter. The procedural context also brings with it some uncertainty in that there may be issues where a Supreme Court decision would be necessary for clarifying the law, but for one reason or another such a case has not been brought before the court yet.

While the Supreme Court publishes relatively few decisions per year, the Supreme Administrative Court's case law is more numerous. The jurisdiction of the Supreme Administrative Court (in Finnish, *korkein hallinto-oikeus*) covers administrative law, taxation, social security and more; more specifically, care orders and other child protection matters as well as issues concerning migration law belong to the Supreme Administrative Court's ambit. Its decisions serve a somewhat different function from those of the Supreme Court, as the case law contributes to the overview of the legality of administration as a whole in addition to deciding individual cases.[20]

As a result of the different traditions of the two supreme courts in Finland, along with the uncertainties of the procedural setting, the case law on children's right to family life has a few different strands that do not correspond directly to the issues emphasised in legislation. Some topics which are notable in legislation have not given much rise to case law, while some others have been the focus in relatively many cases. For example, the case law on adoption is rather sparse and does not elaborate all that much on the right to family life despite the topic being highly relevant for protection of family life. On the other hand, there is interesting case law on international child abduction that

19 In Finnish, *harkintaohjeprejudikaatti*, meaning precedents where there is no decisive legal rule being communicated by the court. See, for instance, Supreme Court judge Pertti Välimäki's essay on the procedural rules on appeal to Supreme Court, and on the role of precedent, available at <http://korkeinoikeus.fi/fi/index/muutoksenhakijalle/valituslupahakemuksensisallosta.html> accessed 1 September 2018.

20 Olli Mäenpää, *Hallinto-oikeus* (Alma Talent 2018) 849–851, Markus Kari (ed), *Oikeusvaltion rakentaja – Korkein hallinto-oikeus 100 vuotta* (Edita Publishing 2018).

also discusses the right to family life.[21] In the following section, I wish to outline these differences briefly and consider how they reflect on case law on the respective issues.

4 Family Life in Substantive Legislation and Case Law

4.1 *Parenthood and Adoption*

The protection of family life in the Acts on parenthood and adoption (Paternity Act, 11/2015, *isyyslaki*[22] and Adoption Act, 22/2012, *adoptiolaki*)[23] focuses on *biological descent and legal status*. Most recently, the newly enacted Maternity Act (253/2018, *äitiyslaki*) has extended the legal recognition of parenthood to co-mothers in certain cases. The acts are broadly similar in their approach to respect for family life. In short, the protection of private and family life is recognised as the constitutional right at hand, and the provisions of the acts try to strike a balance between the various parties' interests. Thus, for example, the child's right to private life is reflected in the provisions on the child's right to bring a paternity case to court and on his or her right of veto in certain circumstances, while the importance of family ties can be seen to underlie the time limit placed on the mother and the legal father if they want to bring action on revoking paternity to court (section 44).[24] The Paternity Act and Maternity Act also reflect the growing importance of intent as a factor for parenthood, as both allow for the possibility of registering parenthood on the basis of informed consent to assisted reproductive treatments.

Filiation and paternity fall within the scope of private life according to article 8 of the ECHR, and the protection of private life and legal status is a key concern in the provisions of the reformed the Paternity Act of 2015. However, established family ties are also pertinent and bring the protection of family life to the fore. For instance, section 44 of the Paternity Act provides that the mother or the legal father can only bring an action on annulling paternity within

21 Cases on international child abduction according to the Hague Convention are heard at the Helsinki Court of Appeals as the first instance. Thus, they do not require leave to appeal (in Finnish, *valituslupa*) in order to be brought before the Supreme Court on appeal.

22 The unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/2015/en20150011_20151596.pdf> accessed 1 September 2018.

23 The unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/2012/en20120022.pdf> accessed 1 September 2018.

24 See eg Markku Helin's systematic commentary of the Paternity Act, *Isyyslaki* (Talentum Pro 2016).

two years of the birth of the child as a rule,[25] a limitation that helps protect the child's established circumstances. One of the more interesting provisions for the protection of family life is section 42, subsection 3, which concerns situations in which the child's legal father knew that he was not the biological father and still acknowledged the child in writing as his. In such cases, the legal father is barred from bringing the case to court, thus indirectly protecting the child's right to established family ties.

> The reform of the Paternity Act in 2014 also emphasised the role of human rights and the praxis of the ECtHR. The influence of ECtHR case law is visible throughout the Act, but two notable examples are found in section 42, subsection 2 and section 65. The first example, section 42, subsection 2, deals with the case where a man suspects he is the actual biological father of a child whose mother is married to someone else. The ECtHR has examined the human rights dimensions involved in somewhat similar circumstances in e.g. Anayo v Germany[26] and Ahrens v Germany[27] and noted that the member states could be considered to have a wide margin of appreciation.[28] The Finnish legislative approach in section 42, subsection 2 aims for a reasonable balance between the different interests. In brief, the putative father will have right to contest the husband's paternity if three criteria are fulfilled: the mother and the husband were living apart at the time, a relationship comparable to a family bond was formed between the putative father and the child, and the bringing of the action is in the best interests of the child.[29]
>
> The second example revisits the issues brought up in the Supreme Court decision KKO 2012:11. The key question in the case concerned the

25 The time limit is the same as in the previous act before the 2014 reform. Interestingly, the preparatory works for the reform only refer to the child's best interests, not her right to family life, as grounds for the limitation (see government proposal HE 91/2014 vp 57.) While the mention is brief, it can be surmised that the best interests of the child were seen as encompassing the right to family life as well.

26 *Anayo v Germany* App no 20578/07 (ECtHR, 21 December 2010). Here, the application concerned contact between the biological father and child as opposed to paternity itself, and the Court found a violation of article 8.

27 *Ahrens v Germany* App no 45071/09 (ECtHR, 22 March 2012). In cases Ahrens v Germany and Kautzor v Germany no violation was found, as the German courts were considered to have struck a balance between the conflicting interests.

28 Hirvelä and Heikkilä (n 10) 700.

29 It is worth noting, however, that the provision does not apply to the reasonably common case where the child's paternity is established on the basis of somebody acknowledging the child, even if the other criteria were met.

constitutionality (and compliance with human rights provisions) of the original implementation of the Paternity Act of 1975. As discussed earlier, the original act had set a restrictive time limit on a child's right to bring a paternity case to court. The time limit was determined to be unconstitutional by the Supreme Court in 2012, and in 2015 section 65 of the new Paternity Act removed this time limit completely.

In adoption cases, the importance of family life shows in two key aspects. First, the consent of a child's earlier parents is considered in assessing an adoption application, and in cases where consent is not given the decision may turn on whether there was family life between the child and the non-consenting parent. Second, the existence of established family life has also been relevant in earlier case law when considering whether to allow adoption of an adult, since Finnish law requires an established bond like that between a child and a parent.

In contrast to paternity, adoption decisions may not as a rule be revoked or annulled. However, an interesting Supreme Court decision took place in case KKO 2011:106. The case concerned a decision on adoption that had mistakenly been made a few days after the adoptive father had died, even though by law there were no grounds for the decision at that point. The child's right to family life was a crucial factor in not revoking the decision.

4.2 *Child Custody and Contact*

The legislation and case law on child custody and contact is based on the Child Custody Act, 361/1983 (*laki lapsen huollosta ja tapaamisoikeudesta*). The Act can be said to protect children's family ties both in formal terms (in *issues concerning the legal status of having custody*) as well as more pragmatically in protecting *relations of care.*[30] While the Act is still based on a rather traditional understanding of family life, a significant reform took place in late 2018[31] and the new provisions also recognise the possibility of family life being established between a child and a step-parent or grandparent, for example.[32] When the reform enters into force, it will be possible to establish a legally enforceable

30 For discussion on care and ethics of care in relation to child custody and contact, see eg Carol Smart and Bren Neale, *Family Fragments?* (Polity Press 1999) and Choudhry and Herring (n 2), as well as in the Finnish context Sanna Koulu, *Lapsen huolto- ja tapaamissopimukset: Oikeuden rakenteet ja sopivat perheet* (Lakimiesliiton kustannus 2014).

31 HE 88/2018 vp. The proposal is available online at <https://www.finlex.fi/fi/esitykset/he/2018/20180088.pdf> accessed 15 October 2018.

32 See HE 88/2018 vp (n 31) 54–55.

right for the child to have contact with, for example, a step-parent if the criteria in the proposed section 9 c are met. This could also indicate that there will be more emphasis on protecting family ties even when they are not based on biological or legal status.

The case law of the ECtHR has established that the mutual enjoyment of family life by parents and children is a core part of the right to private and family life in article 8.[33] This stance is reflected also in Finnish case law on contact between parents and children, such as the Supreme Court case KKO 2017:54. The decision itself was somewhat technical in nature, as it dealt with how the Court of Appeal should have handled the case, but the reasoning also considered the protection of family life. In the case there had been a dispute concerning contact between two young children and their mother who lived separately, and the father had refused to bring the children to the previously-agreed meetings because of the mother's earlier lateness in returning the children. The District Court (the court of first instance) had refused the mother's application for enforcement, and the Court of Appeal had declined to hear the case. The Supreme Court noted, *inter alia*, that the original decision had interfered with the mother's and the children's right to family life, and thus the Court of Appeal should have heard the case.[34] Interestingly, the decision does not mention any specific constitutional provisions. Instead, it discusses 'constitutional and human rights' as a whole, and only refers specifically to the provisions of ECHR and the case law of the European court. A similar model of reasoning was arguably adopted in the 2018 preparatory works for the reform of the Act on Custody and Contact in that the government proposal discusses the constitutional rights of children only briefly and focuses more on the ECHR obligations and case law.[35] However, the government proposal does include a weighty section on the compatibility of the proposed provisions with the Constitution and with international treaty obligations.[36] Here, the proposal considers the interplay of constitutional provisions, ECHR and CRC obligations, and other international

33 See eg Hirvelä and Heikkilä 2017 (n 10) and *Handbook on European Law Relating to the Rights of the Child* (n 13) 82.

34 The case also concerned the importance of the best interests of the children, as the mother's lateness in returning the children was due to her worry about the other child's visible bruises. However, it is worth noting that as the precedent concerned procedural issues, the Supreme Court did not carry out a full evaluation of the best interests of the children in the material case.

35 See eg the brief remarks on HE 88/2018 vp (n 31) 5, and the further discussion on ECtHR case law on 13–14.

36 HE 88/2018 vp (n 31) 73–75, on whether normal legislative procedure is appropriate for the reform.

treaties in a rather successful way. The protection of family life is only addressed briefly, though, and the constitutional provision most in the spotlight is section 9 of the Constitution on the freedom of movement.[37]

4.3 *Child Protection and Child Welfare Services*

The act on child protection and child welfare services (Child Protection Act, 417/2007, *lastensuojelulaki*) is rather pragmatic with regard to the protection of family life. While the main focus is on the *legal position of the children themselves and their parents*, there are also provisions that recognise *the variability of family life* (e.g. section 32 on the child's close relations and section 54 on contact when the child is in care). Thus, section 32 provides, among other things, that before a child is placed away from home, the authorities should investigate whether it is possible for the child to live with their non-residential parent or with relatives or other close persons or whether these people can otherwise participate in supporting the child. Similarly, the section on contact after a care order (section 54) notes the following:

> Children in substitute care must be guaranteed human relations that are important, continuous and safe for their development. Children have the right to meet their parents, siblings and other people close to them by receiving visitors or by making visits outside the place of substitute care and to keep in contact otherwise [...].

As mentioned above, there is a lot of case law on child protection and child welfare services.[38] In addition to the case law of the Supreme Administrative Court, many highly relevant issues are examined more closely in the praxis of the Parliamentary Ombudsman. The Ombudsman's role is overseeing that public authorities and officials act in accordance with the law and with constitutional and human rights obligations, and the Ombudsman can also carry out inspections, in youth homes or child protection facilities for example. The Ombudsman's praxis is especially relevant for those issues that rarely give rise to actual court cases, such as local practices in facilitating contact between

37 HE 88/2018 vp (n 31) 74–75. The issue here concerns a proposed provision (section 9 b) to the effect that in some rare circumstances a parent may have to hand over their passports before a visitation between parent and child can take place.

38 For an overview of the Finnish context see Tarja Pösö and Raija Huhtanen, 'Removals of children in Finland: A mix of voluntary and involuntary decisions' in Kenneth Burns, Tarja Pösö and Marit Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (OUP 2016).

children in care and their other family members, that are still significant for the actual realisation of children's right to family life.[39]

However, while the protection of family life is an important concern in child protection cases, the consideration of family life is often tacit. The protection of family life obviously affects the interpretation of the Child Protection Act, especially when considering placement into substitute care, but a detailed examination of the elements of family life is uncommon. The slight exception here seems to consist of cases concerning contact during substitute care. For example, a recent Supreme Administrative Court decision in KHO 2017:54 referred to the protection of family life and noted that the provisions on contact must also allow for the establishment of new close relationships during the care order. While the circumstances of the case were somewhat unusual, the Court stated specifically that the child's right to close relationships as guaranteed in section 54, subsection 1 is not limited to relationships established before the child was placed in care, but that the provision also means that the child has the right to develop new relationships during care. The decision as a whole is rather thorough and carefully reasoned.[40] The Court also includes section 10 of the Constitution in its list of legislation that was applied and discusses the viewpoints that had been presented by the Constitutional Law Committee during the drafting of the Child Protection Act.

4.4 *Migration and Asylum*

Migration and asylum issues are covered by the Aliens Act, 301/2004 (*ulkomaalaislaki*),[41] which might be described as having a somewhat ambivalent stance

39 Cf eg the case of *Gluhakoviç v Croatia* App no 21188/09 (ECtHR, 12 November 2011). For a discussion of legal safety in court settings, see Virve-Maria de Godzinsky, 'Legal Safety of the Child in Court Procedures of Care Orders' (2013) 7–8 Nordisk socialrättslig tidskrift 43–80.

40 Another thoroughly and carefully argued decision took place in case KHO 2015:38, which concerned restrictions placed on phone calls between father and child. There were restrictions on contact due to concerns about domestic violence, and the social authorities had determined that phone calls also needed to be restricted. The phone call had to be on speaker phone so that a member of the staff at the child's residential home could make sure that the child was not harassed. The Supreme Administrative Court examined this restriction in light of domestic legislation, constitutional rights, and ECtHR case law, and came to the conclusion that the restriction was unlawful. The decision mentioned but did not consider the significance of family life in particular; instead, the decision weighed the secrecy of confidential communications according to section 10 ss 2 of the Constitution (see above, n 8 for the unofficial translation).

41 The unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/2004/en20040301_20101152.pdf> accessed 26 February 2019.

on children's family life. The Act is one of the few pieces of legislation that is based on the existence of family ties and established family life rather than on legal status, but, in practice, its implementation can be challenging.

The existence of family ties is one of the grounds that are considered in granting residence permits. Family ties can be established on the basis of legal status (see section 37, subsection 1), biological kinship (e.g. section 65) or *de facto* family life (section 37, subsections 2–3). The section on defining family members is rather lengthy but valuable for examining the understanding of family life for the purposes of the act. Firstly, section 37, subsection 1 notes that when applying the act, 'unmarried children under 18 years of age over whom the person residing in Finland or his or her spouse had guardianship are considered family members'. Subsection 2 provides for the recognition of family membership with regard to marriage-like relationships. As a rule, the couple must have lived together in the same household for at least two years, but this time limit is waived if the persons have a child in their joint custody. While subsections 1 and 2 refer to guardianship and custody as legal concepts, subsection 3 makes it clear that *de facto* guardianship and care can also establish family ties for the purposes of the act:

> (3) If an unmarried child under 18 years is in de facto care of a person and is dependent on such care, he or she shall be considered to be the guardian's child for purposes of ss 1 even when no official statement is available on the guardianship (foster child). This requires reliable evidence that the child's previous guardians have died or are missing and that the sponsor or his or her spouse was the child's de facto guardian before the sponsor entered Finland. If the sponsor is a foster child residing in Finland, reliable evidence is required to show that the person concerned was the sponsor's de facto guardian before the sponsor entered Finland. (549/2010)[42]

The consideration of *de facto* family ties has proved to be highly relevant in practice, as a large amount of residence permits are issued on basis of family ties.[43] With the on-going conflicts in the Syria region official proof of family ties can be hard to obtain, and assessment of family ties often relies on less black-and-white evidence even in clear cases. Family ties are examined in the

42 Here, the available unofficial translation is somewhat misleading regarding ss 3, so the text included here is the author's own translation.

43 Eg Jaana Palander, 'Perheenyhdistäminen ja perhe-elämän suoja' in Heikki Kallio, Toomas Kotkas and Jaana Palander (eds), *Ulkomaalaisoikeus* (Talentum 2018) 357.

proceedings concerning the need for international protection or other grounds for asylum, and family ties also affect the consideration of the best interests of the child.[44]

The amount of cases also shows in the case law of the Supreme Administrative Court, and an important strand in this case law is assessing how 'real' family ties are. For instance, in its decision KHO 2016:204 the court examined the case of a mother who had been granted asylum after leaving her 2-year-old child behind in her own mother's care. The mother had applied for a residence permit for her child as well, and the court assessed whether she should be considered as having relinquished the custody of the child. The court referred to articles 3, 7 and 10 of CRC as well as article 8 of ECHR among other applicable law, and came to the conclusion that the 2-year-old was the mother's child in the sense of section 37. The alternative approach would have been to consider the grandmother as the child's guardian according to section 37, subsection 3, which would have precluded the mother's role. The decision does not refer to any constitutional provisions or specific ECtHR case law, but the provisions of CRC and ECHR are given a lot of weight in the reasoning.

5 Conclusions

The Finnish Constitution does not explicitly mention the protection of family life in its list of constitutional rights and section 10 on the right to privacy only mentions private life. However, the preparatory works make it clear that the concept of private life is to be understood as encompassing family life as well, and this starting point has been reaffirmed in case law. All in all the two highest courts of Finland, the Supreme Court and the Supreme Administrative Court, have had a significant role in integrating the human rights obligations with our national legislation and constitutional rights protection, and their decisions can also influence legislative work. While case law has been noteworthy in elaborating on the protection of family, case law does have a few drawbacks as

44 See Hannele Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019); Hannele Tolonen and others, Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same? in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019); Suvianna Hakalehto, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

a way of developing law as well. First, since case law by its very nature concerns individual cases, it only rarely allows for the kind of universalistic legal argumentation that is necessary for in-depth analysis of concepts such as family life. A second, more fundamental issue is that judicial decision-making is not subject to the parliamentary process, so the courts' law-making powers need to be limited – as the Supreme Court recognised in its significant decision in KKO 2012:11.

Thirdly, the concept of family life can be somewhat hard to pin down, and this means that family life is surprisingly rarely discussed or elaborated on in case law. Family ties and their importance are either taken as a given or elided in published cases. Some of the more interesting case law is to be found in the field of migration and asylum law, where family ties are examined more plainly. However, the paradigmatic difference between this body of case law and more traditional family law cases is striking, as in family law cases family ties are rarely if ever examined in terms of whether they are authentic enough or whether they merit protection.

Especially in cases that concern the nuclear family, without direct interference from the State or from other parties, the child's right to family life is often conflated with that of the parents. Thus, for example, with regard to contact between child and parent, the child's right to family life is indirectly protected when the parent seeks contact. Meanwhile, a child has no independent legal standing according to the Act on Custody and Contact (361/1983) to demand for their right to family life to be upheld if the parent wishes to cut ties with the child. The recent reform of the Act does account for the possibility of the child having close relationships that are not based on parenthood, but here too the focus is on 'established relationships that are comparable to the relationship between parent and child' and the child has no independent procedural standing.

In effect, while children's rights are inextricably linked with the right to family life, children are not necessarily perceived as having an *independent* right to protection of their family life. While children's family life is protected on the basis of several constitutional and human rights provisions, that protection sometimes seems to derive from the protection of the family unit rather than from any independent right of the child. It is as if the protection of family life is a side effect of the family itself. Of course, the implicit conflation of different family members' right to family life is rather reasonable in cases where there is no internal conflict or tension between individuals' rights to family life. However, it may mean that it is harder to recognise and safeguard children's right to family life in situations that do not match with this ideal conception of the family.

References

Choudhry S and Herring J, *European Human Rights and Family Law* (Hart Publishing 2010).

Eekelaar J, *Family Law and Personal Life* (OUP 2009).

de Godzinsky V-M, 'Legal Safety of the Child in Court Procedures of Care Orders' (2013) 7–8 Nordisk socialrättslig tidskrift 43–80.

Gozdecka D and Koulu S, 'What to do with the Other in Human Rights Law? Ethics of Alterity versus Ethics of Care' in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds), *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections* (Routledge 2016) 171–190.

Hakalehto S, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Hallberg P and others, *Perusoikeudet* (WSOYpro 2011).

Handbook on European Law Relating to the Rights of the Child (European Union Agency for Fundamental Rights and Council of Europe 2015) <https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf> accessed 26 February 2019.

HE 309/1993 vp. Government proposal for a reform of constitutional rights provisions. (Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta).

HE 66/2010 vp. Government proposal for the incorporation and implementation of the European Convention on the Exercise of Children's Rights. (Hallituksen esitys eduskunnalle lasten oikeuksien käyttöä koskevan eurooppalaisen yleissopimuksen hyväksymisestä ja laiksi sanotun yleissopimuksen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta).

HE 91/2014 vp. Government proposal for a new Paternity Act. (Hallituksen esitys eduskunnalle isyyslaiksi ja eräiksi siihen liittyviksi laeiksi).

HE 88/2018 vp. Government proposal for a reform of the Act on Child Custody and Contact. (Hallituksen esitys eduskunnalle laiksi lapsen huollosta ja tapaamisoikeudesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi).

Helin M, *Isyyslaki* (Talentum Pro 2016).

Hirvelä P and Heikkilä S, *Ihmisoikeudet: Käsikirja EIT:n oikeuskäytäntöön* (Alma Talent 2017).

Kari M (ed), *Oikeusvaltion rakentaja – Korkein hallinto-oikeus 100 vuotta* (Edita Publishing 2018).

Koulu S, *Lapsen huolto- ja tapaamissopimukset* (Lakimiesliiton Kustannus 2014).

Mäenpää O, *Hallinto-oikeus* (Alma Talent 2018).

Nieminen L, 'Perusoikeuksien yksilöllisyys ja perhekäsitykset perusoikeusjärjestelmässä' (1996) 5–6 Lakimies 909–929.

Nieminen L, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013).

Palander J, 'Perheenyhdistäminen ja perhe-elämän suoja' in Heikki Kallio, Toomas Kotkas and Jaana Palander (eds), *Ulkomaalaisoikeus* (Talentum 2018).

PeVM 25/1994. Constitutional Law Committee memorandum no. 25 on the government proposal for a reform of constitutional rights provisions. (Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta).

Pösö T and Huhtanen R, 'Removals of children in Finland: A mix of voluntary and involuntary decisions' in Kenneth Burns, Tarja Pösö and Marit Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (OUP 2016).

Smart C and Neale B, *Family Fragments?* (Polity Press 1999).

Tolonen H, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Tolonen H, Koulu S and Hakalehto S, Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same? in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Välimäki P, 'Valituslupajärjestelmästä ja valituslupahakemuksen sisällöstä' (Korkein oikeus 2013) <http://korkeinoikeus.fi/fi/index/muutoksenhakijalle/valituslupahakemuksensisallosta.html> accessed 26 February 2019.

CHAPTER 18

Children's Right to Family Life and the Swedish Constitution

Johanna Schiratzki

1 Introduction: Children and Other Subjects[1]

The Swedish Constitution, in chapter 1, section 2 of the Instrument of Government, imposes a duty on the Swedish State to work positively to protect each individual's right to privacy and family life. The Constitution states as follows: 'The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of the individual'.[2]

The Swedish Constitution further includes a dedicated provision for children in chapter 1, section 2 of the Instrument of Government.[3] This provision is not enforceable but provides general aims and ambitions for the governance of children (and adults) in Swedish society.[4] The link between the Swedish Constitution and human rights has been described as too complex to summarise briefly.[5] There is no doubt, however, that the understanding of chapter 1, section 2 of the Instrument of Government is closely connected to human rights as expressed in conventions from European Union, the European Council and the United Nations.[6] Three human rights instruments with a strong bearing on the constitutional right to family are, therefore, the Charter of the European

1 Approved by the Ethical board of Stockholm 17-05-2018. Registration number 2018/704-31-5.

2 Translated in Magnus Isberg, *The Constitution of Sweden The Fundamental Laws and the Riksdag Act* (Riksdagen 2016). *See* Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

3 Legislative Bill 2009/10:80 (Sw. *Prop. 2009/10:80 En reformerad grundlag*).

4 Legislative Bill 1975/76:209 (Sw. *Prop. 1975/76:209 om ändring i regeringsformen*) 32.

5 Lena Marcusson, 'Det offentliga uppdraget och de mänskliga rättigheterna' in Anna-Sara Lind and Elena Namli (ed), *Mänskliga rättigheter i det offentliga Sverige* (Studentlitteratur 2017) 33.

6 Chapter 10, section 6 Instrument of Government; chapter 2, section 19 Instrument of Government; chapter 10, section 1–2 Instrument of Government.

Union, the European Convention on the Fundamental Human Rights and Freedoms (ECHR) and the United Nations Convention on the Rights of the Child (CRC).[7] Article 7 of the Charter of the European Union is identical to article 8.1 of the ECHR. Children's right to privacy and family life is further protected by the CRC, foremost by articles 16, 7 and 9 as well as articles 18, 20 and 21.

The right to privacy and family life is a so-called negative right, as well as a positive right.[8] It imposes a duty on the State not to intervene in family life and to afford protection against violence from non-State actors.[9] The State may intervene in family life only if such an intervention is in accordance with the law. An intervention must also be considered necessary in a democratic society in the interests either of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The last ground – for the protection of the rights and freedoms of others – is frequently applied with regard to interventions in the family life of children. States also have positive obligations to secure respect for private and family life under article 8 ECHR.[10] The State's duty to secure respect for private and family life is crucial in relation to migration law and family reunification. Recent temporary amendments of the Swedish migration law and related enactments have been considered a non-proportional infringement of the right to family life child according to article 8 ECHR.[11]

As a consequence of the dual nature of the right to protection for family life, the requirement of legality and the obligation to promote the best interests of the child, a multitude of legal acts relating to the protection of the family life of children have been passed by the Swedish legislator. The legal activity further points to the fact that the right to family life has a bearing on virtually all areas

7 See Louise Dane, 'Europadomstolen och barnets bästa' (2015) 2 *Förvaltningsrättslig tidskrift* 193–224; M. Grahn-Farley, 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen' (2017) Europarättslig tidskrift 651–669.

8 ECtHR, *Guide on article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (Updated on 31 August 2018) 9, with reference to *Kroon and Others v the Netherlands* App no 18535/91 (ECtHR, 27 October 1994) para 31. <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed date Month year.

9 Eg Case of Hajduová v Slovakia App no 2660/03 (ECtHR, 30 November 2010), para 46.

10 Guide on article 8 of the European Convention on Human Rights (n 8) 9, with references to *Lozovyye v. Russia* App no 4587/09 (ECtHR, 24 April 2018) para 36, *Evans v the United Kingdom* [GC] App no 6339/05 (ECtHR, 10 April 2007) para 75, and *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

11 The Migration Court of Appeal, no 5407–08. 2018:20, 13 November 2018.

of child law – given the child's need for care and protection as well as guidance for autonomy and participation. Some of these aspects, such as regulations on paternity and out-of-home care relate to the question of who are considered a child's legally recognised parents and who may be considered as *de facto* parents. According to the case law of the European Court of Human Rights (ECtHR), children's family consists of persons with *ipso jure* recognised positions as parents as well as *de facto* family members. For defining a *de facto* family, the existence of an emotional attachment and close personal ties are key.[12] As will be discussed below, the existence of *de facto* family relation may trump legally recognised family relations. There is a tension between the two concepts of construing a family in that the fundamental part of the right to family life is the right to live together so that family relationships may develop normally. If this is the case, and a child lives with his or her legally recognised parents and family relations develops normally, the child's legally recognised parents are also *de facto* parents.[13] A child may, however, develop *de facto* family ties to adults who are not legally recognised parents. For this to happen the child's right to family life understood as living together with *de facto* parents is either not fulfilled or extended. The first case would be when the child is not living with his or her legally recognised parents and, therefore, does not have a close personal tie to them. In the second case, a child could be living with the legally recognised parents as well as other persons. This could be, for example, a partner to a legally recognised parent living with the child or children living together as siblings.

Although children's right to family life has a bearing on virtually all areas of child law, this chapter is primarily limited to a discussion on the right to family life of the child with regard to the *establishment* of a family, either by a child's birth, adoption, custody or care-arrangement. These questions are not expressively covered by the Swedish Constitution.[14] They are, however, covered by article 7.1 of the CRC, which states as follows:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

12 Guide on article 8 of the European Convention on Human Rights (n 8) 46, with references to *Paradiso and Campanelli v Italy* [GC] App no 25358/12 (ECtHR, 24 January 2017) para 140.

13 *Marckx v Belgium* (n 10) para 31; *Olsson v Sweden* (*no. 1*) App no 10465/83 (ECtHR, 24 March 1988) 59.

14 See Legislative Bill 2009/10:80 (*En reformerad grundlag*). Swedish Government Official Reports 2008:125 SOU 2008:12(*En reformerad grundlag* del 1) 451 refers to the protection offered in legislative acts such as the Parental Code and the Social Services Act.

The last phrase to 'be cared for by his or her parents' is in the case law of the European Court of Human Rights, often expressed as 'the mutual enjoyment by parent and child of each other's company'.[15] It is presumed to constitute a fundamental element of family life. The aim of this article is to give an overview of a child's right to know and be cared for by his or her parents – be it birth-parents, adoptive parents, divorced parents, step-parents, foster parents or institutions[16] – in the light of the Swedish Constitution, recent legislation and case law. To set the scene, some characteristics of Swedish society are sketched in the next section.

2 Family Life in Sweden

When family life in Sweden is presented in figures, some features are notable in a comparative perspective. Some of these are the high percentage of children born to unmarried parents, 65 per cent, and the high percentage of employed mothers.[17] Couples, as well as single women, are entitled to assisted reproduction within the Swedish health system. Surrogacy is not permitted in Sweden. Paternity may be, however, established for fathers of children born to surrogacy-mothers abroad.[18] As will be discussed below, equality for parents and prospective parents have been paramount in the development of the law. In current amendments of Swedish family law, the child's right to knowledge

15 Case of *McMichael v the United Kingdom* App no 16424/90 (ECtHR, 24 February 1995). See further Elisabeth Gording Stang, 'The Child's Right to Protection of Private Life and Family Life' in Said Mahmoudi and others, *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

16 I am indebted to Professor John Asland for his insightful discussion on this topic at the 20th Nordic Family Law Seminar 25–26 May 2018. See also Kirsten Ketscher, 'Relationsret – en ny retsvidenskabelig optik?: Fra ægteskabs- og familieret mod en inkluderende relationsret' (2012) 35 *Retfaerd* 81–98; Erik Mägi and Lina-Lea Zimmerman, *Stjärnfamiljejuridik: Svensk familjelagstiftning ur ett normkritiskt perspektiv* (Gleerups 2015).

17 The Family Law and Parental Support Authority, *Statistics on family law 2017* (28 June 2018) Art No 2018-6-2. <http://www.mfof.se/en/english/> accessed 12 December 2018; Ylva Nowak and Heléne Thomsson, 'Motherhood as idea and practice: A discursive understanding of employed mothers in Sweden' (2001) 15 Gender & Society 407–428. See also Johanna Schiratzki, *Barnrättens grunder* (7 edn, Studentlitteratur 2019); Johanna Schiratzki, *Mamma och papa inför rätta* (Iustus 2008).

18 Titti Mattsson and Lotta Dahlstrand, 'Erkännande av föräldraskap vid assisterad befruktning utomlands' (Blendow Lexnova Expertkommentar – Familjerätt 2018).

of his or her (genetical) origins is given a lot of attention in relation to the establishment of paternity and adoption.[19]

Around 50 per cent of all children experience parental separation during childhood. Approximately one-third of all children with separated parents are perceived to have dual residence, in other words, share their time between parents' households.[20] As a main rule, parents have joint custody after a separation, which is the case for over 70 per cent of children.[21] According to the Swedish interpretation of joint custody, both parents should agree on decisions necessary for the up-bringing of the child.[22] A child's right to autonomy in relation to the custodian's responsibilities, as well as according to procedural law, is challenging to pinpoint down.[23] Procedural law does not grant children under 18 years the right to litigate (*talerätt*) in, for example, court disputes on adoption and custody. In other areas, such as paternity and compulsory care, the child has a formal right to litigate (*talerätt*). Given that the child lacks procedural capacity (*processbehörighet*), the child is dependent on his or her custodian or guardian as legal representative.[24]

3 Lack of Common Legal Concepts for the Establishment of Family

Swedish law recognises two ways for a child to get legal parents. These are either by establishing legal paternity and maternity in connection with the birth of a child or by adoption.

19 Legislative Bill 2017/18:121 (*Prop. 2017/18:121 Modernare adoptionsregler*); Legislative Bill 2017/18:155 (Prop. 2017/18:155 *Modernare regler om assisterad befruktning och föräldraskap*). See also Swedish Government Offical Reports 2018:68 (*SOU 2018:68 Nya regler om faderskap och föräldraskap*).

20 Swedish Government Official Reports (*SOU 2011:51 Fortsatt föräldrar – om ansvar, ekonomi och samarbete för barnets skull*).

21 Statistiska centralbyrån, *50 000 barn är med om en separation varje år* (2013).

22 Chapter 6, section13 the Parental Code. See also chapter 6, section13 of the Parental Code. Suggestions for amendments in legislation relating to custody and to the right of the child to 'enjoy the company' of his or her parents has not led to legislation. Swedish Government Official Reports 2015:71 (*SOU 2015:71* Barns och ungas rätt vid tvångsvård. Förslag till ny LVU); Swedish Government Official Reports (SOU 2009:68 *Lag om stöd och skydd för barn och unga* [*LBU*]*;* Swedish Government Official Reports (SOU 2007:52 *Beslutanderätt vid gemensam vårdnad m.m.*).

23 See Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

24 From the age of 15 years, children have procedural capacity in litigation on compulsory care.

The establishment of paternity and maternity for a child are not expressively covered in the Swedish Instrument of Government. Instead, these issues are regulated by legal acts such as the Parental Code, Act on Genetic Integrity, and Act on Personal Names.[25] As a main rule, a person is recognised as a mother when giving birth to a child, and as a father if having contributed his sperm. In case a child is born after assisted reproduction, in accordance with Swedish law, a person who has consented to the treatment on the to-be-mother is considered a father or a parent. The consent then replaces a genetic link.

During 2018 and 2019, comprehensive amendments were made to the Parental Code regarding establishment of paternity (chapters 1–3 Parental Code) as well as adoption (chapter 4 Parental Code).[26] Common to these amendments are a strong emphasis on the child's right to know his or her genetical origin in accordance with article 7 the CRC. In addition, the amendments meet adults' wishes for parenthood and respect for gender identity and sexual orientation, including gender changes.[27] The amendments have led to the regulation on establishment of family, as the Swedish Council on Legislation (*Lagrådet*), has pointed out, becoming hard to get an overview of, and arguably, to apply.[28] An example is the terminology in chapters 1–3 of the Parental Code, which appears to be inconsistent with both traditional language and the concepts used in other chapters of the Parental Code, as well as in other Swedish legal Acts. The following terms and definitions are now to be found in the Parental Code:[29]

MOTHER this could be either (a) a woman who gives birth to a child; or (b) in the case of changed gender, a woman who has contributed with sperm or have agreed to assisted conception with donor germs. However, the legal position of the sperm-contributing-mother or the mother that has agreed to assisted conception with donor germs is covered by legal rules regarding paternity.

FATHER this could be either (a) a man who is covered by the presumption for paternity of the child of a married woman, has acknowledge paternity or has consented to assisted conception

25 Parental Code (*föräldrabalken*; 1949:381) the Act on Genetic Integrity (*lag 2006:351 om genetisk integritet*) and the Act on Personal names (*lag 2016:1030 om personnamn*).

26 Chapters 1 and 4 of the Parental Code.

27 Legislative Bill 2017/18:121; Legislative Bill 2017/18:155.

28 Legislative Bill 2017/18:155.

29 Chapter 1, sections 10–15.

outside the body of a woman whom he is married to or living with; or (b) in the case of a changed gender, a man who gives birth to a child. However, the legal position of a father who gives birth to a child is covered by legal rules regarding maternity.

PARENT (a) a woman who is the mother's spouse, registered partner or cohabitant and has consented to assisted conception (Ch. 1, Sec. 9 Parental Code); or b) a gender-neutral term covering parenthood for men and women (e.g. Ch. 1, Sec. 15 Parental Code on the child's right to knowledge about its parents).

Thus, the well-established, highly gendered, concepts 'mother' and 'farther' are used inconsequently in that a person termed 'father' are dependent on rules for 'mothers', regarding i.e. social benefits, and vice-versa. Likewise, the concept of 'parent' is used inconsequently; either designating a female partner of a birth-mother or as a gender-neutral term for parenthood.

As of 2019 consent to assisted reproduction with donated sperm may constitute grounds for paternity when the assisted reproduction is carried out abroad, provided that the treatment has been performed at a competent institution and that the child is entitled to take part of the sperm donor data. As a consequence of the new rules it has been suggested that paternity should be lifted if these conditions are not fulfilled, e.g. if the child's right to know the donor's identity cannot be met by the competent institution abroad.[30] It is unclear how this broad possibility to revoke paternity correspond to the child's right of family life understood not only as a right to know about its genetic origins but also to be cared for by legally recognised parents especially when a *de facto* family relation is established.

An issue that may be closely connected with paternity is a child's right to citizenship, which is covered by the Constitution.[31] Chapter 2, section 7 of the Instrument of Government states the following:[32]

> No Swedish citizen may be deported from or refused entry into the Realm. No Swedish citizen who is domiciled in the Realm or who has previously been domiciled in the Realm may be deprived of his or her citizenship. It

30 SOU 2018:68 *Nya regler om faderskap och föräldraskap.*

31 Rebecca Thorburn-Stern, 'Vem får del av kakan? Om migranter, rättigheter och solidaritet' in Thomas Erhag, Pernilla Leviner and Anna-Sara Lind (eds), *Socialrätt under omvandling* (*Liber 2018*) 169.

32 Translated in Isberg (n 2).

> may however be prescribed that children under the age of eighteen shall have the same nationality as their parents or as one parent.

Children's right to citizenship may thus depend on their parents.[33] This dependency may *not*, according to the Swedish Supreme Court, be interpreted in the negative. In other words, a withdrawal of Swedish citizen's paternity should not affect citizenship. The Supreme Court have in the cases NJA 2014 p. 323 and NJA 2018 p. 103 found the Swedish State to be bound to pay compensation for wrongfully withdrawing citizenship as a consequence of a withdrawal of paternity.

4 Adoption—Consent from the Child but Not from Birth Parent

The legal position of a child's birth parents has been weakened by the 2018 amendments on adoption. An adoption may now be granted without consent of a parent with custody if that parent is absent, has a severe physical or psychological medical condition that prevents consent or if there are otherwise special reasons. What would constitute special reasons are not spelled out in the legislative bill. According to the legislative bill introducing the amendments, the possibility to pass an adoption of a child without the consent of a parent with custody is primarily intended for international adoptions. According to the Chapter 4 of the Parental Code, however, all adoptions of children, national as well as international, are covered. An adoption may not be granted without the consent of the child if the child has reached the age of 12 years. It is labelled a 'valve'. The exception should only be applied in exceptional cases when it would appear 'objectionable' if an adoption was not approved.[34] What that would be remains for the courts to determine.

The amendments could be described as a paradigm shift in Swedish law, as it is, in fact, introducing forced adoptions. The amendment that allows for a child to be adopted without the consent of a parent with custody was added late in the legislative process and has not been being circulated for formal consultation in the referral procedure of Swedish law-making. Nor has there been a public debate on the issue. This far-reaching change in the protection of right to family life was passed at time when very few children – less than 600 – a year were adopted.[35]

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33 Section 2 of the Swedish Citizenship Act (lag 2001:82 om svenskt medborgarskap).

34 Legislative Bill 2017/18:121 152.

35 In 2017, 240 children were placed for adoption through authorised organisations in 2017 (Legislative Bill 2017/18:121 95). An additional 21 applications for international

5 How Many Parents May Be Included in Family Life?

Swedish law is incoherent in its view on the number of parents that are considered to be in a child's best interests to have. With regard to the establishment of a family through adoption or assisted conception one parent is accepted:[36]

> That the child has one legal parent instead of two means an increased social and economic vulnerability for the child, e.g. if the parent becomes sick or dies. However, this does not mean that the child generally has a poorer upbringing than children who have two parents from birth.

One parent is thus accepted when establishing a family through assisted reproduction or adoption, whereas two parents are the norm in most other situations. In some areas of Swedish child law, such as custody, the right to family life of a child is understood as a right to have two parents, preferably as custodians, regardless of if the parents are living together in a traditional nuclear family or in separate households.[37]

In other areas of law, e.g. adoption, the interpretation of children's right to family life as including two parents is not upheld. Custody may not be shared between the foster parents and birth parents, nor may it be bestowed on more than two persons. In the public debate it has been suggested that to recognise parental rights for more than two persons would help to give children a more stable and secure childhood. It is argued that this would be the case for children in so-called step-families, same-sex relations and foster care.[38]

6 Right to Family Life in Post-Divorce Families

For a parent to have comprehensive legal rights and duties, in relation to his or her child, under Swedish law, the parent most have part in the custody. In the

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adoption of children was processed by the Authority for family law and parental support. In addition, around 300 Swedish children were adopted (Sw. *Myndigheten för familjerätt och föräldraskapsstöd*).

36 Legislative Bill 2014/15:127 (*Prop. 2014/15:127* Assisterad befruktning för ensamstående kvinnor) 12. Translation by the author.

37 Pernilla Leviner, 'Kärnfamiljsideal och fri familjebildning: oförenliga utvecklingsspår i den svenska familjerätten?' (2016–17) 3 Juridisk tidskrift 625–642.

38 Anna Singer, 'En, två, ett par eller flera?: föräldraskap i det 21:a århundradet' (2002) Svensk Juristtidning 377–389; Johanna Schiratzki, 'Förslag kan ge fler övergrepp' *Svenska dagbladet* (2 March 2016).

context of post-separation, the interpretation of the best interests of a child as having two parents is quite strongly upheld.[39] In line with this understanding of the right to family life, shared custody, shared residence or contact arrangements are encouraged in the Parental Code, as well as in the in case law and by the social welfare committee. The paramount argument for doing so is the child's right to family life.[40] The child's right to contact should not override the child's right to protection against maltreatment and other risks. In practice, however, it may be hard to properly assess the risks. It is further hard to assess the importance of the opinions of especially younger child, as guidelines and court praxis are lacking.

The Supreme Court has in case NJA 2017 p. 557 given a 16-year-old's opinions considerable weight with regard to liability for arbitrary handling of a child (*egenmäktighet med barn*) according to the Penal Code[41] and custody according to chapter 6 of the Parental Code.

> The child in case NJA 2017 p. 557 was at the time of Supreme Court's judgment, 16-year-old. She had three years earlier when her parents had joint custody been retained in Norway by a parent without the consent of the other. The Swedish Supreme Court held that child abduction and retention normally is considered inconsistent with the best interests of the child. Given the age of the child and her consequent position not to meet with her parent in Sweden, the Supreme Court found that the retaining parent could not be held liable for not returning the teenager against her explicit wishes. Neither did the Supreme Court consider it reasonable to expect the retaining parent to do more to make the child change her mind.

Issues on custody are to be decided in accordance with the best interests of the child. The understanding of the best interests of child and the right to family life are closely connected. The principal interpretations of the best interests of the child are to protect the child against harms and for the child to maintain close relations to both parents.[42] The right to family life understood as the parents and children seeing each other may depend on the parents' ability to co-operate.

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39 For example, Maria Eriksson, 'Contact, shared parenting, and violence: children as witnesses of domestic violence in Sweden' (2011) 25 International Journal of Law, Policy and the Family 165–183.

40 Swedish Government Official Reports 2017:6 (*SOU 2017:6 Se barnet!*).

41 Chapter 7, section 4 of the Penal Code (*brottsbalken*; 1962:700).

42 Chapter 6, section 2a of the Parental Code. The paramount argument for doing so is the child's right to family life. The right to family life understood as the parents and children seeing each other may depend on the parents' ability to co-operate.

A child's healthy attachment to his/her parent(s) is presumed to enable the child to establish new emotional bonds to a potentially quite large group of people, i.e. parents' current and former partners and their children. These relations are not covered by the Parental Code or any other legal Act.[43] Therefore, this heterogenous group of a child's potential *de facto* family members have no legal obligation to care for the child, nor a right to initiate litigation. By way of protecting *de facto* family relations between an adult and a child, the social welfare committee (*socialnämnden*) may on behalf of the adult initiate proceedings on contact (chapter 6, section 15 a, the Parental Code).

7 Right to Family Life for Children in Out-of-Home Care

A child may be placed with foster parents in accordance with the Social Service Act (S*ocialtjänstlag*; 2001:453) or following a compulsory care order, as per the Care of Young Persons Act (*Lag 1990:52 med särskilda bestämmelser om vård av unga*). Foster parents are contracted by the social welfare committee to take care of the child. They do not have an independent legally recognised relation to the child. They may, however, with the passing of time, develop *de facto* family relations to the child. The *de facto* family relation may, in turn, be legally recognised by a court order transferring custody from the birth parents to the foster parents. The social welfare committee are to consider initiating such a transfer of custody when a child has lived with the same foster family for three years.[44] A transfer of custody is considered to be a Swedish version of adoption of a child without consent from birth parents.[45] In 2013, 259 cases of transfer of custody to foster parents was reported.[46] The argument for transfer of custody to foster parents is to enhance the child's stability. For the child to have a right to contact with its family of origin, the birth parents may initiate court proceedings on contact. In other cases, the child contact with its family of origin depends on foster parents in their capacity of specially appointed custodians.

In Swedish case law, case NJA 2014 p. 307 from the Supreme Court and case HFD 2011 ref. 13 from the Supreme Administrative Court regard the interpretation of the best interests of the child when choosing between maintaining family relations for children in care in relation to biological parents or foster parents. In these judgments the Supreme Court, as well as the Supreme

43 Anna Singer, *Föräldraskap i rättslig belysning* (Iustus 2000).
44 Chapter 6, section 8, the Parental Code; chapter 6, section 8, the Social Service Act.
45 Swedish Government Official Reports 2015:71.
46 Swedish Government Official Reports 2015:71 621.

Administrative Court, concluded that the best interests of the child should be understood as a right to continue the *de facto* ongoing relations, i.e. social relations with the foster parents where prioritised over the birth parents legal standing as holder of custody. The child's right to family life with the family of origin was not analysed by the Supreme Administrative Court.

A child placed in a foster family has a right to contact with his or her his family-of-origin according to the Social Services Act as well as the Care of Young Persons Act. The implementation of this right may, in many cases, depend on the ability of the parents as well as the social welfare committee to support contact between the family of origin and the child. Birth parents, as well as other next-of-kin, has testified that they, contrary to the intention of the law, have been kept at arms-length from children in out-of-home care by the social welfare committee and by foster parents.[47]

In the Case of *S.J.P. and E.S. v Sweden*[48] the European Court of Human Rights, in 2018, found that a child's right to contact with his/her family of origin under article 8 of the ECHR be may be severely restricted without it constituting a breach to respect for private and family life when children are taken into compulsory care.

> The case concerned three siblings taken into care in 2009. The Swedish courts had placed restrictions on the applicants' contact with the children. At the outset, there was a total prohibition on contact but this was eventually lifted and the latest order, issued in April 2015, allowed them contact rights of six hours every other month.

It is worth noting that the total prohibition on limited contact between children and parents was lifted after six months. The contact granted since April 2015, six hours every other month, is of a duration that appears consistent with rulings of Swedish court. However, the Administrative Supreme Court in the case HFD 2017 ref. 40 were the Administrative Supreme Court ruled that strong reasons are required for a total prohibition on contact between a child in foster care and birth parents. This also applies to so-called upbringing placements when it is not considered realistic that the child returns to the birth parent(s).

Regardless of these rulings, a child's right to family life in relation to foster parents has been construed as sometimes conflicting with a right to family

47 The Supreme Administrative Court, Judgement Case no 6062-15, 17-06-15; Johanna Schiratzki, 'Hur ska en vårdnadshavare göra för att få hem ett barn som varit placerat för samhällsvård?' (2015) 1 Juridisk tidskrift.

48 Case of *S.J.P. and E.S. v Sweden* App no 8610/11 (ECtHR, 2 August 2018).

life with the child's family of origin.[49] The best interests of the child in care is frequently understood as exclusively dependent on the child's relations with the foster parents.[50] This perception of the best interests of the child is in stark contrast to the understanding of the best interests in post-divorce families. In post-divorce families, children are supposed to be able to establish and maintain close relations with several other.[51] For children in care, a close relation with the foster parents is presumed to exclude maintaining or re-building relations with the family of origin.[52]

8 Right to Family Life and Compulsory Care—Different Impact of Child Testimony

In Swedish court practice, children's right to family life in relation to compulsory out-of-home care frequently depend on issues of investigation and evidence, including information disclosed by a child potentially at risk of abuse. As is the case in relation to other legal issues with a bearing on the child's right to family life, such as custody, the importance of the views of the child is hard to assess. In the rulings of the Swedish Supreme Administrative Court, information from the child has been given quite different impact. An example is the Supreme Administrative Court's ruling in case HFD 2017 ref. 42. The case entails a six-year-old girl who had disclosed that her father often hit her and her siblings.

> In HFD 2017 ref. 42 the parents denied that violence had occurred and there was no evidence available, apart from the testimony of the six-year-old. The parents agreed to receive support from the social welfare committee, but did not consent to the children being placed in out-of-home care. In view of the purpose of the legislation, the Supreme Administrative Court held that information of a younger child could alone be the basis for a decision on compulsory care.

49 Titti Mattsson, *Rätten till familj inom barn- och ungdomsvården* (Liber 2010); Pernilla Leviner, 'När kan och bör placerade barn flytta hem: en oklar balansering mellan återförening och stabilitet i tre processer' in Ann-Christin Cederborg and Wiweka Warnling-Nerep (eds), *Barnrätt: En antologi* (Norstedts Juridik 2014).

50 Anders Broberg and Pia Risholm Motander (2006), 'Anknytning' in SOU 2015:71 *Barns och ungas rätt vid tvångsvård. Förslag till ny LVU*.

51 Legislative Bill 2005/06:99 (*Prop. 2005/06:99 Ny vårdnadsregler*) 57.

52 The Svea Court of Appeal (*Svea hovrätt*) 2015-03-23, T 108327-13.

Information from the six-year old was thus decisive for the decision on compulsory care of the child. This position could be contrasted with the case HFD 2014 ref. 46 decided by the Supreme Administrative Court three year earlier. In this case, information from a 15-year-old girl was disregarded.

> In HFD 2014 ref. 46 a 15-year-old asylum-seeking girl disclosed that she was beaten by her father. She was temporarily placed with a foster family, with the consent of her father. It was undisputed that the father insisted on the girl should undergo gynaecological examination to find out if she was still a virgin. The girl had threatened to take her life if she had to return to Russia with her family. The Supreme Administrative Court held that compulsory care should not be granted. The fact that the girl was an asylum-seeker was considered by the Supreme Administrative Court to weaken her credibility with regard to the alleged abuse. Other circumstances brought forward by the social welfare committee were not considered enough for a care order.

The position of the Supreme Administrative Court in the case HFD 2014 ref. 46 seems hard to accommodate with article 2 the CRC, on the right to equal treatment:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

It appears that the girl's status as an asylum-seeker was imperative to the conclusion of the Supreme Administrative Court that the family life of the 15-year-old should not be limited. The concerned raised by Leviner in this volume appears to be relevant in this area of child law as well. That is to say that there is a risk that 'perspectives and wishes [of children] are only included and taken into account when in line with what adults have already decided in individual cases and/or only an argument for what adults want when it comes to public decision-making'.[53]

53 Leviner, 'Voice but no Choice' (n 23). See also, Lotta Dahlstrand, *Barns deltagande i familjerättsliga processer* (Juridiska institutionen, Uppsala universitet 2004).

9 Is the Child's Right to Family Life Only a Right Know His or Her Origins, but Not to Be Cared for

The right to family life at the beginning of life, according to Swedish law, is made up by an intricate web of sometimes contradicting rights and duties of the child and the (presumed) parents. The 2018 and 2019 amendments of the Swedish Parental Code regarding adoption and establishment of paternity aim at strengthening the child's right to know his or her genetical origin in line with article 7 the CRC. Less is said concerning the child's right to be cared for by his or her parents.

A child's right to knowledge, according to article 7 of the CRC, does not necessarily correspond to a right to family life understood as a right to be cared for. The child's right to be cared for by his or her parents – defined as men or women recognised as mothers, fathers or parents under Swedish law – has not been co-ordinated with the far-reaching principal changes on how to become a parent. The result may be described as prioritising a child's right to know 'who one is' over the right to have legally recognised relations to a father, mother or other parent. An example is the suggestion to revoke established paternity for children conceived with donated sperm in institutions abroad on the grounds that the child is at some point, after the establishment of paternity, no longer entitled to take part of the sperm donor data. Such a discourse appears to jeopardise the child's right to family life understood as a right to be cared for by, once, legally recognised parents especially when a *de facto* family relation is established. The understanding and protection of this aspect of a child's right to family life has proven more challenging.

The challenge of protecting the child's right to family life cannot be met by constitutional rights alone, nor by human rights' convention. On the contrary, it takes careful legal craftmanship to create a comprehensive legal system that meets the demands of protecting and promoting those relations that make up contemporary family life. Given, however, recent developments in family law, which are characterised by speed, rather than careful consideration, it appears that a constitutional right to family life might help to give time for such considerations and cautious craftmanship.

References

Broberg A and Risholm Motander P (2006), 'Anknytning' in SOU 2015:71 *Barns och ungas rätt vid tvångsvård. Förslag till ny LVU.*

Cederborg A-C and Warnling-Nerep W (eds), *Barnrätt: En antologi* (Norstedts Juridik 2014).

Dahlstrand L, *Barns deltagande i familjerättsliga processer* (Juridiska institutionen, Uppsala universitet 2004).

Dane L, 'Europadomstolen och barnets bästa' (2015) 2 *Förvaltningsrättslig tidskrift* 193–224.

ECtHR, *Guide on article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (Updated on 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 12 December 2018.

Erhag T, Leviner P and Lind A-S (eds), *Socialrätt under omvandling* (*Liber 2018*).

Eriksson M, 'Contact, shared parenting, and violence: children as witnesses of domestic violence in Sweden' (2011) 25 International Journal of Law, Policy and the Family 165–183.

Family Law and Parental Support Authority, *Statistics on family law 2017* (28 June 2018) Art No 2018-6-2. <http://www.mfof.se/en/english/≥ accessed 12 December 2018.

Grahn-Farley M, 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen' (2017) Europarättslig tidskrift 651–669.

Isberg M, *The Constitution of Sweden The Fundamental Laws and the Riksdag Act* (Riksdagen 2016).

Ketscher K, 'Relationsret – en ny retsvidenskabelig optik?: Fra ægteskabs- og familieret mod en inkluderende relationsret' (2012) 35 *Retfaerd* 81–98.

Legislative Bill 1975/76:209 (*Prop. 1975/76:209 om ändring i regeringsformen*).

Legislative Bill 2005/06:99 (*Prop. 2005/06:99 Ny vårdnadsregler*).

Legislative Bill 2009/10:80 (*Prop. 2009/10:80 En reformerad grundlag*).

Legislative Bill 2014/15:127 (*Prop. 2014/15:127 Assisterad befruktning för ensamstående kvinnor*).

Legislative Bill 2017/18:121 (*Prop. 2017/18:121 Modernare adoptionsregler*).

Legislative Bill 2017/18:155 (*Prop. 2017*/18:155 *Modernare regler om assisterad befruktning och föräldraskap*).

Leviner P, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).

Leviner P, 'Kärnfamiljsideal och fri familjebildning: oförenliga utvecklingsspår i den svenska familjerätten?' (2016–17) 3 Juridisk tidskrift 625–642.

Leviner P, 'När kan och bör placerade barn flytta hem: en oklar balansering mellan återförening och stabilitet i tre processer' in Ann-Christin Cederborg and Wiweka Warnling-Nerep (eds), *Barnrätt: En antologi* (Norstedts Juridik 2014).

Lind A-S and Namli E (eds), *Mänskliga rättigheter i det offentliga Sverige* (Studentlitteratur 2017).

Mahmoudi S and others, *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

Marcusson L, 'Det offentliga uppdraget och de mänskliga rättigheterna' in A-S Lind and E Namli (eds), *Mänskliga rättigheter i det offentliga Sverige* (Studentlitteratur 2017).

Mattsson T, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Mattsson T, *Rätten till familj inom barn- och ungdomsvården* (Liber 2010).

Mattsson T and Dahlstrand L, 'Erkännande av föräldraskap vid assisterad befruktning utomlands' (Blendow Lexnova Expertkommentar – Familjerätt 2018).

Mägi E and Zimmerman L-L, *Stjärnfamiljejuridik: Svensk familjelagstiftning ur ett normkritiskt perspektiv* (Gleerups 2015).

Nowak Y and Thomsson H, 'Motherhood as idea and practice: A discursive understanding of employed mothers in Sweden'(2001) 15 Gender & Society 407–428.

Schiratzki J, *Barnrättens grunder* (7 edn, Studentlitteratur 2019).

Schiratzki J, 'Förslag kan ge fler övergrepp' *Svenska dagbladet* (2 March 2016).

Schiratzki J, *Mamma och pappa inför rätta* (Iustus 2008).

Schiratzki J, 'Hur ska en vårdnadshavare göra för att få hemmet ett barn som varit placerat för samhällsvård?' (2015) 1 Juridisk tidskrift.

Singer A, 'En, två, ett par eller flera?: föräldraskap i det 21:a århundradet' (2002) Svensk Juristtidning 377–389.

Singer A, *Föräldraskap i rättslig belysning* (Iustus 2000).

Stang EG, 'The Child's Right to Protection of Private Life and Family Life' in S Mahmoudi and others, *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015).

Statistiska centralbyrån, *50 000 barn är med om en separation varje år* (2013).

Swedish Government Official Reports 2007:52 (SOU 2007:52 *Beslutanderätt vid gemensam vårdnad m.m.*)

Swedish Government Official Reports 2008:125 (SOU 2008:12 *En reformerad grundlag* del 1).

Swedish Government Official Reports 2009:68 (SOU 2009:68 *Lag om stöd och skydd för barn och unga* (*LBU*)).

Swedish Government Official Reports 2011:51 (*SOU 2011:51 Fortsatt föräldrar – om ansvar, ekonomi och samarbete för barnets skull*).

Swedish Government Official Reports 2015:71 (*SOU 2015:71 Barns och ungas rätt vid tvångsvård. Förslag till ny LVU*).

Swedish Government Official Reports 2017:6 (*SOU 2017:6 Se barnet!*).

Swedish Government Offical Reports 2018:68 (*SOU 2018:68 Nya regler om faderskap och föräldraskap*).

Thorburn-Stern R, 'Vem får del av kakan? Om migranter, rättigheter och solidaritet' in Thomas Erhag, Pernilla Leviner and Anna-Sara Lind (eds), *Socialrätt under omvandling* (*Liber 2018*).

CHAPTER 19

Children's Right to Family Life in Denmark

Caroline Adolphsen

1 Introduction: Legal Framework for Children's Right to Family Life in Denmark

The right to family life is not directly protected in the Danish Constitution,[1] but involuntary placement of a child into care is considered an intervention in the right to personal liberty under section 71.[2]

The Constitution thus gives a limited *negative protection* against interventions by providing a safeguard against removal of the child from the family, but offers no *positive right* to family life. This right is only granted in the ordinary legislation, namely the Parental Responsibility Act[3] (governing custody and access), the Social Services Act[4] (governing interventions in the family and access during a placement of the child outside of his/her home), the Children's Act (establishing who the child's parents are)[5] and, of course, the law incorporating the European Convention of Human Rights (ECHR) into national law.[6] As the Convention on the Rights of the Child (CRC), unlike the ECHR, is not incorporated into Danish legislation, the child cannot refer to the convention in order to invoke rights that have no specific basis in the legislation.[7]

It is characteristic for the specific rules that they do not entail a starting point from which the child is capable of exercising his or her individual rights and when the parents exercise the rights. Furthermore, the rules show considerable consideration for the parents' rights to both privacy and family life, even when these rights are in conflict with the wishes and maybe even needs of the child, which can, for instance, be seen in the rules about establishing

1 The Danish Constitution of 5 June 1953 no. 169 (grundloven).
2 See Caroline Adolphsen, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
3 Parental Responsibility Act of 1 December 2017 no. 1417.
4 Social Services Act of 29 January 2018 no. 102 (Serviceloven).
5 Children's Act of 23 December 2015 no. 1817.
6 Act on Incorporating the European Convention on Human Rights of 19 October 1998 no. 750.
7 See Adolphsen, 'Constitutional Rights for Danish Children' (n 2).

parenthood and the rules about how to obtain contact between the child and the parent.

On can, of course, only speculate as to whether this unevenness in the regulation is caused by the lack of a specific constitutional protection of the child. As the chapter will show, the child's perspective or best interest and the focus on the child as an individual with an independent right to family life differs in the different sets of rules, making it natural to assume that a constitutional basis for the child's rights would strengthen them or at least force the legislator to make a common legislative ground for children's rights.

The focus of the chapter is parental responsibility, the child's right to contact with his or her family and the rules about public intervention in the child's family. However, as the Danish rules have a very strong focus on the parents as the child's primary family, the rules about establishing paternity or co-maternity are also a part of the chapter, as they are very categorical in setting up time limits for paternity or co-maternity cases.

2 The Right to Know Who Your Parents Are—Regulation of Maternity and Paternity

2.1 *The Duty of Care and the Importance of Establishing Maternity and Paternity*

It is considered a value in the rules regarding establishing parenthood[8] that fatherhood and co-motherhood is established so that the child has two parents: both in order to ensure maintenance for the child, but also out of regard for the child's emotional stability and identity creation.[9] It is furthermore only parents with legal custody who have a duty to care for the child, and the child is, therefore, better protected with two parents than with one.

However, the Danish rules do not guarantee the child two parents even if two people wish to be or become the parents of the child.

According to Danish law, the woman giving birth to the child is the child's mother.[10] Unless the child is adopted as an infant he/she will always know who the biological mother is and she will play some sort of role in the child's life until the child reaches the age of majority or the mother dies. The mother is

8 The Children's Act chapter 1–5.

9 Jonna Waage, *Børneloven med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2015) 47.

10 Irene Nørgaard, Caroline Adolphsen and Eva Naur, *Familieret* (3rd edn, Jurist- og Økonomforbundets Forlag 2017) 24.

automatically legal custody holder and has the parental responsibility over the child,[11] making her responsible for providing care for the child.

The child's right to a father or co-mother is not offered the same protection or regard in the legislation.

In order to become a co-parent, be that a co-mother or a father, directly from the birth of the child the mother's partner has to be either married to the mother or live with her in the period of conception and sign a document stating that he/she will care for and be responsible for the child.[12] If these criteria are not met, the co-maternity or paternity can also be established by the parents signing a declaration or by a district court stating the parenthood pursuant to the rules in the Children's Act.

The Children's Act covers all cases regarding establishing parenthood, but the possibility of appointing a parent who does not meet the criteria mention above is to a wide degree dependent on the mother's and father/co-mothers will to participate.

As long as the woman is still pregnant, the case can only be started by the woman herself and an administrative authority – the latter ensuring the public interest in establishing maintenance for the child (so that society will not have to offer financial support) and the child's interest in knowing who the other parent is. The child's right to two parents *independent* of the wishes of the mother is, therefore, not activated until the child is born.

After the child is born, both the mother, potential father/co-mother and the legal guardian of the child can start the case. If the legal guardian – *in casu* the mother – does not make sure that the case is started, the interest of the child is ensured by a specially appointed guardian who can start the case on behalf of the child.[13] The mother is obliged to disclose who the potential fathers/co-mothers are, if parenthood has not already been established,[14] but she cannot be subject to sanctions if she does not,[15] and the mother and potential

11 Her maternal rights can only be removed by either adoption (termination of the relationship with the child altogether) or by granting the father full custody over the child (which does not terminate her parental rights). If the child is placed into care the mother still holds the legal custody whereas the parental responsibility is largely assigned to the foster-parents or children's home.

12 See the Children's Act chapter 1-1a and the Parental Responsibility Act section 6 and 7. There are several nuances in the rules about periods of separation, couples who are not married when the child is born but get married later on, etc.

13 Under the Guardianship Act of 20 August 2007 no. 1015 section 47.

14 Children's Act section 8.

15 The Administrative Justice Act of 14 November 2018 no. 1284 section 178, subsection 1, no. 1, 4 and 5.

fathers are encouraged to participate in forensic genetic examinations if it is considered relevant for the case, but cannot be forced to do so.[16] If the administrative case does not result in the establishment of parenthood, the authority can bring the base before the court, as it is only the court that can establish parenthood if the parties do not come to an agreement in the administrative case. Both the mother and the potential fathers/co-mothers are obliged to appear before the court, but the court cannot use physical force to conduct the forensic genetical examinations. The court can, however, fine the party if he/she does not show up and/or put him/her in custody until he/she is willing to participate in the court case and give his/her testimony.

2.2 *The Strict Time Limits and R.L. and Others v Denmark*

Though it is considered of great value for the child to know who his/her parents are, the Children's Act entails a strict time limit for starting a paternity/co-maternity case. Such a case must be started within six months after the child is born,[17] and after this fixed limit, the case can only be reopened under very specific circumstances. The short time limit is set out of consideration for the need for stability around the child,[18] which is interesting as the motivation for establishing the parenthood is (at least partly) the child's right to know who the parents are.

It is also interesting from a child's rights perspective to look at the rules about reopening the case. The case can be opened by the mother, (potential) father/co-mother or by the child or his/her guardian. The law divides the reopening cases into four categories – each with its own criteria:

If no father/co-mother was found in the original case, the case can be reopened without any time limits if it is made probable (*antageliggjort*) by the applicant that a specific man or woman is the child's parent. In such a situation the child does not risk losing a parent (the person that the child thought was the parent) and the grounds for reopening the case, therefore, do not have to be as heavy as if somebody had been appointed as or considered to be the child's parent earlier on. If the adult child opposes the reopening of the case, it cannot be reopened.[19]

If the parenthood has been established, the case can be reopened if both parents and the child agree and it is made likely (*sandsynliggjort*) that a specific

16 Children's Act section 11.
17 Children's Act sections 5, 6 and 6 a.
18 Waage (n 9) 121.
19 Children's Act section 21.

man or woman is the child's parent instead. As it shows, it is harder to reopen such a case than a case where no parent was originally found/pointed out.[20]

If mistakes were made in the original case and the mistakes could have influence on the original result, the case can be reopened within three years after the birth of the child unless the request is made by a party who was aware of or had reason to assume that a mistake had been made, and (for the father/co-mother) who nonetheless treated the child as his/her own.[21]

If it can be assumed due to new information that the new case will have a different outcome or there are other reasons for assuming this, the case can be reopened even though the parenthood has been established. Just like above the request has to be made within three years after the birth of the child, and just like above, it can be made later if there are very special reasons for the delay and it is not of substantial inconvenience for the child. In these cases, the request must be evaluated in light of the time passed, how the parents have behaved towards the child if they were in doubt of the parenthood, if the request has been made within a reasonable timeframe and whether or not it is likely that the child will have a (new) parent as a result of the case.[22]

The reopening rules, more specifically the latter, were brought before the European Court of Human Rights (ECtHR) in the case of *R.L and Others v. Denmark*.[23] There was no doubt that the registered father was not the father as both parents explained that they had not had sexual relations at the time of conception – at least of the second child. The mother had had an affair during the years where the children were born, but the man she had an affair with was not willing to have the case reopened although there were strong indications that he was indeed the father. Both legal parents wanted the case reopened but the request was denied by the district court because they had both been aware of the strong likelihood that the father was not the biological father but had nonetheless acted as though he was.

The applicants argued that the refusal to reopen the case was a breach of their rights under Article 8. The Court, however, found that the High Court had indeed taken the various interests in the case into account and given weight to what it believed to be the best interests of the children, and notably their interest in maintaining the family united.[24] The first applicant in

20 Children's Act section 22. See Waage (n 9) 282–283.
21 Children's Act sections 23 and 25.
22 Children's Act sections 45 and 25.
23 *R.L and Others v Denmark* App no. 52629/11 (ECtHR 7 March 2017).
24 *R.L and Others v Denmark* (n 23) para 47.

the case (the mother) had argued that it would be in the best interest of the children to find their true identity, but both the children's counsel (the competent authority) and the High Court saw it differently, and the ECtHR did not find sufficient reason to set aside this assessment.[25] When reading the case, it is rather clear that it is important that the mother was aware of the facts all along and did nothing to change the situation for the children who were around four years old and two years old when the case started, and that the assessment might have been different, had the request been made by the children. The ECtHR explicitly says: 'The Court cannot ignore, either, that the first applicant, *being the best placed person* to know about any uncertainty as to the fatherhood of her children, did not take any initiative to establish their biological identity until 29 November 2008.'[26] Or to put it differently: As the mother was both responsible for and aware of the situation, no special considerations were to be made on her behalf. As a conclusion, one could say that the ECtHR accepts the strict reopening rules as long as there is still room for discretion.

2.3 *The Two-Parent Principle and the Best Interest of the Child*

The emergence of new family structures challenges the notion of the family as consisting of two parents and children. This has not yet resulted in a legislative discussion or initiatives towards accepting a larger number of parents. Here, in 2018/2019, there is an ongoing legislative process towards great changes in the family-related legislation, which has just resulted in a new administrative system,[27] but the rules do not change the two-parent principle and no suggestions have been made to widen the number of parents, for instance, in cases where a couple have a child with a known donor.

2.4 *Conclusion*

The child's right to know who his or her parents are is limited by a number of procedural rules and strict statutes of limitation protecting the potential parent's right to privacy. One could certainly argue that a best interest-approach in the constitution would encourage the legislator to consider whether the rules should be changed.

25 *R.L and Others v Denmark* (n 23) para 48.

26 *R.L and Others v Denmark* (n 23) para 48.

27 The Familiehouse Act of 27. December 2017 no. 1702.

3 The Right to Contact with the Non-Cohabitant Parent and the Rest of the Family

3.1 *The Parental Responsibility Act and the Best Interest of the Child*

The Parental Responsibility Act puts forward a rights-based approach for the child in cases regarding contact to the non-cohabitant parent and thus introduced – at least on paper – a paradigm shift in the thinking behind the rules. The child – not the parent – has a right to contact and the decision regarding access has to be in the best interest of the child.[28] However, even though the child's perspective has to be part of the basis for the decision, the child itself is not a party to the case and cannot start a case regarding access or complain about a decision on the matter. To remedy the lack of rights for the child, the law grants children above the age of ten the right to ask the competent body to call the parents to a meeting regarding (among other things) the question about contact.[29] However, the parents are not obliged to participate in the meeting and the competent authority has no *ex officio* powers to start a case based on the child's wishes. The child, therefore, has no actual legal remedies and can be said to be totally reliant on the parents starting the case.

The rules are a clear example of the fundamental understanding in Danish law that the parents *want* what is best for their children, and *know* what is best for their children. If the parents reach an agreement, the decision is as a clear main rule considered to be in the best interest of the child and the only safeguard is the duty to report to social services for the caseworker who has to register the parents' agreement, if they chose to have it registered, which is necessary if it is to serve as a basis for enforcement of the agreement at a later point. It is thus not a prerequisite that the agreement is registered and it is not a part of the registration that the caseworker makes a discretion of whether or not the agreement is in the best interest of the child. If the parents do not agree, they can start an access case.

3.2 *Access Cases – a Parent's Right to Contact with the Child*

Though the Parental Responsibility Act talks about the child's right to access, it is not up to the child to start an access case, and the parent cannot be forced to have contact with the child if the parent does not want it.[30] The 'right' to

28 The Parental Responsibility Act section 19, subsection 1.

29 The Parental Responsibility Act section 35.

30 In the preparatory works it is thus stated that the wording (the *child's* right to access) is of moral/political nature. See KBET 2006/1475 'Barnets Perspektiv: forældremyndighed, barnets bopæl, samvær, tvangsfuldbyrdelse: betænkning afgivet af Udvalget om

access thus only actually counts *if* the parents agree on access or the parent in question is interested in access and is willing to start a case.

The preparatory works discussed whether or not the child should have full rights as an independent party in cases regarding access, custody and residence. But it was concluded that it would not be in the best interest of the child to commence actions against the parents[31] – in these cases, the best interest of the child is a *protection from* having to take action on his/her own.[32]

The other underlying best interest-assumption in the law is the main rule that it is beneficial for children to have contact with both parents.[33] It means that there will be established contact between the parent and the child if the parent applies for it. This main rule has been criticised for giving the non-cohabitant parent (typically the father) rights on behalf of the child. It has been further strengthened by the fact that the child cannot itself choose *not* to have contact and by the fact that a decision about access can be executed with the use of force unless the child's physical or mental health is exposed to serious risk.[34]

As one of the reasons *not* to grant access, however, is a high-level of conflict between the parents,[35] other stakeholders have criticised the law for making it possible for the cohabitant parent to prevent access by starting and maintaining conflicts that influence the child in a negative way making it unadvisable from a best-interest perspective to grant access.

The rules have been changed a number of times during the 11 years that the law has been into force, and it seems difficult for the legislator to strike the best balance between the best interest of the child and the right to family life and privacy under article 8 of the European Convention on Human Rights. The shift in the wording has apparently not made it easier to ensure that the main focus is indeed the child.[36]

Forældremyndighed og Samvær', 2.3.2. See also Stine Krone Christensen, *Forældreansvarsloven med kommentarer* (2nd edn, Karnov Group 2014) 301.

31 See KBET 2006/1475 'Barnets Perspektiv: forældremyndighed, barnets bopæl, samvær, tvangsfuldbyrdelse: betænkning afgivet af Udvalget om Forældremyndighed og Samvær', 4.6.3.1.

32 See about this reasoning in Stine Jørgensen, 'Børns rettigheder i socialretlige og familieretlige sager' (2007) 4 Tidsskrift for Familie og Arveret 525.

33 See Lovforslag L 133, 2006–2007, the specific remarks to § 4; Stine Krone Christensen, *Forældreansvarsloven med kommentarer* (2nd edn, Karnov Group 2014) 98.

34 The Administration of Justice Act of 22 September 2017 no. 1101 (Retsplejeloven) section 536, subsection 6.

35 See the administrative guidelines for cases regarding access, 'Vejledning nr. 11362 af 30 December 2015', section 14.1.1.2., Samvær.

36 The Parental Responsibility Act sections 20 and 22.

3.3 *Access to the Extended Family*

As mentioned above, the rules regarding parenthood only allow for the child to have two parents. This view is mirrored in the rules regarding access as the possibility for the child to maintain contact to the extended family or siblings is very narrow. These rules thus only apply if one or both of the parents are dead, one of the parents is unknown or under very limited circumstances if both parents are known and alive but the child only has very little or no contact to one of the parents.[37]

Furthermore, the rules only regard the child's closest *next of kin* and as mentioned before the child himself/herself cannot start the case if he/she would rather have contact to someone else – cases can only be started by the adults seeking contact. The concept of *who* the child's family is can therefore be said to be defined by the legislator instead of asking the child. A relevant example where the child is left without rights would be if the child wants to have a right to stay in contact with his/her former stepsiblings but without the parents' acceptance. The problem is somewhat remedied for older children who can maintain contact online but from a rights-based approach this somewhat coincidental solution *outside* of the rules is not satisfactory for the child.

3.4 *Access When the Child is Placed into Care*

When a child is placed into care in Denmark, legal custody remains with the custody holding parent(s) and the child is still considered a part of the biological family. The child has a right to stay in contact with the biological family during the placement.

The issue is governed by the Social Services Act and unlike the cases governed by the Parental Responsibility Act, where the child is living with one of the parents, the access rule for children placed in care gives a right to stay in contact not only with the child's parents but also with the child's network.[38] The difference between the two sets of rules can be explained by the fact that whereas contact cases can involve parents who have sufficient parental abilities there is presumably a greater need for support from the network for children who are placed into care and a need for their support after a placement is terminated.[39]

37 The Parental Responsibility Act sections 20 and 22.

38 The Social Services Act section 71, subsection 1.

39 This is also reflected in section 47 that imposes a duty on the responsible authority to consider how to involve the child's network in any social welfare case. See Trine Schultz and others, *Socialret: Børn og Unge* (Jurist- og Økonomforbundets Forlag 2017) 366.

The application for access, however, must still be given by one of the parents, and neither the parents nor other members of the network are obliged to visit or in other ways have contact to the child. Children aged 12 years and above can *complain* about a decision about access but this presupposes that one of the parents actually starts a case.

If access is not granted at all or if the visits are limited to less than once a month, the decision cannot be made by social services. It has to be put before the same board that can decide to remove the child from his/her home and place him/her into care, and the same legal rights and procedures are set into motion.[40]

3.5 *Conclusions and Reflections*

Though the rules about contact between the child and family clearly state that their focus is solely on the child's right to contact, this is not the case when it comes to actually ensuring the right. To change this it would, as the Danish administrative and legal system is constructed, be necessary to give the child a number of independent rights – as a party to his/her case – as done in the Social Services Act.[41] This does not require an amendment to the Constitution, and it is my opinion primarily a matter of the underlying assumption in the Parental Responsibility Act that the parent(s), as a minimum rule, act in the best interest of their child.

4 Intervention in the Child's Right to Family Life

4.1 *Placement of the Child Outside of His/Her Home*

4.1.1 Consent from the Child or the Parent?

The consent of a child below the age of 15 is not necessary to deem a placement by social welfare authorities of the child outside of his/her home voluntary or to consider a placement in a psychiatric ward voluntary.[42] If the custody holder(s) gives consent, the placement is not considered an intervention in the right to personal liberty for the child and the decision can be, therefore, made by the caseworker her/himself and there is no access to a special judicial control of the placement for the child.

The child can complain about a placement in foster care or another social welfare institution from age 12 but only to an administrative board, and the child

40 The Social Services Act section 73, subsections 3–4.

41 See directly below.

42 See Adolphsen, 'Constitutional Rights for Danish Children' (n 3), section 4.2.

has no clear legal basis for complaining about a hospitalization in a psychiatric ward. If the parent does not consent to a placement in either a social welfare institution or a psychiatric ward, however, the child has a right to a lawyer from age 12 and can request that the case undergoes the special judicial control.[43]

As shown, the limitation of the child's liberty is considered less serious if the parents give consent. This is because the intervention has traditionally been seen as an intervention in the parent's rights. One could, therefore, argue that the rules do not pay sufficient attention to the *family life* between siblings or the child's family life with other relatives. As mentioned above, this is, interestingly enough, mirrored in the rules about access once the child is already in care, which apply in both cases about placement with or without consent from the parent.

4.1.2 The Involuntary Care-Case

If the custody holder or the child above the age of 15 do not consent to the placement and the placement is deemed necessary under the specific criteria in the Social Services Act, the local authority has to bring the question about placement before a local administrative board with both legal, psychological and pedagogical expertise.[44]

The cases are handled in a quasi-judicial setting and both the parents and the child above the age of 12 are issued an attorney and have a right to appear before the board.[45] The law also specifically states that the parties must be given explicit information about the right to document access – although the extent of the right is the same as in other cases.

If the administrative board decides that the criteria for involuntary placement are met, the parents and the child aged 12 and above have the right to bring the case before a court under the special and comprehensive rules in the Administration of Justice Act.[46]

If the decision is upheld, the child is placed into care in principle under the same rules that govern voluntary placements.[47] In both cases, the child can end up in a 'continued placement', i.e. a more permanent placement – possibly up until the child turns 18 – if the municipal authority in charge of social welfare

43 See Adolphsen, 'Constitutional Rights for Danish Children' (n 3), section 4.2.

44 The rules about the competent body, 'Børn og ungeudvalget', are found in the Act on due process and administration in social law cases of 8 March 2018 no.188.

45 The Social Services Act section 72, subsection 1, no. 2 and section 74, subsection 1, no 2 and subsection 2. If the child is below the age of 12 he/she also has a right to appear before the board but only if is not harmful for the child.

46 Chapter 43 a.

47 See specifically section 70, subsection 1 about revision of the plans for the placement and the overall placement decision, but it is possible for the administrative board to make a

cases finds it necessary and the criteria for the continued placement are met. This means that the case worker on the basis of her professional discretion and initiative, can recommend to the administrative board mentioned above that they make a decision on continues placement if the child has been placed in care for three years if the child has developed such a powerful connection to the care facility that it – either in the shorter or longer run – is considered to be of significant importance for the best interest of the child to remain at the facility. The decision can be made *even if* the grounds for the decision of placing the child in care in the first place are no longer present.[48] This is in contrast to the principle of proportionality in the Social Services Act stating that interventions cannot continue longer than required, that is to say longer than the grounds for the interventions are present and is an example of rules given more weight to the best interest of the child than to the legal certainty of the parents.

Since the criteria is the best interest of the child, it is interesting that the rule states that only the child above the age of 15 has to give consent to the placement. The age-limit is coherent with the age-limit for voluntary placement and, therefore, appears to make sense, but why insist upon having the opportunity for continued placement without consent from the child, when the child is already protected by the 'normal' placement? As continued placement builds on the child's right to stability it is difficult to argue that such a placement would be in the best interest of the child who does not want to stay at the foster-home bearing in mind that it is only necessary to make the decision if the grounds for the placement are no longer present.

4.2 *Adoption without Consent*

The Danish rules about adoption without consent were changed in 2009 and 2015 in order to make it easier to terminate the relationship between the child and parents.[49] The criteria for the decisions have therefore been widened, and more focus has been put on the child's emotional attachment to the foster family or care facility where the child lives and less on the parent's (lack of) parental abilities. Before 2015, adoption without consent could not be granted if the parent had parental abilities but now it is sufficient that the criteria for an involuntary placement are met and that it would be harmful for the child

decision about prolonging the deadline for revision of the placement under the specific rules in section 62.

48 The Social Services Act section 68 a.

49 See LFF nr. 105 of 28 January 2009 (from now on LFF nr. 105), the specific remarks to § 1, nr. 6. See Caroline Adolphsen, 'Tvangsadoption af anbragte børn' (2015) 48 Ugeskrift for Retsvæsen 450.

to discontinue the contact with the foster-parents due to the closeness of the foster-parent/child-relationship.[50] Whether or not this is a positive thing depends on one's view of the rights of the biological family when these are in conflict with the rights of the child, but the rules have been criticised for leaving the parents with insufficient legal certainty.[51]

As adoption means that the family life between the parent and the child as a clear main rule ceases to exist,[52] the procedure for the decision is very comprehensive and involves both municipal (*kommunale*) and national authorities, access to the same court procedure as in involuntary placement cases and – unlike placement cases – a delayed effect of the administrative case if the parties bring it before court.

However, it is quite clear from reading the rules, the preparatory works and the spars case-law that the child has a very passive role in the procedure compared to placement cases. The adoption rules[53] do not have an age-limit for consent from the child, but only a right to be heard and a rule stating that if the child is aged 12 and above the authorisation '*should not*' be given without consent from the child unless it is considered to be damaging for the child to be asked for consent.[54] The consent is thus not a prerequisite for the decision, and it does not change the procedure that the child opposes the adoption.

4.3 *Comments and Perspectives*

In cases regarding interventions in the right to family life, it is quite clear that the lack of a specific constitutional protection of the child has a direct impact on the child's rights in the legislation. By implementing such a right in the Constitution for the child regardless of his/her age the constitutional assembly could impose a specific duty on the legislator to make the rules more discretion-based and less dependent on age-limits.[55] As age-limits, however, also exist in the other Scandinavian countries where the child *does* have independent and specific rights in the Constitution, it would, however, be necessary with very clear constitutional rules if there were to be perceived as boundaries on the legislator.

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50 The Adoption Act of 3 March 2018 no. 1041 section 9, subsection 4.

51 See Mads Pedersen, 'Forældre med handicap og tvangsadoption' (2016) 8 Ugeskrift for Retsvæsen 99; Caroline Adolphsen, 'Tvangsadoption af anbragte børn' (2015) 48 Ugeskrift for Retsvæsen 450. Mads Pedersen was at that point employed at the Danish Institute on Human Rights.

52 There is a very narrow opportunity for contact *after* the adoption in PRA section 20 a, but this is in no way as strong a right as in ordinary access cases.

53 The Adoption Act (n 50).

54 The Adoption Act section 8.

55 See, for instance, the Norwegian Barnevernloven § 4-4a, stk. 1, litra d.

5 Concluding Remarks

As shown above, the child's right to family life is protected in a number of different sets of rules and the rules do not contain a uniform approach to independent rights for children. The Constitution only projects the child from being removed from the family and offers no positive rights to family life or contact. There is no political desire to change the Constitution and as the political agenda in Denmark is to challenge the international human rights instead of adoption them,[56] no such desire will probably arise in the foreseeable future. Though all of the rules have been changed several times in the last years, no attempts have been made to make a common ground for children's rights. Whether such a common ground – for instance, regarding age limits – is desirable is a matter for the legislators, but from a legal perspective, it is interesting that the differences seem more coincidental and based on historical grounds than a well-thought-out view on the child's rights.

References

Adolphsen C, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Adolphsen C, 'Tvangsadoption af anbragte børn' (2015) 48 Ugeskrift for Retsvæsen 450.

Christensen SK, *Forældreansvarsloven med kommentarer* (2nd edn, Karnov Group 2014).

Jørgensen S, 'Børns rettigheder i socialretlige og familieretlige sager' (2007) 4 Tidsskrift for Familie og Arveret 523.

Nørgaard I, Adolphsen C and Naur E, *Familieret* (3rd edn, Jurist- og Økonomforbundets Forlag 2017).

Pedersen M, 'Forældre med handicap og tvangsadoption' (2016) 8 Ugeskrift for Retsvæsen 99.

Schultz T, *Socialret: Børn og Unge* (Jurist- og Økonomforbundets Forlag 2017).

Waage J, *Børneloven med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2015).

56 This has been explicitly stated by several ministers in the current government, see, for example, <https://www.dr.dk/nyheder/politik/stoejberg-i-muligt-konventionsbrud-jeg-goer-det-med-aabne-oejne> (the Minister of Immigration and Integration) or <https://www.dr.dk/nyheder/politik/pape-i-spidsen-reform-af-domstol-menneskerettigheder-er-ikke-uroerlige> (the Minister of Justice) accessed 10 January 2018.

PART 6

Concluding Analysis

CHAPTER 20

Children's Constitutional Rights in the Nordic Countries: Do Constitutional Rights Matter?

Trude Haugli and Anna Nylund

1 Introduction

This study demonstrates tangible variations in how children's rights are protected in the Nordic Constitutions, even given that the countries, in many ways, have similar cultures, traditions and legal systems. Thus, a central undertaking for this chapter is to analyse the interlinkages and discrepancies between the formal level of protection of children's rights in the Constitution with the level of protection in statutory law and court practice. We also analyse whether and how constitutional protection is reflected in legislation, court rulings, and government policies and practices. A central question is whether constitutional protection matters for implementation of children's rights and whether it provides advocacy tools. A key observation is that the protection of children's rights varies within each country: In some areas of law, children's rights are outlined in detail, in other areas, obvious lacunae remain. Some domains of law are more 'child-including', others remain 'adult-centred'. The question is whether some domains are more prone or resistant towards acknowledging children as agents and right's holders.

In this chapter, we compare the findings from the contributions in this volume to attempt to uncover whether and how including children's rights in the Constitution matters.

Firstly, we analyse children's constitutional rights in general in the Nordic countries, building on a typology developed by Conor O'Mahony, which builds on children's rights as envisaged in the Convention on the Rights of the Child (CRC).[1] The model measures the protection of children's rights on three spectrums: visibility, agency and enforceability. However, since we study the Nordic countries in specific, our analyses allow us a more detailed analysis than what could be done in his study, analysing 47 European countries. In addition, we

1 Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19(3) Human Rights Law Review (forthcoming).

analyse implementation of children's rights in general and the interrelation between the wording of the Constitution and implementation.

Secondly, we discuss how international instruments work as supplement to constitutional law in the Nordic countries. The rationale is to illustrate how international instruments supply protection offered by national constitutions and how case law from international bodies serves as an impetus for change.

Thirdly, we compare implementation and enforcement of children's rights in each of the three domains included in this volume: the principle of the best interests of the child, participatory rights and the right to family life.

Finally, we address the question of whether enshrining children's rights explicitly in the constitution really matters.

2 Protection of Constitutional Rights in the Nordic Countries

2.1 *A Spectrum Analysis of Children's Rights*

As mentioned above, this general analysis of protection of children's constitutional rights in the Nordic countries utilises a typology consisting of three indicators – visibility, agency and enforcement – each of which consists of a spectrum of classifications developed by Conor O'Mahony.[2] His typology matches our approach. The multiple dimensions allow a nuanced analysis to a far greater extent than binary categories do. The visibility spectrum measures the extent to which children's rights are expressly protected in the Constitution. The agency spectrum assesses whether children are considered independent, autonomous rights-holder or merely objects in need of protection. The enforcement spectrum determines the extent to which children's rights are enforceable through a variety of remedies. A Constitution

2 Conor O'Mahony (n 1). For other typologies of children's constitutional rights, see John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights'(2005) 21 South African Journal on Human Rights 86–126 and Janette Habashi and others, 'Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation' (2010) 18 International Journal of Children's Rights 267–290. Tobin employs the categories of 'invisible child', 'special protection' and 'child rights' constitutions, which is a more rudimentary typology than measuring the spectrums of visibility and agency. Furthermore, although Tobin discusses enforcement by mentioning justiciability, access to justice, judicial conservatism and social legitimacy, the aspect of enforcement remains underdeveloped in his typology. Habashi and others utilise a linguistic content analysis to provide quantitative data on the prevalence of protection, provision and participation rights in constitutions of countries with a high, medium and low Human Development Index. This methodology is too rudimentary for our purposes.

might score high on one of the spectrums, but, at the same time, low on the other spectrums. O'Mahony's classification captures the recognition that mentioning children in the Constitution does not suffice if children are treated as 'objects' of protection rather than individuals who can exercise agency and when rights are mere symbols without sufficient remedies attached to them.[3]

In addition to discussing the wording, interpretation and enforcement of Nordic Constitutions, this study encompasses implementation of children's constitutional rights in legislation and government practice. Thus, we add the component of implementation to the aspects of the analysis.

2.2 *Visibility Spectrum of Children's Constitutional Rights in the Nordics*

O'Mahony applies a four-tier scale for the visibility spectrum of children's rights: invisible, education, education+ and detailed children's rights provisions. Despite their cultural, historical, legal and societal similarities, in our study, the Nordic countries receive dissimilar ratings on the visibility spectrum.

Norway receives the highest score, since section 104 of the Constitution is devoted to children's rights vesting several different rights with children and stressing children's dignity as a basic legal principle. In addition, section 109 of the Constitution on the right to education mentions children explicitly. Denmark, on the other hand, lands in the second-lowest category of education, since children are only mentioned explicitly in section 76 of the Danish Constitution, which regulates the right to free primary education.

The Finnish Constitution mentions children explicitly and give the right to equality and the right to participation in decisions concerning themselves. The principle of non-discrimination, freedom, education and social benefits are also enshrined in the Constitution, but these sections do not mention children.[4]

Section 65 of the Icelandic Constitution contains the principles of equality and non-discrimination, but the article does not mention children. Section 76, subsection 3, however, gives the state the duty to provide children with protection and care. Subsection 2 enshrines the right to education but does not mention children. Thus, children are assigned some visibility. The proposed

3 Michael Freeman, 'Why it remains important to take children's rights seriously' (2007) 15 International Journal of Children's Rights 5–23, 8.

4 Suvianna Hakalehto, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 4, section 2.

amendments to the Icelandic Constitution would, nevertheless, improve children's agency by giving children the right to be heard.[5]

The Swedish Constitution only mentions children in chapter 1, section 2 of the Instrument of Government (one of the four Constitutional Acts). Children's right to education is also specifically included in the Instrument of Government. Other provisions safeguard non-discrimination and citizenship, but do not render visibility to children, as children are not explicitly mentioned.[6]

The Swedish and Norwegian Constitutions have provisions of a declaratory, symbolic nature that highlight children's rights. The Swedish Constitution mentions children in the general introduction to human rights. Section 104 of the Norwegian Constitution acknowledges specifically the human dignity of children as a rationale for why children's rights must be taken seriously. Sigurdsen argues that vesting children with crucial rights is a prerequisite for recognising and honouring their human dignity.[7] The declaratory nature of the Swedish provision lessens, however, its value as a legal tool with a clear potential to create a shift in the recognition and enforcement of children's rights.

The Finnish, Icelandic and Swedish Constitutions fall somewhere between the second highest and the highest category, with provisions explicitly mentioning children's rights, albeit not in a section dedicated to children, in addition to provisions on education where children are either the implicit primary beneficiary or the outspoken holders of the right. Pigeon-holing the Nordic Constitutions is difficult. Although the Finnish, Icelandic and Swedish Constitutions assign particular rights to children, their provisions render less visibility both in terms of structure and the rights recognised explicitly as children's rights, than the Norwegian Constitution does. This is in accordance with O'Mahony's rating of Norway at the highest level of the visibility spectrum, Finland and Iceland at the second highest level and Denmark at the third level.[8]

Naturally, all constitutional rights apply to everyone, also children, but as many of the authors note, the focus has traditionally been on adults' rights and an adult perspective on rights. For instance, mandatory measures in child welfare have been considered primarily a possible infringement of parents' rights

5 Hrefna Friðriksdóttir, 'Protection of Children's Rights in the Icelandic Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 5, section 5.

6 Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 6, section 3.

7 Randi Sigurdsen, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 2, sections 2 and 3.

8 O'Mahony (11).

rather than children's rights in Danish law.[9] However, children are increasingly seen as autonomous holders of rights across the Nordic countries, particularly in certain areas, such as child welfare law.

The age of the Constitution and the timing of the reform cycle seems to be the primary explanation for these differences. Though the Norwegian Constitution was formally enacted in 1814, the Bill of Rights was completely overhauled in the 2010s. The Finnish Constitution reflects state-of-the-art of the 1990s, and the Danish Constitution the legal thinking of the early post-war years with mainly classic liberty rights, many of which are not specifically relevant for children. The Finnish and Icelandic Constitutions enshrine rights for children in specific contexts related to non-discrimination and social rights. The Swedish Constitution has only educational rights, in addition to a declaratory provision mentioning children's rights. Since the Swedish constitutional acts were partly amended in the early 2000s, this age-explanation is not accurate for all countries. Nonetheless, it explains the differences among the Nordic countries, in general.

Another explanation is the stance towards constitutional reforms. Danes appear to consider their Constitution to a larger extent than their Nordic neighbours to be a static document that the legislator should not 'meddle' with it by amending it.[10] In contrast, the Icelandic Constitution appears to be amenable to periodic review.[11]

A third aspect consists of constitutional interpretation, in particular, the interpretation of vague provisions. The Finnish and Icelandic Constitutions have vague, open-ended provisions on children's rights. According to Friðriksdóttir, it is 'widely recognised that the written text of the Constitution does not fully represent the extent and depth of constitutional law'.[12] Therefore, section 76 of the Icelandic Constitution could – and should – be interpreted broadly to encompass participatory rights, either because it is presumed to reflect the CRC or as a result of dynamic interpretation, as Gísladóttir.[13] Finland, in contrast, has a tradition for literal interpretation. Consequently, the wording of the

9 Caroline Adolphsen, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 7, sections 2 and 4.2.1.

10 Adolphsen, 'Constitutional Rights' (n 9) sections 1 and 2.

11 Friðriksdóttir (n 5) sections 2.1 and 5..

12 Friðriksdóttir (n 5) section 2.3.

13 Elisabet Gísladóttir, 'Children's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 13, section 2.

Constitution alone may not be decisive for establishing the level of constitutional protection.

Interestingly, only a small range of children's rights are explicitly included in the Nordic Constitutions. Protection from economic exploitation, child labour, harm and sexual abuse are not explicitly included in any of the Nordic Constitutions. Specific rights for children representing ethnic, religious, and sexual minorities, and children with disabilities are not explicitly included in any of the Constitutions, unlike several other European Constitutions.[14] The reason could be that children are considered included regardless of whether they are explicitly mentioned or not. Thus, mentioning children explicitly could be considered redundant. This appears to be in harmony with the prevailing Nordic ideology of equality, where mentioning one group would be at odds with egalitarianism.[15] Swedish constitutional law reflects this view because it seems to expect that a general declaration that children are equal suffices to ensure equal rights.[16] Another explanation is the perceived absence of child labour and gross exploitation of children in the Nordic countries. Hence, there would be no direct need to include these issues in the Constitution, because criminalisation of such acts would suffice.[17] Furthermore, one could argue that the protection of the right to respect for dignity and integrity encompasses these aspects, as well.

The inherent weakness of the Nordic approach is that a narrow catalogue of rights may result in children having rights in some areas of law, but not in others. As Sigurdsen emphasises, dignity is entangled with equality and autonomy; dignity is honoured when we respect children's autonomy and capabilities rather by giving them rights than accentuating their vulnerability and need for protection.[18] Furthermore, the approach may both reflect and result in adult decision-makers overlooking or disregarding the specific problems disabled and minority children face as a combination of being simultaneously part of at least two vulnerable groups.[19] Exploitation of children may fall under the radar because it takes a different, less visible form in highly developed societies, such

14 O'Mahony (n 1).

15 Anna Nylund, 'Introduction' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 1, section 2.1.

16 Mattsson (n 6) section 4.

17 Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 3, sections 3.2, 5.3 and 5.4.

18 Sigurdsen (n 7) sections 4 and 6.

19 Sigurdsen (n 7) section 6.

as the Nordic countries, than it does in less developed, less affluent places.[20] The question is whether the result is that children are not afforded adequate constitutional protection against exploitation. Failing to provide specific protection of violence against children may result from lack of recognition of the particular vulnerability of children vis-à-vis their parents and other caretakers.

Enumerating a right in the Constitution serves as a tool for advocacy and a beacon guiding implementation and for developing policies. For instance, in the case of protecting children from abuse, penalisation of child abuse does not suffice; protection requires other measures as well, such as preventive measures offered by health care professional and social services, and equipping police investigators with sufficient resources. Provisions recognising the specific vulnerabilities of children and particular groups of vulnerable children (e.g. disabled and minority children) are likely to be more powerful tools than general provisions on children's rights or on equality.

2.3 *Agency Spectrum of Children's Constitutional Rights*

Agency is a measure of the extent to which children are treated as autonomous, independent rights-holders rather than objects in need of protection. O'Mahony applies a four-tier typology here, too: paternalistic, predominantly paternalistic, predominantly child-centred and child-centred.[21] The Nordic Constitutions assign agency to children to various degrees. The Danish Constitution only assigns children the right to primary education, which leaves little room for agency.

The only provision in the Icelandic Constitution devoted to children does not convey agency. It only obliges the state to protect children and provide care. The question is whether it is merely an expression of a social policy goal or whether and to which extent it entails rights.[22] The Icelandic Constitution could be characterised as primarily paternalistic.

The Finnish Constitution contains a general duty to treat children equally and with respect, which is an expression of a child-centric mentality. Additionally, children are given the right to be heard, which clearly assigns children a right and thus agency.[23] The Finnish Constitution underlines agency since the

20 See eg the recent report on trafficking in children and juveniles in Finland uncovered more extensive problems than expected and how authorities often do not recognise trafficking. See Elina Kervinen and Natalia Ollus, *Lapsiin ja nuoriin kohdistuva ihmiskauppa Suomessa* (European Institute for Crime Prevention and Control 2019). Affiliated with the United Nations (HEUNI) Publication Series No. 89.

21 O'Mahony (n 1).

22 Friðriksdóttir (n 5) section 4.

23 Hakalehto (n 4) section 2.

single right vested with children is participation. Hence, the Finnish Constitution could be classified as predominantly child-centred.

Chapter 1, section 2 of the Swedish Instrument of Government obliges public organs and institutions to safeguard children's rights. In doing so, the provision recognises explicitly that children have rights, although it does not specify these rights.[24] Hence, the provisions assign children agency and could be labelled (primarily) child-centred.

The Norwegian Constitution scores highest on agency, since it explicitly bestows children the right to participation.[25] The right to respect for human dignity assigns agency in the sense that it requires adults to enhance children's capacities, which in turn requires agency.[26] The duty to provide for social and economic rights is framed as an obligation for the state to protect children rather than providing children agency. Consequently, the Norwegian Constitution scores highly on agency.

The Nordic Constitutions vary considerably in the degree to which agency is assigned to children, from no explicit mention of children to a powerful statement recognising children as autonomous, independent persons. The level of agency reflects primarily the age of the Constitution and its provisions and follows the same pattern as visibility. However, the Swedish constitution receives a higher score on agency than on visibility.

2.4 *Enforceability of Children's Constitutional Rights in the Nordic Countries*

The enforceability spectrum of children's constitutional rights measures whether and how children's rights are enforceable through a variety of remedial avenues. Are rights unenforceable or enforceable through administrative, weak judicial or strong judicial remedies? Unless children are able to obtain a timely and just remedy, their rights are reduced to 'mere symbols that miss out on much of the added value that constitutional status can bring', O'Mahony asserts, referring to Freeman.[27]

The Nordic Constitutions enshrine rights that are at least *prima facie* enforceable, such as the rights to participate in decision-making, education, physical freedom, and private and family life.[28] However, some of them also include rights of a more declaratory nature, as discussed above. The introductory

24 Mattsson (n 6) section 3.
25 Haugli (n 17) section 4.2.
26 For a more detailed discussion on the implications of human dignity, see Sigurdsen (n 7).
27 O'Mahony (n 1).
28 See e.g. Hakalehto (n 4) section 2.

chapter in the Swedish Instrument of Government includes a reference to children, but the reference has a mere symbolic character.[29] The question is whether the same applies to the duty to guarantee children care and provision in the Icelandic constitution.[30] Furthermore, the right to equal treatment in the Finnish Constitution appears to be of a declaratory character. The right to non-discrimination and the right to respect of human dignity fall somewhere in-between justiciable and expression of a general principle.[31] Particularly, the latter is likely to be non-justiciable, unless it is combined with other rights. As an expression of a general principle these kinds of provisions—in particular, the Norwegian provision accentuating the human dignity of children—have the potential of becoming a strong tool for advocacy of children's rights; especially, rights that do not assigned agency to children explicitly.

However, the question is whether children are able to invoke their rights in practice. The constitutional practice of limited judicial review could pose a hindrance to enforcing children's rights. Apart from Norwegian courts, Nordic courts have been hesitant in exercising their powers and have limited open judicial review to instances where legislation is clearly and manifestly contrary to constitutional law. However, this restrained approach to judicial review is attributable to differences in the role of courts as guardians of the Constitution and human rights, rather than protection of children's rights.[32]

Interestingly, the willingness of courts to use the Constitution actively in their argumentation varies within the countries studied. The differences are most tangible in Finland, which has both general and administrative courts. The Supreme Administrative Court seems to be more willing to refer to the Constitution when ruling on children's rights.[33] What could explain the differences among the Finnish Supreme Court and the Supreme Administrative Court? One answer could be differences in legal constellations in these cases. Administrative courts adjudicate cases where the government infringes on individual rights, whereas general courts adjudicate matters between private individuals. Perhaps the threshold to protect children's constitutional rights vis-à-vis the state is lower than forcefully applying children's rights when the

29 Mattsson (n 6) section 3.

30 Friðriksdóttir (n 5) section 4.

31 Sigurdsen (n 7) section 5.

32 Nylund, 'Introduction' (n 15) section 2.2.

33 Hakalehto (n 4) section 2.2; Hannele Tolonen, Sanna Koulu and Suvianna Hakalehto, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 12, section 3.2.

counterpart is an adult care-taker. A further question is whether the same difference exists in Sweden, which also has a two-tier court structure with general and administrative courts. Similarly, courts appear to be prone to resort to the Constitution in their argumentation in some areas of law, but not in others, following at least partly the distinction between private law and public law.

Legal standing influences enforceability. Giving children, rather than their guardian, legal standing improves enforceability, since the absence of independent legal standing is likely to inhibit children from invoking their rights.[34] In the Nordic countries, guardians have legal standing on behalf of their children until the children reach the age of maturity. Parents are assumed to make decisions that are in the best interests of the child.[35] In child welfare cases, the conflicts of interests between the child and parents are immanent and palpable. Thus, children are given independent rights earlier than in most other cases. In contrast, in cases on parental responsibility, children are in practice prevented from invoking their rights even if there could be significant conflicts of interests between the child and the parents. The lack of recognition of the manifold situations where the child's interests and rights are in dissonance with parents' interests and rights impedes children from enforcing their rights.[36]

Furthermore, much of the decision-making involving children's rights takes place in municipal organs. Consequently, the road to courts is oftentimes long and winding. In the majority of cases, the question of enforcement is therefore a matter of whether teachers, social workers, nurses and other civil servants value children's rights and implement children's rights in their daily activities. The design of administrative complaints is decisive for enforcement of children's rights.

Finally, ombudsmen are key actors in enforcing children's rights in the Nordic countries. Parliamentary Ombudsmen have a paramount role in all Nordic countries in handling individual complaints against state organs. The Parliamentary Ombudsmen also hear complaints filed by children. The ombudsmen do not have the power to overturn or remand administrative decisions, however, their reproofs are taken seriously and are often consequential.

All Nordic Countries, except for Denmark, have ombudsmen for children. None of the ombudsmen has the authority to handle individual complaints from children.[37] Denmark has, however, a Children's Office[38] at the

34 Adolphsen, 'Constitutional Rights' (n 9) section 3.

35 Sigurdsen (n 7) section 6.

36 For a discussion of this topic, see sections 5.1 and 5.2 below.

37 See Friðriksdóttir (n 5) section 2.3; Hakalehto (n 4) sections 2.2, 3.3 and 5.2; Haugli (n 17) section 7; and Barnombudsmannen in Sweden www.barnombudsmannen.se (accessed 29 April 2019).

38 http://boernekontoret.ombudsmanden.dk/ (accessed 29 April 2019).

Parliamentary Ombudsman's Office and also a Children's Council.[39] The advantage of the Danish system, where children have a dedicated unit under the auspices of the Parliamentary Ombudsman rather than a separate unit, is that the children's unit has the power to hear individual complaints and is, hence, a more efficient mechanism. In its Concluding observations on the Nordic countries, except Denmark, the Committee on the Rights of the Child reiterates its recommendation to consider giving the ombudsmen such competence and ensure that this mechanism is effective and accessible to all children.[40]

2.5 *Implementation of Children's Constitutional Rights*

Assessing implementation of children's constitutional rights in the Nordic countries is arduous for several reasons. One reason is that the Nordic countries, as many other countries, recognise children's rights in general terms, if not overtly as a legal principle. Attributing the existence of children's rights to constitutional law is consequently not easy. Furthermore, variations in children's rights among the Nordic countries at the legislative, policy and practice levels are fairly small. Another question is whether one should limit the study to provisions explicitly mentioning children or to rights enshrined in the respective Constitution in general. A further question is whether implementation should be assessed individually for each country or whether one should compare children's rights within specific areas of law across the Nordic countries. Moreover, the chapters discussing children's constitutional rights in general in in this volume (chapters 3–7) have a limited scope. Further, the areas studied reflect the scope of constitutional protection of children's rights, current debates and topics in each country and perhaps also the research interests of each author. They are thus not amenable to direct comparison.

Nevertheless, there are indications that visibility in the Constitution translates into implementation in legislation, court practice and policies.

The findings on the Norwegian Constitution illustrates the potential symbolic value of a specific section on children's rights as a primary source of law and guideline for lawmakers and policymakers. In contrast to the Icelandic Constitution, the Norwegian preparatory works give ample guidance on why

39 https://www.boerneraadet.dk/ (accessed 29 April 2019).

40 Concluding observations of the CRC Committee on consideration of reports submitted by State parties under Article 44 of the Convention. Norway CRC/C/NOR/CO/5–6 (1 June 2018) chapter A, para 8; Sweden CRC/C/SWE/CO/5 (6 March 2015) chapter A para 14; Iceland CRC/C/ISL/CO/3–4 (23 January 2012) chapter IV, para 17; Finland CRC/C/FIN/C/4 (3 August 2011) chapter A para 15.

specific rights were included, and the section 104 subsection 1 emphasising human dignity of children imposes a general duty to respect children as autonomous rights-holders. Although the duty to facilitate children's development is of a declaratory nature, economic and social rights are justiciable according to the preparatory works.[41] Considering the paramount role of preparatory works in Norway, and the Nordic countries in general,[42] these comments remove many of the potential ambiguities associated with economic and social rights. In spite of a specific provision in the Constitution, children's rights are still sometimes overlooked in the legislative process,[43] and there are numerous examples of policies and practices that are contrary to the wording and spirit of section 104.[44] The impact on court rulings is unclear, because although Norwegian courts refer to section 104, they have so far refrained from interpreting it independently and from explaining whether and how it influences the outcome, notes Haugli.[45] However, since section 104 is relatively new, our conclusions are only provisional. To the extent that children's rights are well protected in Norway, much of the work that caused this pre-dates section 104 and may stem from a child-centric turn in general rather than from constitutionalisation of children's rights.

In Finland, children's constitutional rights are employed as an argument in the legislative process . Hakalehto notes a shift in the use of children's rights as a key argument and explicit references to both section 6 of the Constitution and relevant provisions in the CRC in preparatory works.[46] The changes have been gradual and is probably linked to the increasing role of human rights in general. As Hakalehto notes, embedding children's rights in statutory law is imperative since practitioners rely primarily on statutory law, not the Constitution, when they develop and monitor practices. For rights that are

41 Haugli (n 17) section 4.6.

42 Nylund, 'Introduction' (n 15) section 2.1.

43 Haugli (n 17) section 7.

44 For examples, see Lena R L Bendiksen, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 16, section 6; Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 11, sections 5.1.2, 5.2 and 5.3; Kirsten Sandberg, 'Best Interests of the Child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 8, sections 3.2 and 5.2.

45 Haugli (n 17) section 7.

46 Hakalehto (n 4) section 3.

not explicitly recognised in the Constitution, implementation in statutory law both directly and through preparatory works is vital.[47]

The limited context in which children are explicitly enshrined in the Icelandic Constitution and the brief discussions in the preparatory works hinder a broader analysis of children's rights and may lead to the false conclusion that both children's rights and economic and social rights are policy statements rather than rights and that they are only weakly enforceable. Furthermore, 'protection and care' is ambiguous: it could be interpreted narrowly or broadly, and even interpreted to encompass participatory rights. As Friðriksdóttir explains, Icelandic courts have been hesitant to add to the analysis of the provision.[48]

Despite the fact that children's rights are protected only in a declaratory provision in the Swedish Instrument of Government and that it is hence not justiciable and does not entail any specific rights, children's rights are increasingly recognised and implemented in Swedish legislation and legal practices. However, the child-centric turn emanates more from general shifts in the view of children and from international instruments such as the CRC, European Court of Human Rights (ECHR) and EU instruments, explains Mattsson. In her opinion, the forthcoming implementation of the CRC ought to result in a review of Swedish law, both on the constitutional level and the level of statutory law.[49]

Although the Danish Constitution does not mention children specifically, it nevertheless endows children's rights. Children have a constitutional right to physical integrity; hence, it must be respected. In this respect, Denmark is similar to the other Nordic countries. Nonetheless, the protection is weaker because the Constitution does not mandate treating children as autonomous rights holders. This, in turn, influences arguments available in a discussion on *inter alia* appropriate age-limits for assigning children autonomy, and whether age-limits should be combined with individual assessments on the maturity of the child, notes Adolphsen.[50]

The contributions in this volume hint at a specific problem in implementing children's rights: providing equal rights for all children. Friðriksdóttir discusses how children in rural areas may be deprived of social services and special education due to the fact that access to services is more limited in these places than in urban areas and how the needs of particularly vulnerable children, for instance, disabled children, may be disregarded.[51] Hakalehto notes how the

47 Hakalehto (n 4) section 7.
48 Friðriksdóttir (n 5) section 4.
49 Mattsson (n 6) section 6.
50 Adolphsen, 'Constitutional Rights' (n 9) section 4.2.
51 Friðriksdóttir (n 5) section 4.3.

fact that the right to early childhood education is limited to 20 hours a week unless both parents work full-time, amounts to discrimination of children based on their needs.

Based on the perspectives and examples in the five contributions on children's constitutional rights in general, the visibility, agency and enforceability of children's rights at the constitutional level has at least some impact on implementation of those rights. The Constitutions provide powerful tools for advocacy, both in terms of general principles mandating the government and government officials at all levels to treat children as autonomous subjects and by specifying rights. Therefore, it comes as no surprise that the Norwegian Constitution appears to offer the best tools for implementing children's rights. Even so, implementation is slow and sometimes cumbersome or unsuccessful.

One important caveat remains in our study. All contributions in this volume discuss children's rights in general. Consequently, issues related to children in particularly vulnerable situations are mentioned haphazardly, but the issues are not explored in-depth. The contributions indicate that such children are at risk of having deprived of their rights in practice. A few authors mention children in immigration cases and how these children are given less voice than children in child welfare and parental responsibility cases. Disabled and seriously ill children receive only limited attention as do minority children. Our study is an initial study that lays ground for further exploration of specific children's rights in specific contexts. Vulnerable children and their rights are an area calling for more research.

3 International Instruments as Supplements to Constitutional Law

In all the Nordic countries children's rights are also protected through international instruments, many of which have a semi-constitutional character.

The Fundamental Rights Charter of the European Union is directly applicable in Denmark, Finland and Sweden in the power of their EU membership. The EFTA Court has repeatedly stated that although the Charter is not formally European Free Trade Association (EFTA) law, the rights enshrined in it are applicable as general principles of EFTA law.[52]

The ECHR and the CRC have a semi-constitutional character in Finnish and Norwegian law since the Constitution obliges government organs to ensure

52 Eg Case E-14/15 Holship v Norsk Transportarbeiderforbund [2016] EFTA Ct. Rep. 240, section 123.

human rights, which includes all ratified human right's treaties. Finnish and Norwegian courts tend to interpret their Constitutions in the light of the ECHR.[53] The Norwegian Human Rights Act explicitly gives the ECHR and CRC a semi-constitutional character. Their rank is below the Constitution but above other statutory law. The ECHR has a similar status in Swedish law, however, the CRC has not been incorporated into Swedish law yet, but from 2020 onwards it will.[54] In Finland and Iceland, the ECHR and the CRC have the same status as other acts of parliament.[55] In Denmark, only the ECHR is incorporated into Danish law, while Denmark has only ratified the CRC. Danish courts are reluctant to use international instruments in their argumentation.[56] As explained in the introductory chapter, the disinclination of Danish courts to use the CRC and other international instruments, stems from a tradition of emphasising sovereignty in combination with a restrained approach to judicial review.[57]

The extent to which children's rights are enshrined under the panoply of international instrument varies to some extent among the Nordic countries, particularly, as to the CRC and to the extent to which the legislature explicitly bases their argumentation on these instruments and the courts are willing to enforce the rights enshrined and to interpret national legislation in light of international instruments. Based on the contributions in this volume, European Court of Human Rights (ECtHR) case law comes across as having particularly strong persuasive force in Finland. One reason may be that Finnish courts had no right to perform judicial review until the ECHR was ratified and implemented in Finnish law in the mid-1990s.[58]

However, as for constitutional protection of children's rights, differences seem to derive mainly from the general approach to human rights and international law rather than children's rights, in particular. The ECHR and the EU Charter may be considered to have a higher status than the CRC due to the high status of the ECtHR and the Court of Justice of the European Union (CJEU). For instance, the majority in a plenary judgement of the Norwegian Supreme Court refused to assign significant weight to the general comments from the CRC Committee.[59]

53 Hakalehto (n 4) section 2; Haugli (n 17) sections 2 and 3.3, Tolonen et al. (n 33) sections 3.1 and 3.2.

54 Mattsson (n 6) sections 2.3, 2.4. and 4.

55 Friðriksdóttir (n 5) section 2.2.

56 Adolphsen, 'Constitutional Rights' (n 9) section 1.2.

57 Nylund, 'Introduction' (n 15) section 2.2.

58 Nylund, 'Introduction' (n 15) section 2.2.

59 HR-2015-2524-P (Rt. 2015 p 1388) para 153–154. See also Sandberg (n 44) section 3.3.1.

4 The Best Interests of the Child

The implementation of the principle of the right of the child to have his or her best interests taken as a primary consideration differs between the Nordic countries and also within different domains within each country. This analysis is based on Norwegian, Finish and Swedish law. The principle has been well known and applied in practise for several decades, especially in family law, child protection and adoption law. Regarding the formal status, only the Norwegian Constitution explicitly recognises this principle. Because the best interest of the child is one of the general principles of the CRC, the variation in the status of the CRC (Norway and Finland – semi constitutional character, Iceland – incorporated, status as national law, Sweden – partly incorporated, will become national law in 2020; Denmark – only ratified, not incorporated) may also influence the status of the principle in national law.

All the Nordic countries have statutory provisions in different areas of law where the principle is stated, primarily in the field of family law, child protection, adoption and immigration. In Norway and Sweden, the principle is in addition stated in a wide range of areas of law, for example, in health law, education law, and even in criminal law. In Finland, the best interests-principles is stated in the Act on Early Childhood Education and Care, but not in the Basic Education Act. Although the principle is seemingly coherent, as Schiratzki notes, the principle may presumably be given divergent interpretations in the various field of law.[60] A common observation is that the more politically loaded an area is, with immigration law as the paramount example, the weaker the position of the principle is, both in legislative work and in individual cases.[61] Court cases are considerably influenced by CRC and case law from the ECtHR. Further, one could argue that a 'constitutionalisation' of the concept is taking place both in Sweden and Finland.[62]

An interesting issue before Norwegian courts has been whether CRC article 3 is justiciable in and of itself, without being connected to other claims. This is discussed by Sandberg, who notes that the new section 104 of the Norwegian Constitution may shed new light on this issue, after the Supreme Court in 2012 decided that article 3 is not justiciable.[63]

60 Johanna Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 10, section 4.

61 Sandberg (n 44) section 4.

62 Tolonen, Koulu and Hakalehto (n 33) section 4; and Schiratzki, 'The Elusive Best Interests' (n 60) section 4.

63 Sandberg (n 44) section 2.5.

In this volume, the authors mainly focus on the best interests of the child in case law and in preparation of legislation. However, the best interests-principle has a much wider scope. For all the Nordic countries, one may see from the concluding observations of the Committee on the Rights of the Child, referring to its general comment No 14 (2013), that it recommends in slightly differing wording that states

- strengthen their efforts to establish clear criteria regarding the best interests of the child for all those authorities that have to take decisions affecting children;
- provide sufficient training for relevant professionals on best interests-determinations, and
- ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes, projects and international cooperation relevant to and having an impact on children.[64]

Constitutionally protected or not, it seems like all the Nordic countries still have a long way to go in order to fulfil the requirements of the CRC committee on how to really take the best interests-principle into account.

5 The Right to Participation in Decision-Making

5.1 *Defining Participatory Rights*

All Nordic countries recognise children's right to participation, although only the Finnish and Norwegian Constitutions provide explicitly protection. Rules providing for participation emerged already decades ago, far earlier than the constitutional right.

A question raised in all five chapters on participatory rights is what participation entails. Is it a question of hearing children to gain information to improve the quality of the decisions that adults make on behalf of children? Is it a matter of giving children voice to enable child-focused or child-friendly decisions? Or, does it entail a duty to let children participate directly or through a representative and to let them form the decision-making process, the agenda and the outcomes? Is it primarily a question of hearing the child – a procedural

64 Concluding observations of the CRC Committee on consideration of reports submitted by State parties under Article 44 of the Convention. Norway (n 40) Part B para 13; Sweden (n 40) Part B paras 17–18; Iceland (n 40) Part IV paras 26 and 27; Finland (n 40) Part B paras 27–28. The topic is not mentioned in the concluding observation to the Danish report, CRC/C/DNK/CO/5 (26 October 2017).

matter or also an obligation to give children influence on the outcome – a substantive matter in addition to a procedural matter? When children are assigned a representative, should the representative primarily advocate the views of the child, the individual perspective of the child concerned, or the child's best interests, a child perspective but not so much from the point of view of the specific child concerned?[65] Although the CRC and the Committee on the Rights of the Child clearly support to the broadest notion of participation and focusing on each child's individual views,[66] on a national level the issue still appears to be unclear.

Despite progress, the belief that participation is harmful for children is still common, as is the belief that younger children (i.e. children age 8–9 or younger) are too immature to participate.[67] Current practices and processes are seldom designed to enable meaningful participation and the views of the child are construed narrowly, which presupposes fairly advanced cognitive and verbal capabilities. Additionally, exceptions for children's participation are sometimes interpreted quite broadly, such as in the Finnish Aliens Act which makes an exception for situations when hearing the child is manifestly unnecessary. The Finnish Supreme Administrative Court, however, ruled that the exception must be interpreted narrowly.[68]

Furthermore, parents are generally considered to have the power to make decisions on behalf of their children and have the primary obligation to hear the child[69]: authorities have traditionally entrusted hearing the child to the

65 Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 14, section 3.2.1; Nylund, 'Children's Right to Participate' (n 44) section 2.

66 *General comment no. 20 (2016) on the implementation of the rights of the child during adolescence* (6 December 2016) CRC/C/GC/20 paras 7–8; *General comment no. 12 (2009) The Right of the child to be heard* (20 July 2009) CRC/C/GC/12; *General comment No. 7 (2005) Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7/Rev.1 paras 6–7; *General comment no. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child* (1 July 2003) CRC/GC/2003/4 paras 7, 9–10.

67 Gísladóttir (n 13) sections 5.3–5.4; Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 12, section 2.

68 Tolonen (n 67) section 2.3. Gísladóttir (n 13) section 5.4, mentions a comparable example where the Icelandic Supreme Court overruled a ruling where a 10-year-old had not been heard in a case concerning residence and contact.

69 Gísladóttir (n 13) section 4; Hanne Hartoft, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination? in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 15, section 5; Leviner (n 65) section 3.1.

parents and trusted that the parents' give a sufficient and exact account of the child's views. Authorities do not control whether and how parents have involved their child in decision-making. Moreover, these methods of participation disregard potential conflicts of interests between the parents and the child, and that, in some situations, children have a legitimate wish of privacy from their parents. Consequently, these practices are not compatible with the spirit of the CRC as expressed in the general comments,[70] since they deprive children of effective participation and hinder children from receiving information directly.

There are signs of change, such as reforms giving children the right to act without involvement of their parents in health care settings and even to keep information secret from their parents.[71] Another example is the Danish family-law house where children have an independent right to schedule a meeting at the house to discuss custody, residence and contact arrangements.[72]

5.2 *Participatory Rights – Voice and Choice*

Children's right to participation varies across different domains. Children have very limited opportunities to collective, civic participation and active citizenship in the Nordic countries. Although extending voting rights to 16- and 17-year-olds has been discussed, the arguments of the opponents, mainly that children are immature and inexperienced, have – at least until now – prevailed.[73] Leviner remarks how children are automatically considered to lack the capacity and competence to assess information and make 'rational' choices in elections, and that the capacity will magically surface at the moment they turn 18.[74] The youth demonstrations for climate are a direct consequence of the disenfranchisement of children: since children are barred from participating in political processes, they must avail themselves of other opportunities for making their voices heard.

Youth councils and school councils are the exceptions to lack of participation at the collective level. Nonetheless, since the decision-making authority of these organs is very limited, in the case of youth councils sometimes even virtually non-existent, these organs pay, in effect, lip service to children's

70 Gísladóttir (n 13) sections 5.3–5.4; Tolonen (n 67) section 2.
71 See Gísladóttir (n 13) section 4; Hartoft (n 69) section 7; Nylund, 'Children's Right to Participate' (n 44) section 5.3; Tolonen (n 67) section 2.3.
72 Hartoft (n 69) section 5.
73 Gísladóttir (n 13) section 3.3; Leviner (n 65) section 2.1.
74 Leviner (n 65) section 2.1.

participatory rights.[75] Denmark and Norway serve as examples: the youngest children in primary schools are excluded from participation in the student council and have therefore a limited say on how the physical and social school environment is shaped.[76] This is true even though one would expect most children age 6–10 be far more interested in, for example, the design of the playground, than children age 11–13 would be. Although town planning has significant impact on children's lives, in particular, for making public spaces appealing and accessible and for enabling children to move independently in their surroundings, children are not regularly given an opportunity to participate in decision-making processes or even rendered an opportunity to be heard. Consequently, children's opportunities to advocate for their views and to invoke their rights is limited. This is also an example of the principle of 'integration through separation' of children and young people, where participation is confined to a narrow area that serves primarily children and young people.[77]

On the level of decision-making concerning individual children or siblings, the view of children's participatory rights is in a process of transformation. Children's participation is increasingly enshrined, not just in a tokenistic perspective as a source of information, but also as an intrinsic value. Progress is, nonetheless, fairly slow and proceeds unevenly across different domains. Participation in child welfare services has been improved significantly; nonetheless, problematic regulation and practices are still abundant. For instance, in Sweden, hearing the child regardless of whether the parents cooperate is still considered an exception designed only for serious cases.[78]

In cases on parental responsibility, which belong to the core domain of private life, participation rights for children are still limited. In particular, children lack legal standing in courts. However, courts increasingly hear children either directly during or before the main hearing or request social services or

75 See Gísladóttir (n 13) section 3.2; Hartoft (n 69) section 4; Leviner (n 65) sections 2.2–2.3; Nylund, 'Children's Right to Participate' (n 44) section 4; Tolonen (n 67) section 2.3. See also the concluding observations of the CRC Committee on Norway (n 40) Part III para 14; Iceland (n 40) Part IV paras 28–29; and Denmark (n 64) Part III para 13.

76 Hartoft (n 69) section 4.1; Nylund, 'Children's Right to Participate' (n 44) section 4. See also the concluding observations of the CRC Committee on Denmark (n 64) Part III, para 13.

77 Michael-Sebastian Honig, 'Work and Care: Reconstructing Childhood through Childcare Policy in Germany' In Allison James and Adrian L James (eds), *European Childhoods: Cultures, Politics and Childhoods in Europe* (Palgrave Macmillan 2008) 198–215, 202.

78 Leviner (n 65) section 3.2.1 and the concluding observations of the CRC Committee on Sweden (n 40) Part III, paras 19–20.

an expert to do so.[79] The former method is preferable, as it ensures children superior voice.[80] In recent years, systems have been put in place for child-inclusive decision-making processes on parental responsibility in mandatory out-of-court mediation.[81] However, even when child-inclusive processes have been developed, they do not necessarily become the standard, as the Norwegian BIM model illustrates.[82] When parents agree on residence and contact, children's voices become muted unless the parents are willing to hear the views of the child and to incorporate those views in decision-making.[83]

The Nordic countries operate with numerous age-limits for participation in different areas of law, where 15 and 12 are very common. The approach appears to be haphazard because age-limits vary across different domains. While age limits ensure participation for children above the limit, they tend to hinder participation for younger children even when the provision states that sufficiently mature children have participatory rights. Thus, age limits are a double-edged sword. Denmark, Finland and Sweden have high age limits, putting the limit mostly at 12 or 15 years of age.[84] The Norwegian strategy is using two age limits, a lower limit ensuring the right to express views and a higher limit ensuring that proper weight is assigned to those views. This approach is preferable, because it forces authorities to hear children already at an earlier age.[85] Based on the contributions in this volume, time is not ripe for abolishing age limits; rather, the primary focus should be to lower them significantly. To avoid 'infantilisation' of adolescents, we should simultaneously mind their capacities by endowing young people with stronger participatory rights than younger children.[86]

Children's participatory rights depend to a large extent on practices: on whether professionals involved in decision-making processes develop

79 Leviner (n 65) section 3.2.1; Nylund, 'Children's Right to Participate' (n 44) sections 5.1.2 and 5.2; Tolonen (n 67) section 3.

80 CRC Committee on Sweden (n 40) Part III D.

81 Gísladóttir (n 13) section 5.3; Hartoft (n 69) section 5; Nylund, 'Children's Right to Participate' (n 44) section 5.1.1. For criticism on the practice in Denmark in place until March 2019, see the concluding observations of the CRC Committee on Denmark (n 64) Part III, para 14.

82 Nylund, 'Children's Right to Participate' (n 44) section 5.1.1. See also the concluding observations of the CRC Committee on Norway (n 40) Part III para 14.

83 Gísladóttir (n 13), section 5.2.

84 Hartoft (n 69) section 5; Leviner (n 65) section 3.2.1; Tolonen (n 67) section 3.

85 Nylund, 'Children's Right to Participate' (n 44) section 6.

86 Bruce Abramson, 'The Invisibility of Children and Adolescents: The Need to Monitor our Rhetoric and our Attitudes' in Eugeen Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 393–402, 397400.

processes for involving children and hearing the voice of the child. Professionals need skills to engage children in age-appropriate ways. The contributions unanimously emphasise that formal participation does not guarantee voice and choice for children. It must be accompanied by appropriate child-friendly and child-centred practices and proper training of the professionals involved.[87]

Several authors address the difference between enabling children to express their views and giving due weight to those views. The two concepts do not appear to be highly problematized nationally, even though hearing the child does not automatically translate into giving weight to the views of the child.[88] Perhaps the two are largely thought to coincide – only children who are capable of 'rational' thinking are considered to be capable of forming their own views or perhaps the main problem is that children do not have access to meaningful participation, and consequently, the issue of assigning weight to those view does not arise. Icelandic and Norwegian law are the exception, operating with different age limits for the right to be heard, the right to participate in decision-making and the right to self-determination.[89]

5.3 *The Role of Constitutional Protection*

The question remains whether including children's participatory rights in the Constitution matters. Despite the differences in the formal constitutional protection, the issues addressed in the five chapters on participation in this volume are similar. Divergences among the contributions seem to ensue primarily from each author's research interest and is to some extent contingent on incidental factors such as recent cases. As Hartoft notes, lack of constitutional protection (and lack of implementation of the CRC at a semi-constitutional level) impedes reforms to some extent.[90] Although the right to voice and choice is enshrined in the Finnish Constitution, case law from the ECtHR appear to be highly influential, perhaps much more so than case law from national courts, at least based on Tolonen's contribution.[91] The question is whether incorporating children's rights into the Finnish Constitution has propelled the development of the right to participation or whether the shift emanates from the evolution in the role of human rights and changing attitudes to children.

87 Gísladóttir (n 13) sections 4 and 5; Hartoft (n 69) section 6; Leviner (n 65) section 3.2; Nylund, 'Children's Right to Participate' (n 44) sections 5 and 7; Tolonen (n 67) section 4.

88 Hartoft (n 69) section 6; Leviner (n 65) sections 3.2.2–3.2.3 and 4.

89 Gísladóttir (n 13) section 4.

90 Hartoft (n 69) section 2.

91 Tolonen (n 67).

Although the value of explicitly including the right to participation as a constitutional right is limited, Norwegian law has several examples of a burgeoning shift in the patterns of argumentation.[92] Children's constitutional right to participation serves perhaps not by itself as a sufficient impetus for change of legislation and practices, but it adds significant weight to arguments for improving participatory rights and to extend the reach of those rights. The combined effect of the shift in our view of children and constitutional law could prove to be forceful.

6 The Right to Family Life

6.1 *'Family' as a Legal Concept*

The family is almost universally considered as the natural environment for the child to live and grow. Although the right to family life has a bearing on virtually all areas of child law, as Schiratzki notes,[93] and 'family' is a legal concept used in numerous international and national legal instruments, there is no common definition of 'family'. If the concept is defined at all, it is presumably given divergent definitions in the various domains of law, e.g. in family law, child protection law and immigration law. Some guidance may be found by analysing ECHR article 8, which is incorporated into national law in all the Nordic countries.[94] The ECtHR has developed the concept of and the right to family life over the years in its extensive practice, with increasing attention to the rights of the child and the CRC. According to the ECtHR, family life may depend on biological, legal or social (*de facto*) ties between a child and another person.[95] The right to family life is understood both as a negative right that imposes a duty on the state not to interfere in family life and as a positive duty for the state to promote family life and to protect the family from violations from third parties. The Committee on the Rights of the Children interprets the concept of 'family' concordantly with the ECtHR when stating the following:

> [t]he family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children

92 Nylund, 'Children's Right to Participate' (n 44) sections 5.1.2, 5.2 and 5.3.

93 Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 18, section 1.

94 See this chapter, section 3.

95 See *K. and T. v Finland* (Application no. 25702/94) ECtHR Grand Chamber 12 July 2001.

> (preamble of the Convention). The right of the child to family life is protected under the Convention (art 16). The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art 5).[96]

According to the Norwegian Constitution, section 102, everyone has a right to respect for private and family life. 'Everyone' includes children, of course, and the provision should be read in conjunction with section 104. Section 71 of the Icelandic Constitution ensures the right to respect for private and family life. Family is not mentioned in the Finnish Constitution, however, the right to privacy as stated in section 10 is meant to cover family life as well. According to chapter 1, section 2 of the Swedish Instrument of Government, the State has a duty to protect the private and family life of the individual. Family is not mentioned in the Danish Constitution, however, the right to personal liberty is protected under section 71, and interference with family life may be considered as an intervention in the right to personal liberty.

To identify how children's right to family life has been implemented, one must turn to statutory law and court cases. In analysing children's right to family life, the authors in this volume have mainly discussed children's rights to know and to be cared for by their parents, which includes registration of paternity, parental responsibility and the post-divorce family; adoption; out of home care; and forming and maintaining relationships with the extended family. Based on the four chapters on family life in this volume, the variations among the Nordic countries regarding children's rights to family life are fairly small. Therefore, the areas with the most pronounced differences will be subject to further analysis.

6.2 *Defining and Establishing Parenthood*

The idea of parenthood in Nordic legislation appears to stem tacitly from the idea of the nuclear family with two parents of opposite sexes, even when the parents are separated, divorced or have never lived together. However, the regulation of parenthood is far from consistent. Despite recurrent debates of extending parenthood to more than two persons when more than two persons are the *de facto* parents of the child, no legislative changes have been made.

96 Committee on the Rights of the Child, *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3.1)* (29 May 2013) para 59.

Thera are naturally many children with only one parent, and in Norway and Sweden single persons are allowed to adopt children. In Sweden, assisted reproduction is legal for single women, in Norway they are limited to married and co-habiting couples.

Regarding the right to contest and change legal paternity, the views differ – and evolve – in the Nordic countries. The main concern is balancing 'the right to know' and the protection of the family that has been established *de facto*. The right to know one's identity is an integral part of the right to privacy and family life, stated the Supreme Court of Iceland in a paternity suit.[97] In Norway, the Children Act has been amended several times in this respect. Currently the child, either of the parents and any person who believes he is the father of a child, may at any time bring an action before the courts regarding paternity, even when paternity has already been established through marriage or declaration. Denmark, on the other hand, has very strict reopening rules. The ECtHR has accepted these rules under the condition that there is still room for some discretion.[98] Thus, Norway protects the right to know and biological factors, whereas Denmark protects the family as an established social unit. Finland is in a middle position: Since 2015, the time limits for the child to bring a paternity case to court have been abolished as a consequence of a ruling of the Supreme Court from 2012 finding such time limits unconstitutional.[99] However, a time limit still restricts the right of the legal mother and father to bring an action on paternity.[100]

Legislation reflects how particularly assisted reproductive treatments result in the increasing importance of intent as a factor for establishing parenthood, observes Koulu.[101] Still, the Icelandic Supreme Court found that the refusal to acknowledge non-biological intended parents as legal parents pursuant to a surrogacy arrangement did not amount to a violation of the right to family life.[102]

97 Friðriksdóttir (n 5) section 3.

98 Caroline Adolphsen, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 19, section 2.2.

99 Sanna Koulu, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 17, section 4.1.

100 Koulu (n 99) section 4.1.

101 Koulu (n 99) section 4.1.

102 Friðriksdóttir (n 5) section 3.

6.3 *The Right to Family Life for Children in Out-of-Home Care and in Post-Divorce Families*

The ECtHR has repeatedly stated that 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8'.[103]

A fundamental part of this 'mutual enjoyment' is the right to live together, enable 'normal' development of family relationships, or at least to enable regular contact between the child and parent(s). As Koulu notes, 'the child's right to family life does not suddenly disappear just because her right to protection and her best interest need to take precedence at a given moment'.[104]

The right of the child to maintain contact with the biological family other than the parents (i.e. siblings and grandparents), or the *de facto* family, or both (i.e. step- or social-siblings or parents), is very limited in post-divorce cases in the Nordic countries, which reflects the dominance of the two-parent norm in all the Nordic countries, and how family is construed narrowly to encompass child-parent relations only. However, the 2018 reform of the Finnish Child Custody Act constitutes a shift in extending family life to include for example step-parents and grand-parents as persons with whom an enforceable right to contact can be established.[105]

For children in out-of-home care, the general picture is slightly different. In Norway and Finland, the social welfare authorities have a duty to investigate whether children can live with their non-residential parent or be placed in foster care within the extended family. In Finland, the variations in social family constellations are recognises by giving children placed in care the right to meet their parents, siblings and 'other people close to them'.[106] Similarly, in Denmark, children in care have the right to stay in contact with their social network.[107] In Sweden and Norway, the child's right to contact with the extended family is more restricted. This might amount to a violation of children's right to respect for their family life, according to ECHR article 8, and, in Norway, in conflict with the Constitution sections 102 and 104. For children living in a foster home, the foster-family may over time turn into the child's *de facto* family, especially in cases where contact between the child and the biological family has been very limited.

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103 *Johansen v Norway* App no 7383/90 (ECtHR, 7 August 1996).

104 Koulu (n 99) section 1.

105 Koulu (n 99) section 4.2.

106 Koulu (n 99) section 4.3.

107 Adolphsen 'Children's Right to Family Life' (n 98) section 3.4.

During the last few years Norwegian child protection cases have been heavily criticized by an international audience, mainly for not paying sufficient respect to family life. Since 2016, the ECtHR has received 13 complaints against Norway in such cases.[108] The main questions concern care orders, contact and adoption. Norwegian courts should give proper attention and weight to children's rights to respect for their family life, balancing the principle of the best interests of the child, as Bendiksen notes.[109]

In Norway, Denmark and Finland children placed in care may in extraordinary circumstances be adopted without the consent of the parents.[110] In Sweden, custody may be transferred to the child's foster parents, and this is regarded as the Swedish version of adoption of a child without consent from the birth parents.[111] Adoption transfers the child's right to family life to concern the adoptive family and terminates the legal ties to the birth family.

6.4 *An Emerging Shift in the Nordic Definition of Family Life?*

Nordic family life has changed significantly over the past decades, but these changes are not sufficiently reflected in the legal regulation of family life and parenthood. Cohabitation is legally largely equated marriage and same sex relations are legally recognized. Many children live in post-divorce families and experience that their parents establish new relationships. Children's family relationships have become more diverse, complex and fluid. Regulating the right of the child to family life with the extended or *de facto* family in different areas is one challenge.

If family is defined in a too narrow way, law may put restrictions on a child's right to contact with people close to them. This may represent a violation of the right to respect for family life and the best interest of the child. There must

108 Ten cases have been communicated from the EMD since 2016. *K.O. and V.M. v Norway* App no 64808/16; *Hernehult v Norway* App no 14652/16; *Ibrahim v Norway* App no 15379/16; *Pedersen and others v Norway* App no 39710/15; *Hasan v Norway* App no 27496/15; *M.L. v Norway* App no 43701/14; *A.S v Norway* App no 60371/15; *Strand Lobben and others v Norway* App no 37283/13; *Jansen v Norway* App no 2822/16 *Bodnariu and others v Norway* App no 73890/16.Three cases have been lawfully settled; there was a violation in one of the cases (*Jansen v Norway*) and Norway was acquitted in the other two (*M.L v Norway*, *M.H. v Norway*). In addition, the case of *Strand Lobben and Others v Norway*, where Norway was acquitted—however, with a dissenting opinion—was brought before the EMD's Grand Chamber in 2018. The decision is not yet final. Another three complaints against Norway have been rejected with justification, without being communicated.

109 Bendiksen (n 44) section 6.

110 Bendiksen (n 44) section 6; Koulu (n 99) section 4.1; Adolphsen, 'Children's Right to Family Life' (n 98) section 4.2.

111 Schiratzki, 'Children's Right to Family Life' (n 93) sections 4 and 7.

be room for discretion, as a child may have lived with a person for a long time without establishing any emotional connection with the person or contrary, have developed a close emotional connection during a short period of time.

Fathers spend much more time with their children and in many families the parents participate in taking care of children equally. This is a consequence of Nordic women's high participation in working life outside of home. For separated or divorced parents, shared parental responsibility has, in practice, become the main rule. One sees a clear trend towards increased shared residence for children.

How parenthood can be established has also changed considerably, with genetics and intention as new factors in the context of increased possibilities for various forms of assisted reproduction. Co-motherhood is a new legal concept, linked to the fact that the mother's female partner establishes parenthood through consent to assisted reproduction. Children can be created through surrogacy schemes, which in themselves raise a number of unresolved legal challenges both nationally and internationally, including the issues of how the intention to become a parent should be protected legally, and which obligations towards the future child the intention should entail.

One challenge is the balancing of children's right to know about their genetic origin, with the child's right to be cared for by the persons legally recognised as a child's parents.

The Nordic countries are trying to cope with these challenges, often by frequently changing statutory law, piece by piece. Children's rights to respect for their family life are heavily protected by constitutional law and human rights conventions, but this does not suffice. Those rights must be comprehensively implemented in national law. However, the task is far from easy: 'It takes careful legal craftsmanship to create a comprehensive legal system that meets the demands of protecting and promoting those relationships that make up contemporary family life', comments Schiratzki.[112]

7 The Value of Specific Constitutional Protection of Children's Rights

The initial assessment done in section 2.5 above suggests that constitutional protection could render tools for advocating that courts, policy makers and practitioners must take children's rights seriously. According to Conor O'Mahony, making children visible in constitutional matters 'requires child-specific

112 Schiratzki, 'Children's Right to Family Life' (n 93) section 7.

provisions rather than leaving children to rely on general rights guarantees'.[113] The question is whether the varying level of constitutional protection is reflected in legislation, court cases and (legal) practices. Another question is whether codifying children's rights in the Constitution represents the culmination of the development of recognition of children's rights and or the genesis of a new era?

Answering these questions is far from easy, as this study demonstrates. At first glance, the differences among the Nordic countries in terms of recognition and implementation of children's rights are practically non-existent and stem from differences in reform cycles, structural and organisational differences and so forth, rather than from divergent views on children's capabilities and rights. However, this observation would support the view that children's constitutional rights are of little consequence and that constitutionalisation is the apex of the shift in our image of children.

However, a more detailed analysis defeats, at least partly, this line of argumentation. Constitutional rights are an advocacy tool in several respects, as numerous examples from primarily Norway and Finland. These two countries afford a stronger – more comprehensive and obliging – constitutional protection of children's rights. The Constitution demands that children's rights are taken seriously in the legislative process, especially when the act of parliament or decree is of vital importance for children. The legislator must assess whether and how each provision impacts children's rights. There are indications that when a right is explicitly enshrined in the Constitution, the legislator will make a more thorough assessment of that right when drafting new laws. Constitutional rights influence interpretation of statutory law, as well. Again, the more clearly a right is protected in the Constitution, the stronger the persuasive force of it will be, and courts and administrative organs will be more likely to interpret law in light of it and, thus, enforce it. In light of these observations, constitutional rights matter, even in countries where children's rights are widely recognised and even treated as principles of law.

Norway and Finland, by recognising children as rights-holders in their Constitutions, also illustrate the innate transformative power of constitutionalisation of children's rights. Constitutionalisation propels implementation and enforcement of children's rights by mandating policy-makers, legislators, courts and practitioners working with children and children's rights to take those rights seriously. The more unequivocal and comprehensively children's rights are enshrined, and the more children's human dignity is advocated, the

113 O'Mahony (n 1).

more efficient advocacy tools the Constitution offers. Based on our study, a dedicated provision for children's rights, recognising children as agents and containing at least all the general principles of the CRC, is superior to other alternatives.

Despite the value of constitutional law, constitutionalisation is not a magic trick transforming law overnight. On the contrary, implementation is a slow and arduous process, requiring continuous effort. Firstly, constitutions are inherently general, requiring interpretation and in need of implementation through more detailed provisions in legislation, practice guidelines, policy documents and other documents. Courts must be willing to interpret and enforce the Constitution in a manner that empowers children, balancing considerations of agency and vulnerability. This volume contains abundant examples of how children's rights are implemented, interpreted and enforced unevenly in different realms, and how current legislation and practices are oftentimes unsatisfactory. Adult-centric notions produce resistance towards development of child-centred practices and regulation. In many areas, policies, practices and the mind-set of individuals working with children are pivotal for implementing children's rights in practice. Allocation of adequate resources to develop and implement new practices and to provide necessary training and monitoring is required if we want to take children's rights seriously.

References

Abramson B, 'The Invisibility of Children and Adolescents: The Need to Monitor our Rhetoric and our Attitudes' in Eugeen Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 393–402.

Adolphsen C, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).

Adolphsen C, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).

Bendiksen LRL, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Freeman M, 'Why it remains important to take children's rights seriously' (2007) 15 International Journal of Children's Rights 5–23.

Friðriksdóttir H, 'Protection of Children's Rights in the Icelandic Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Gísladóttir E, 'Children's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Habashi J and others 'Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation' (2010) 18 International Journal of Children's Rights 267–290.

Hakalehto S, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Hartoft H, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Haugli T, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Honig M-S, 'Work and Care: Reconstructing Childhood through Childcare Policy in Germany' in Allison James and Adrian L. James (eds), *European Childhoods: Cultures, Politics and Childhoods in Europe* (Palgrave Macmillan 2008) 198–215.

Kervinen E and Ollus N, 'Lapsiin ja nuoriin kohdistuva ihmiskauppa *Suomessa'* (European Institute for Crime Prevention and Control 2019). Affiliated with the United Nations (HEUNI) Publication Series No. 89.

Koulu S, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Leviner P, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Mattsson T, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Nylund A, 'Introduction' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Nylund A, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

O'Mahony C, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (forthcoming) *Human Rights Law Review*.

Sandberg K, 'Best Interests of the Child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Schiratzki J, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Schiratzki J, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Sigurdsen R, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Tobin J, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 South African Journal on Human Rights 86–126.

Tolonen H, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

Tolonen H, Koulu S and Hakalehto S, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

UN Committee on the Rights of the Child, *Concluding Observations: Finland* CRC/C/FIN/C/4 (3 August 2011).

UN Committee on the Rights of the Child, *Concluding Observations: Iceland* CRC/C/ISL/CO/3–4 (23 January 2012).

UN Committee on the Rights of the Child, *Concluding Observations: Sweden* CRC/C/SWE/CO/5 (6 March 2015).

UN Committee on the Rights of the Child, *Concluding Observations: Denmark* CRC/C/DNK/CO/5 (26 October 2017).

UN Committee on the Rights of the Child, *Concluding Observations: Norway* CRC/C/NOR/CO/5–6 (1 June 2018).

Index