

Children's Rights in Norway

Malcolm Langford, Marit Skivenes and Karl Harald Søvig (Eds.)

Children's Rights in Norway

An Implementation Paradox?

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List of Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
HRA	Human Rights Act (Norway)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
MDG	Millennium Development Goal
NGO	Non-governmental Organization
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SDG	Sustainable Development Goal
UN	United Nations
UNICEF	United Nations Children's Fund
WHO	World Health Organization
WTO	World Trade Organization

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Part I

OVERVIEW

1

Introduction: Implementing Child Rights

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ABSTRACT The UN Convention for the Rights of the Child (CRC) has emerged as a central yardstick in assessing policies and practices concerning children. Norway has incorporated the convention in domestic law and performs exceptionally well in global indexes on children's rights. However, the level of compliance and implementation by Norway with the CRC has attracted criticism and many questions can be raised about these global indexes. This chapter sets out this paradox and the background for the book's key questions: What is the extent of implementation? Can we improve measurement? And what might explain the paradox? The remainder of the chapter explains the book's mixed method approach and choice of themes; summarises the key findings concerning implementation (legal, qualitative and statistical); identifies cross-cutting concerns; and explores potential reasons for non-implementation in certain areas.

KEYWORDS children's rights | mixed methods | compliance | indexes | welfare states | decentralisation

1.1 BACKGROUND

Within a short span of twenty-nine years, the UN Convention for the Rights of the Child (CRC) has emerged as a central yardstick in assessing policies and practices concerning children, including in Norway (Ødegård 2010). While many of the key elements in the CRC were legally embedded in Norwegian law before ratification (Andersland 2011), the treaty has helped trigger a series of legal and institutional reforms (see, e.g., Stang and Hydle 2015; Lidén and Rusten 2007). Today, Norway performs exceptionally well on global children's indexes. At the top of the Child Development Index in 2017 and Kids Rights Index in 2017, it is claimed that Norway is the 'best' country in the world in which to be a child (Emmanuel 2017).

However, the level of compliance and implementation by Norway with the CRC has attracted criticism. The UN Committee on the Rights of the Child has reproached Norway in areas such as asylum, child protection, disability and poverty. These concerns and others are not only championed by non-governmental organisations and the Ombudsmen for Children but are also reflected in the scholarly literature (see, e.g., Sandbæk 2013; Bakken and Elstad 2012; Skivenes 2011; Fløtten 2013; Hegna and Wichstrøm 2007; Wendelborg and Tøssebro 2010; Fornes 2013; Løwe 2010). Moreover, questions can be raised about whether global indexes – which focus on certain socio-economic outcomes – capture all the dimensions of children's human rights.

This book sets out to assess this seeming implementation paradox. We ask what is the current state of implementation with a focus on selected children's rights and cross-cutting issues. While various reports have provided a comprehensive overview of Norway's general performance on children's rights (Søvig 2009), few offer a full-bodied quantitative and qualitative analysis. This book seeks to provide a complementary perspective with a focus on quantitative measurement (with in-country and comparative European-specific indicators) and a richer interpretive gloss through grounded qualitative research. The principal question in the book is whether and to what extent policies, laws and practice in Norway successfully incorporate and implement children's human rights in the public and private sphere. Drawing on multiple methods, we seek to provide more informed measurements and determination of level of compliance.

The book also has two additional objectives. The first is an attempt to develop an actual and proposed set of relevant and actionable indicators on children's rights that could be regularly measured and reported in Norway (and potentially extended to other countries). Indexes play a powerful role in contemporary debate and there is a risk that they are misleading or encourage problematic policy action. Improved measurement is discussed in a number of chapters and in chapter 2, in

which the authors present a dashboard of indicators together with recommendations for improving child rights-centric data.

The second additional objective is to identify reasons for the seemingly implementation paradox. Is the paradox illusory because the critiques are too harsh in comparative perspective? Is it real because existing measurements of implementation are flawed and fail to capture the complexity of implementation? In the conclusion of this chapter, we draw together the cross-cutting themes in the book and seek to shed some light on this explanatory question.

1.2 METHODOLOGY AND STRUCTURE

The book adopts a ‘transformative’ mixed-methods approach (Creswell et al. 2003). The performance of Norway is assessed against a normative (legal) standard, but the analysis is grounded within standard social science methodologies.

The *normative benchmark* is constituted by the CRC provisions and the relevant jurisprudence of its oversight Committee (see, for example, analysis of how these standards should apply to Norway in Høstmælingen, Kjørholt and Sandberg 2016). However, we seek to avoid a simple or binary answer as to whether Norway is in compliance with the CRC. Even though authors have concluded in certain instances that there is (or could be) a *violation* of the Convention, the book is more public policy-oriented in nature – seeking to identify areas where a children’s rights *approach* is missing. In this respect, we are particularly mindful of the CRC’s dynamic, interpretive and increasingly equity-focused nature, and the requirement that the best interests of the child permeate and form part of the primary considerations in all actions concerning children. It raises critical questions for states on implementation as much as it provides clear answers on what steps must be taken. Moreover, legal standards need to be interpreted in a domestic policy context with its own array of normative benchmarks (Fløtten 2013).

Thus, a more open-textured approach will be taken and authors seek to identify the level of implementation which is defined as the:

1. degree of legal/institutional *commitment* to child rights;
2. *realisation* of specific rights; and
3. *quality* of steps to address particular areas of concern.

As to *methods*, the chapters vary. Some chapters provide an even mix of quantitative and qualitative perspectives on implementation; while some are more oriented to quantitative or qualitative approaches. Quantitative measures are particu-

larly useful in helping provide an overall measure of commitment and realisation and identifying particular areas of concern.¹ However, such methods are not always possible due to the lack of data or the inappropriateness of statistical measurement for a particular obligation. Qualitative methods are used especially to confirm or challenge quantitative findings or move beyond more cursory assessments of compliance. These methods are particularly helpful in providing a more contextual and nuanced picture of implementation; analyse whether non-implementation is defensible; and identify the most serious areas of concerns.

The book begins in Chapter 2 with an analysis of current and potential indexes of children's rights in Norway. After finding that existing global indexes suffer in terms of their ability to provide accurate and/or relevant measures of children's rights, a dashboard approach is proposed. The authors set out 25 indicators that seek to capture different aspects of children's civil, political and socio-economic rights together with the availability of remedies and accountability mechanisms for those rights.

The remainder of the book is devoted to twelve studies of particular rights and issues by leading Norwegian authors on children's rights who possess specific thematic competence and expertise in either or both qualitative or quantitative methods. Obviously, any choice will be limited given the breadth of the Convention on the Rights of the Child. There are thirty-five concrete rights provisions in the Convention together with specific and general obligations and cross-cutting principles. Thus, we have sought first to cover in *Section II* of the book a selection of representative rights that are also particularly relevant in the Norwegian context: child protection, sexual violence, detention, policing, poverty and the linkages between childcare and education. To be sure, some important areas are not covered. This includes important rights such as health and primary/secondary education, although these are partly addressed in the subsequent section. *Section III* contains analysis of various cross-cutting issues, such as the incorporation of the CRC in Norwegian law and jurisprudence, participation of children in legal family proceedings, child asylum-seekers rights, children with disabilities, sexual orientation and gender identity, and human rights education. In each chapter, authors often address the four general principles of the CRC (non-discrimination; best interests of the child; the right to life, survival and development; and respect for the views of the child), together with the general implementation obligation (Article 4).

1. For an overview of the rise of quantitative-based approaches to human rights measurement, see Langford and Fukuda-Parr (2012). For the relative virtues of quantitative and qualitative approaches, see Mahoney and Goertz (2006) and Creswell et. al. (2003).

In the remainder of this introduction, we describe the departure point for the study in terms of the formal incorporation of the Convention in the Norwegian legal system (section 3), analyse the key cross-cutting themes on compliance, including blindspots (section 4), and discuss the possible explanations for non-compliance and poor implementation (section 5).

1.3 INCORPORATION OF THE CRC

1.3.1 RATIFICATION AND PRESUMPTION OF LEGAL COMPLIANCE

Norway's legislation and institutional framework provides, with some notable exceptions, a reasonable reflection of the Convention's formal demands. Structurally, the level of implementation appears high. Such coherence was largely presumed when the Norwegian government signed the Convention on 26 January 1990 (one of the first to do so) and ratified it a year later on 8 January 1991.² However, according to the Constitution, treaties concerning matters of importance or requiring legislative amendments are not binding on Norway until the parliament has given its *consent*. Moreover, as the Norwegian legal system is based on a dualistic approach,³ treaties must be transformed into the domestic legal system by various techniques, e.g. incorporation through the legislation, before they become part of the legal system. In the case of the CRC, and prior to ratification, the parliament gave its consent without requirements for additional legislation.⁴ It determined that current legislation was in conformity with the obligations following from the Convention. The CRC was thus implemented by so-called passive transformation.

During this process, two possible reservations were discussed. The first concerned the right to appeal in criminal cases to a 'higher competent, independent and impartial authority or judicial body', cf. CRC Article 40(2)(b)(v). According to the legislation then in force, the most serious criminal cases were tried before a jury at High Court with only limited possibilities of appeal. The Government therefore made a reservation on criminal appeals when ratifying the CRC, but later withdrew it in 1995 following a major reform of the Criminal Procedure Act. The second possible reservation concerned the separation of children from adults in

2. According to the Norwegian constitution, the Government is empowered to represent the country in foreign affairs, including entry into treaties.

3. This means that international law – including human rights instruments – are as such not an automatic source of domestic law.

4. St.prp. No. 104 (1989–90).

prison facilities, cf. CRC Article 37(c). In its formal proposal to the parliament, the Government recommended such a reservation be made, emphasizing the enormous distances between the prison facilities in a thinly-populated country. In this instance, the parliament refrained from making a reservation, with a similar decision by the Swedish parliament being a decisive factor. Although, in this light, it is striking that Norway did not remove its reservation to the International Covenant on Civil and Political Rights (ICCPR) concerning the separation of young and adult detainees and prisoners.⁵

1.3.2 POST-RATIFICATION INCORPORATION AND CONSTITUTIONAL REFORM

Shortly after ratification, the relevance and application of the CRC was discussed in the legal literature (Smith 1991, Bratholm 1992), but there were few cases before the Supreme Court in which the CRC was central. During the 1990s, the legal status of all human rights instruments was nonetheless debated, partly due to the increased influence of the European Convention on Human Rights (ECHR) and the growing jurisprudence of the European Courts of Human Rights. This triggered the inclusion of a new provision in the Constitution (section 92, former section 110c) requiring that the State shall 'respect and ensure human rights' as they are expressed in the Constitution and in the treaties concerning human rights that are binding for Norway. The provision presaged the introduction of the Human Rights Act in 1999, which incorporated the ECHR, ICCPR and the International Covenant on Economic Social and Cultural Rights (CESCR).

The CRC was not among the instruments incorporated. A majority of the parliamentary committee encouraged inclusion of the CRC at a later stage;⁶ which was also recommended by the CRC Committee in its second concluding observations to Norway.⁷ Initially, the Ministry of Justice suggested that the CRC should be made more visible through partial transformation, but subsequently submitted a proposal on the inclusion of CRC in HRA. It was passed by the parliament in 2003,⁸ which simultaneously embarked on a number of transformatory steps. Sev-

5. CRC/C/NOR/CO/4, paras. 6 and 7.

6. Innst.O. No. 51 (1998–1999).

7. CRC/C/15/Add.126, para. 13. The incorporation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was at that time also on the political agenda. CEDAW was first incorporated in the Equal Treatment Act, but without supremacy over concurring statutory legislation. In 2009, CEDAW was included in HRA.

8. For contributions in English regarding the relevance of CRC in Norwegian law, see Sandberg (2014); Bårdsen (2015).

eral statutory amendments were passed, with most of them strengthening a children's legal right to be heard.⁹ The Child Welfare Act and the Adoption Act were both amended with a provision stating that children who have reached the age of 7, and younger children who are capable of forming their own opinions, shall receive information and be given an opportunity to state their opinion before a decision is made in a case affecting them. The Children Act was revised in a similar manner.

The final major legal development was the full revision of the bill of rights in the Norwegian constitution.¹⁰ In 2014, a new section 104 on children's rights was added and the wording has several similarities with the CRC, which was clearly a source of inspiration. Section 104(1) states that 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. Section 104(2) states that the best interests of the child shall be a fundamental consideration in actions and decisions that affect children. Section 104(3) provides that children have the right to protection of their personal integrity and that the authorities of the state shall create conditions that facilitate the child's development.

As is apparent, since 2003, the CRC has been steadily integrated in the domestic legal system, which has been welcomed by the CRC committee.¹¹ Through legislative incorporation, all three branches of the state are legally bound by the CRC provisions, although to a different extent. The executive power is clearly bound by the legislation, making compliance with the CRC binding for all state organs. In dispute resolution, the judiciary is equally bound. Although constrained by the boundaries established by the legislature, and self-restraint in the form of justiciability doctrines and a tradition of deferentialism, courts can develop and clarify the CRC's legal meaning and apply the CRC in practice. The parliament has greater flexibility and can amend legislation, including repealing or altering the HRA. Yet, this has not transpired and nor is it likely.¹² Moreover, parliament's actions are now bound by Section 104 of the Constitution, which mirrors the thrust of the CRC.

9. See discussion by Skjørten and Sandberg in chapter 10 on the impact of these changes in family law proceedings.

10. For two centuries, the human rights provisions in the Norwegian constitution remained virtually unchanged, although there were some notable revisions (e.g., freedom of speech) and amendments (e.g., right to work). As part of the bicentenary of the constitution in 2014, several new provisions regarding human rights were included, including for the first time express provisions on children's rights.

11. See Committee on the Rights of the Child, *Concluding Observations: Norway*, UN. Doc CRC/C/NOR/CO/4 (2010), para 8.

12. Although a government commission is currently discussing whether the government should be granted further full powers in certain situations.

In practice, relevant provisions of the CRC are often referenced in the preparatory work of new legislation. In the drafting of the new Children's Welfare Act, obligations deriving from CRC and other relevant human rights instruments were used as an overarching framework, and the background report includes an appendix analysing the relevant provisions.¹³ In 2018, the government justified the inclusion of a provision entitling children to services in this law¹⁴ on the grounds that it would implement the children's right to care contained in the CRC.¹⁵ To be sure, a similar provision might have been adopted without the existence or incorporation of the CRC, but it seems fair to conclude that it played a role. This does not mean, however, that legislative concerns do not feature in evaluations of compliance with the CRC. As the next section and book shows, certain legislative provisions have attracted strong critique, which has sometimes been met with varying levels of responsiveness by the Norwegian state.

Turning to the jurisprudence of international supervision bodies for international human rights treaties, including the CRC Committee, it has been partially incorporated within the Norwegian legal system. While this aspect was not addressed in the preparatory work for the domestic incorporation of the CRC, general comments from the CRC committee are an increasingly important relevant legal source in applying the convention in practice (see Søvig in chapter 8). In several areas, it has had a sizeable influence, such as catalysing the reduced use of prison sentencing for offenders under the age of 18 (see Grønning and Sætre in chapter 5). However, in areas such as migration, the CRC has had less influence (see chapter 8).

1.3.3 INSTITUTIONAL ACCOUNTABILITY FRAMEWORK

Moving beyond legal standards, some bodies have a special role in the implementation of the CRC. In 1981, Norway was the first state to establish a children's ombudsman; which has inspired many other countries to follow suit.¹⁶ This ombudsman is complemented by the civil ombudsman that oversees legal compliance by public authorities, who can state his/her concern on general themes and make recommendations (often followed) in individual cases; as does the Equality and Discrimination Ombud which has decided many cases concerning children. The revamped Norwegian National Human Rights Institution (NIM) was estab-

13. NOU 2016: 16.

14. Child Welfare Act (as amended 20 April 2018 No. 5, not yet in force).

15. Prop. No. 169 L (2016–2017) p. 35.

lished under the parliament in 2015 with a mandate to promote human rights in Norway.

However, there is a certain asymmetry in this institutional architecture in the case of children's rights. Unlike the civil or equality ombudsmen, the Ombudsmen for Children is not vested with the competence to decide individual cases. In 1998, the children's ombudsman was empowered to supervise whether Norwegian legislation and administrative practice are in accordance with the obligations arising from the CRC. But this did not cover decision-making in individual cases. In 2010, the CRC committee recommended that Norway consider providing the children's ombudsman with the mandate to receive complaints from children and the resources to follow them up in a timely and effective manner.¹⁷

This asymmetry is enhanced by Norway's decision not to ratify the third optional protocol to the CRC on a communication procedure. After an independent consultant's report on the consequences, the Norwegian government recommended to the parliament that the state not ratify.¹⁸ According to the Government, the protocol's consequences for parliamentary freedom and discretion were uncertain, and there was a fear that political issues would be judicialised. A parliamentary majority agreed. Clearly, this decision insulates Norway from international review in concrete cases although the CRC is, at least, generally well integrated within the domestic legal order. It can be invoked before the courts and administrative bodies and is superior to ordinary legislation.

16. As of 2017, we have calculated that 24 countries have child ombudsmen, 28 countries have institutional protection either through the national human rights institutions or national ombudsmen, and 2 countries have ombudsmen for children but only in selected counties or municipalities. In the Nordic context, Denmark is the outlier, lacking an independent children's ombudsperson. However, 'Børnerådet' in Denmark holds many of the same powers as a children's ombud, complemented by the national ombudsman and the institution "Børns Vilkår". See UNICEF (2014) "Har Danmark brug for en børnetalsmand?" Available at: <https://www.information.dk/debat/2011/04/danmark-brug-boernetalsmand>; see also Kjeldahl, Rasmus, Per Larsen, and Jørgen Steen Sørensen (2015) "Den danske børnemodel er ikke så dum" available at <http://jyllands-posten.dk/debat/breve/ECE8316084/Den-danske-b%C3%B8rnemodel-er-ikke-s%C3%A5-dum/>, see also Børnerådet (2009) "Giv Danmark et børneombud" available at <http://www.boerneraadet.dk/nyheder/nyheder-2009/boerneraadet-giv-danmark-et-boerneombud>

17. Committee on the Rights of the Child, *Concluding Observations: Norway*, UN. Doc CRC/C/NOR/CO/4 (2010), para. 14.

18. The same viewpoint was taken regarding optional protocols to the ICESCR and the Convention on Rights of Persons with Disabilities.

1.4 IMPLEMENTATION IN PRACTICE: A MULTI-METHOD PERSPECTIVE

Overwhelmingly, the chapters report that the Norwegian state has a comparably strong commitment to children's rights and that levels of realisation in many areas are generally high. Specific laws and policies are mostly in accordance with the relevant provisions of the CRC and its four pillars of the rights to life, non-discrimination and participation and the principle of best interests of the child. Furthermore, some authors point to improvements. Skjørten and Sandberg find that participation of children in custody proceedings has improved over the past 15 years (chapter 10). Children's views are given more weight by courts, and children under seven are now being interviewed and observed in parental relations after the above-mentioned changes to Child Welfare Act. Likewise, Aasgaard and Langford report dramatic reductions in the number of children arrested (chapter 6), Drange shows improvement in access to childcare services (chapter 7), and Thorsnes tracks important reforms in the rights of transgender children (chapter 13).

Norway's strong position in global and international indexes might therefore be reasonably accurate. For the Child Development Index in 2017, Norway was the best average performer in indicators on infant mortality, malnutrition, school attendance, child labour, early marriage, adolescent births, displacement by conflict, and child homicide.¹⁹ Norway also ranked first on the Kids Rights Index²⁰ and scores well on other relevant indexes to children's rights. In 2015, it was first in the UNDP human development and EIU democracy indexes, second in the GJP rule of law and CIRI human rights indexes, and third in the gender gap index (Langford and Karlsson Schaffer, 2015:26).

Nonetheless, the chapters also reveal blindspots, or areas where Norway's performance is not exceptional or, at worst, lags behind comparable states. In this respect, the high rankings may be counterproductive for children's rights. They may blind policymakers and the public to the many issues that have to be addressed in fully implementing children's rights and responding to ongoing and new challenges. Success may inculcate complacency. In this section, therefore, we overview the use of a broader range of indicators and blindspots identified by authors.

19. Daniella Emanuel, 'The best and worst countries to be a kid', *CNN*, 16 June 2017.

20. KidsRights and Erasmus University Rotterdam (2018).

1.4.1 REVISITING GLOBAL INDEXES

The use of the global indicators to measure compliance with the CRC is problematic in various respects, according to Langford and Kirkebo in chapter 2. After reviewing a wide range of existing measures, they level the following critiques. First, global children's rights indexes are weighted towards socio-economic rights while general global civil/political rights indexes don't address the specific situation of children, for example a child's right to protection or to be heard. Second, a rights content is often missing. For example, socio-economic rights indexes are focused on eventual and average outcomes but do not address other important elements, such as discrimination, physical accessibility, participation and affordability, or interference with these rights in practice. Third, global indexes include vastly different countries such that the best-performing countries are often 'crunched' together at the top of the index, making it difficult to separate meaningfully the differences between them. Comparisons between developed, Western or European countries are likely to be more meaningful. Fourthly, most measures do not indicate whether the right has actually been achieved; only which country has achieved the most. Normative thresholds are needed, where possible, together with an analysis of internal disparities and trends over time. Finally, many indexes measures do not indicate which policy actions might be the most appropriate.

In light of these challenges, Langford and Kirkebo propose a dashboard approach. The aim is to provide a more comprehensive set of indicators across different children's rights which provide a more reasonable 'snapshot' of realization over time. Twenty-five indicators were selected in an attempt to cover a representative set of rights and issues: see Figure 1.1 for a summary of the nine areas of measurement. In selecting the indicators, weight was also placed on various statistical criteria, such as the reliability and regularity of the data collection, the possibility of disaggregating to measure discrimination, and the possibility for external and internal comparison. Approximately a third of the indicators were drawn from the proposals in various chapters; and the remainder after a process of research and vetting. The authors advise though that the process proved deeply challenging as few existing indicators on children meet many or all of the above criteria. Considerable work needs to be done in the future to build up a functioning, relevant and comprehensive set of indicators.

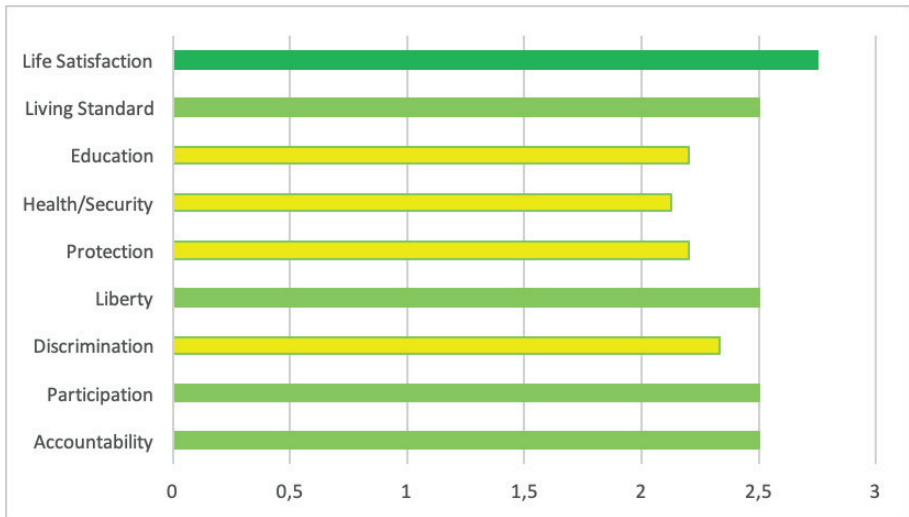


FIGURE 1.1 Dashboard summary of selected indicators.

Figure 1.1 shows Langford and Kirkebø's overall assessment within nine broad categories of Norway's performance on the different indicators. The evaluation is based on comparison of performance with other OECD states and adjusted for internal disparities, with a complementary analysis of trends. Each area is scored out of three. Eyeballing this table, we can identify a clear number of areas where Norway is performing well, particularly on social welfarist indicators (especially overall life satisfaction) and liberty indicators (such as use of prison for child offenders). However, the highest score of 3 is not given for a number of areas where Norway ranks highly internationally. This is because of significant variation in the implementation of these rights, as disaggregated by region or a ground of discrimination (e.g., disability, ethnicity). Moreover, some indicators are moving in a negative direction (e.g. income poverty), although others are moving in a positive direction (e.g. teenage suicides). Turning to the civil and political indicators, we find a more mixed picture. Areas such as protection (which also covers verbal, physical and digital bullying) are graded as poor or average while scores for political rights are rated as average.

To be sure, this assessment has a subjective dimension. However, the graduated results indicate that the key challenges most likely lie with the rights of disadvantaged children in welfare systems, state protection from third parties, and participation in civil, political and legal arenas. Many of these themes or blindspots arise also in the remaining chapters by various authors and we have categorised them as follows: right to be heard, liberty and autonomy of the child; pluralism and accountability.

1.4.2 RIGHT TO BE HEARD

While children's participation has improved in some areas, questions remain over the mainstreaming of a child's right to be heard. The lukewarm score on some children's right to be heard is partly reflected in the qualitative material. For instance, while a children's right to be heard has improved in custody proceedings, Lidén and Aasgaard/Langford do not find the same trend in asylum cases.

Protected by CRC Article 12²¹ and prior to the incorporation of the covenant, the right to be heard was secured by the legislation in selected areas, e.g. child welfare and custody cases. After incorporation, CRC Article 12 was directly applicable and thus covered fields that were still not covered by legislation. Moreover, several legislative provisions were amended in order to strengthen the right to be heard (see examples above in section 3). Subsequently, section 104 of the constitution was amended to include protection of the right to be heard, with a direct relation to the determination of the child's best interest.

Still, some legislative aspects are nevertheless open for discussion. In legislation, the common phrase used is that the child must have reached the age of 7, or, if younger, be capable of forming his or her own opinions. The legislator has taken the position that 7 years should not be a lower limit, but be regarded as an indication of the age at which the child in any circumstances should be involved. In this matter, the government has not followed the CRC committee, which has discouraged states from introducing age limits either in law or in practice.²² It could be claimed that a low age limit, combined with an obligation to consider to include younger children, provides a better legal position for children than an assessment based on maturity. It is also evident in research that the age of seven functions as a barrier for including younger children (e.g. Magnussen and Skivenes 2015). However, some provisions have been recently changed following the recommendation of the CRC Committee²³ to remove all references to age to determine children's right to participate, as the Patient's Rights Act section 3-1.²⁴ Furthermore, the Child Protection Act has a new section, 1–6, providing a general right for children to participate regardless of age.²⁵ However, the age limit is maintained in section 6–3, a procedural right for children.

21. See generally Sandberg (2016).

22. CRC/C/GC/12, para. 20.

23. CRC/C/NOR/CO/4, para. 24. cf. CRC/C/NOR/5-6, paras 187.

24. <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2016-2017/vedtak-201617-109/>

25. <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2017-2018/vedtak-201718-032/>

As to political participation, Langford and Kirkebø find that there are thirteen countries that have expanded voting rights to children between the ages of fifteen and seventeen. An experiment on a lower voting age was conducted in Norway but there was no recommendation to adopt this approach despite the criticisms of the Ombudsmen for Children (Barneombudet, 2017: 19). There are other ways by which youth can engage with policy development such as broader civic engagement. Norwegian children do participate in different civic organizations and two major annual national fundraising actions but participation beyond collecting money is quite low (see chapter 2). Norway has a system of youth councils whereby children are meant to provide input to decision-making by local municipalities but most are not functional and there has been critique of their effectiveness and role (Barneombudet, 2017: 19; 2012: 24).

1.4.3 LIBERTY AND BODILY AUTONOMY

Protecting children from harm and ensuring their liberty remains an ongoing challenge for all states. It requires active measures to regulate third parties and in state interventions a difficult balancing of public interest concerns and a child's right to liberty. In their chapter on sexual abuse, Bakketeig and Skilbrei note that it is extremely difficult to measure the extent of the problem (chapter 4). It is not clear whether the increase in sexual offences as a percentage of all reported crimes represent an increase in crimes against children or greater public trust in public institutions and awareness of the importance of reporting.²⁶

The same applies to interpreting a study from NOVA assessing the prevalence of sexual violations²⁷ amongst 18 year olds: 27 per cent reported that they had been exposed to a sexual violation at least once in 2007 but, in 2015, the number had decreased to 23 per cent.²⁸ In their chapter, Bakketeig and Skilbrei conclude

26. SSB (2018) «Statistikkbanken kildetabell 08484» accessed 06.02.2018, available at <https://www.ssb.no/sosiale-forhold-og-kriminalitet/statistikker/lovbrudda>

27. Sexual violations is not defined in the questionnaire handed out to students, as such one should note that there might be differences in interpretation and reporting.

28. Svein Mossige and Kari Stefansen (eds) (2016) «Vold og overgrep mot barn og unge. Omfang og utviklingstrekk 2007–2015» available at <http://www.hioa.no/Om-HiOA/Senter-for-velferds-og-arbeidslivsforskning/NOVA/Publikasjoner/Rapporter/2016/Vold-og-overgrep-mot-barn-og-unge> (accessed 06.02.2018) Similarly, a time studies on violence against children shows that there has been an overall decrease in the percentage of children exposed to sexual violence from those born in 1939–1989. However, for those born from 1990–1995 an increasing amount had experienced childhood violence. Siri Thorsen and Ole Kristian Hemdal (eds) (2014) «Vold og voldtekt i Norge. En nasjonal forekomststudie av vold i et livsløpsperspektiv» page 70. Available at: https://www.nkvt.no/content/uploads/2015/11/vold_og_voldtekt_i_norge.pdf (accessed 06.02.2018)

that existing research principally shows that sexual abuse is widely underreported despite the obligation of welfare state personnel to report suspicion of abuse to the child welfare services. Moreover, they note the evidence that victims of sexual abuse ‘find it difficult and/or are unwilling to report their abuse experiences to healthcare personnel, child welfare officers or the police’, which raises question marks over the degree of compliance in this field. This may be related to how victims are met by the welfare and criminal justice system, but may also be related to the stigma and experience of shame that is often experienced by victims of sexual abuse (McElvaney et al. 2014). These concerns are amplified with the growing number of children who report unwanted attention online (see chapter 2). The explanation for a disconcertingly low level of reporting is probably complex, and mechanisms that prevent child sexual abuse from being disclosed, and reported to responsible professionals and officials, should be better understood and addressed.

Another aspect of mistreatment is bullying. The Education Act establishes that all schools should ensure a safe learning environment; however, it does not specify the need for human rights education or combating prejudice. Studies from the Education Directorate reveal that a large proportion of students in Norway feel like an outsider at school, and that there has been an increase in bullying, both at school and online, during the least few years (see chapter 2). In chapter 14, Lile finds that some groups are more prone to bullying than others, highlighting the challenges for minority groups such as children with disabilities and LGBTQI children. While Norway has a number of policy initiatives in the field, questions can be raised over their effectiveness and whether progress is being made in this field (Ttofi and Farrington, 2010).

Turning to liberty concerns, Gröning and Sætre point to several challenges with regards to the detention of children (chapter 5). Although the overall number of children detained has been declining and is relatively low, the circumstances under which they are detained and the possibility of indefinite length of sentences pose a serious threat to children protection. The authors problematize the detrimental effects the Norwegian penal system could have on children, with an insufficient focus on rehabilitation. They argue – in line with the most recent recommendations from the CRC Committee – that there is a need for a further development of rules concerning *alternatives* to detention, both police detention and prisons. This is accentuated in the chapter on policing by Aasgaard and Langford in chapter 6 who note the continuing use of solitary confinement in police detention against children – even if new guidelines recommended measures to try to ameliorate the effects of its usage.

More generally, Grønning and Sætre observe that Norway is far from having a separate and specialized criminal justice system for children. Article 40(3) of the CRC provides that States shall seek to 'promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law'. Yet, Norway has no specific courts, or specialized judges, neither a specific criminal process for dealing with children nor many alternatives to the use of prison. Moreover, as discussed, Norway has yet to establish a separate detention system for children despite the very clear provision in article 37(c) of the CRC, and critique from the Committee.²⁹ The Government has defended itself by its noting earlier parliamentary deliberations, its reservation on the same issue under the ICCPR, and in 2009, a new prison unit for *minor* offenders was opened. The government has also emphasised the demographic challenge: an increase in child prisons could decrease proximity with family, which would also be in conflict with CRC Article 37(c).³⁰ While the clear and mandatory requirement might be moderated by this countervailing requirement, it would seem to only apply to truly remote and sparsely populated areas. It is highly questionable whether this logic applies in major urban centres.

1.4.4 PLURALISM AND DIFFERENCE

One regular cross-cutting theme is the response of state institutions to differences between children, in both service provision, regulation and policing. In areas such as poverty reduction, difference based on minority background, parental status and region is particularly striking as Fløtten demonstrates in chapter 7. On one hand, the challenge with poverty rates is partly general and Fløtten points to cross-cutting factors such as the lack of indexation of benefits. On the other hand, the share of poor children is especially high in some immigrant groups and these children are more at risk of not taking part in social activities. Children in single-parent families and in certain districts are also at a higher risk of poverty.

As to disability, Tøssebro and Wendelborg identify several challenges with regards to compliance with the convention, from education to access to public services (see chapter 12). For participation in school, the major issue is segregation from peers in special schools or classes despite alterations for inclusiveness in the early 1990s to enhance compliance with the CRC. There are also concerns about the quality of education for children with disabilities, highlighted also by the

29. CRC/C/NOR/CO/4, paras. 57 and 58(d), cf. paras. 6 and 7.

30. Cf. CRC/C/NOR/5-6, para. 337.

Ombudsmen for Children. On access to public services, barriers remain for families that need support (see chapter 12). Their success in application for services relies on ‘meeting the right person’ in the system, and endurance in resubmitting applications. Success in obtaining support from the system relies on understanding and mastering the bureaucratic system, heightening the risk of socio-economic differences in access to services. Furthermore, as mentioned above, children with disabilities are at greater risk of bullying (see chapter 2). Consequently, one may safely argue that major challenges remain with regards to CRC compliance when it concerns children with disability.

Aasgaard and Langford also discuss the concern of ethnic profiling by Norwegian police, which has been a regular concern of the Committee on the Rights of the Child and the European Commission against Racism and Intolerance. Research on the theme is sparse. According to Aasgaard and Langford, the existing literature suggests that there may be active ethnic profiling by *some* police while some aspects of ethnicity may be problematically indirectly integrated into general police patrolling. Yet, despite constant claims of profiling in media accounts, authorities deny its existence and have taken few steps to support research on the phenomenon or consider proposals that would lessen its likelihood.

The concern with discrimination is core to chapter 14 by Lile on human rights education, which is covered in Article 29 of the CRC. He finds that human rights are only included in a fragmented and haphazard manner in the country’s curriculum plans, raising questions as to compliance with the relevant – especially considering critique by the Committee on the Rights of the Child. Moreover, he raises questions over the effectiveness given the absence of evidence that the educational programmes actually lead to better ‘respect’ for human rights; and notes that some of the curriculum learning outcomes might very well instil negative attitudes.

Turning to asylum seekers, another critical point that is age related is how the Norwegian state protects unaccompanied minors age 15–18 years old, as discussed by Lidén in Chapter 10 (but also in Chapter 6 on policing). This group of children is treated differently than other children in a similar situation, raising clear question of discrimination if it cannot be justified as reasonable and objective. In Norway, children without a parent or a carer are the responsibility of child protection systems. Unaccompanied minors aged 15–18 are not. Rather, they are the responsibility of the immigration authorities and are placed in reception centres, with different quality standards and aims than those applying to the care of the child protection system.³¹

31. See also CRC/C/NOR/CO/5-6, para. 31.

Lidén also discusses the heavily-criticized temporary residency regulation for unaccompanied minors. This regulation states that unaccompanied minors without grounds for residency receive a temporary permit to stay in Norway until they turn 18 years old. Thereafter, they will be deported. This represents a heavy burden for the concerned children, with many fleeing to another country, which can mean a life on the streets. The CRC committee has expressed particular concern about the ‘increase in the use of temporary residence permits’ and the high number of children disappearing and vulnerable to becoming ‘victims to human trafficking and prostitution’; plus concerns over those ‘sent back to countries where their rights are at high risk of being violated, which would contravene the principle of *non-refoulement*’.³² The situation represents an international conundrum and calls for international collaboration and joint solutions. It appears that the Norwegian state has chosen the simplest solution: standards are lowered with regards to the rights of unaccompanied children through temporary residency.

A related concern is education for children not legally residing in Norway. Legally, they are entitled to primary education, cf. section 2(1), Education Act. This was one of the first examples in which critique from the CRC committee³³ influenced domestic legislation.³⁴ Yet, the wording of the Education Act only covers primary education. Recently, the exclusion of secondary education was made explicit. The 2015 amendment provides that legal stay is a condition for access to secondary education.³⁵ In the preparatory works for the legislation, it was stated that the CRC could not contain a clear legal obligation to provide secondary education to irregular children.³⁶ This setback is, as could be expected, not addressed in the recently submitted report to the CRC committee from the Norwegian government; and the issue is not addressed by the Committee. While there may be legal arguments around the existence of this right, it is difficult to conclude that the state is particularly proactive on these children’s education rights.

1.4.5 ACCOUNTABILITY

As discussed in Chapter 2, children are highly limited in their ability to seek legal remedies. The Norwegian legal system does not permit children to bring legal

32. CRC/C/NOR/CO/5-6, para. 31.

33. See CRC/C/15/Add.23, § 12.

34. NOU 1995:18 p. 285 and Ot.prp. 46 (1997–98) p. 26.

35. Section 3(1) of the Education Act, amendment 20 June 2015 No 54.

36. Prop. 68 L (2013–2014) p. 15. See also the critique from the ECSR committee on this matter, cf. E/C.12/1/Add.109, para. 22 and 43.

action: children must rely on their guardians to take legal action or wait until they turn 18. In chapter 13 on sexual orientation and gender identity, Thorsnes shows that this gap is of significant concern: ‘children experiencing discrimination or harassment are dependent on the consent of their parents or legal guardians in order to file a complaint, and the existing procedures cannot be considered child-friendly’.

This lack of attention to children’s legal standing is one reason why Norway scores relatively poorly on CRIN’s legal access index covering 197 jurisdictions. Amongst the OECD states, Norway is ranked at number ten. The ranking is based on the legal status of the CRC in the jurisdiction, the legal status of the child, access to courts for children, and practical barriers for access to justice. As discussed, the Ombudsmen for Children, who receives many complaints from children, cannot make decisions or individual recommendations. Norway has refrained from ratifying the optional protocol to the CRC providing a right to individual complaint, and nor does it provide it legal aid in cases brought on behalf of children, except in limited cases such as child protection.

1.5 EXPLAINING THE BLINDSPOTS

A nuanced approach to quantitative measurement and the qualitative reflections on blindspots suggests a more complex picture of Norwegian implementation of the CRC. So, how can we ultimately understand this outcome? How do we marry these blindspots with Norway’s exceptional performance in aggregative global indexes and other evidence that children’s rights are strongly secured in Norway? Proceeding inductively, we suggest four possible perspectives that might help shed light on the Norwegian case: (1) complex and changing demands; (2) professional and institutional practices in a context of high discretion; (3) regional and governance asymmetries; and (4) poor data.³⁷

1.5.1 COMPLEXITY AND CULTURAL CHANGE

An important point to recall is that implementation of the CRC is *complex*, even for an advanced welfare state like Norway. The Convention is comprehensive and

37. Drawing on compliance theory in social science and international law, it would also possible to analyse implementation in terms of interests, incentives, collective action frames, institutional path dependency and/or culture. Nonetheless, our analysis draws implicitly on a number of these ideas, revealing in particular the role of institutional path dependencies in problematic areas but also underlying interests in their maintenance.

transformative – and in many areas, policymakers seem to have undervalued the need for significant reforms. The chapters in this volume indicate tensions that have arisen in multiple areas of practice and policy, from support for child victims of sexual abuse through to the provision of appropriate disability support services. As discussed, it is often these areas that are immune to quantitative measurement and are rarely reflected in global indexes. In some cases, authors report that laws and policy have been reformed, demonstrating that demands for transformation demands can be met. Yet, these reforms have come only *after* significant campaigning by interest groups and civil society organisations, suggesting that lethargic performance is not simply a matter of complexity (see further section 6.2 below).

Related to complexity is the pace of cultural change. Recent decades have brought children into the policy agenda in new ways, as children in many societies are increasingly regarded as individuals with separate interests and rights. The sociology of childhood shows clearly the changing views on children (James & Prout, 1997); yet societal treatment of children often diverges from this vision. In Norway, as well as other places, this conception of children creates tensions in the traditional relationship between the family and the state. Individuals in a society are imbedded in influential cultural and value systems (G. Hofstede, G.J. Hofstede, & Minkov, 2010), and changes in values and perceptions take time. Thus, pluralism and divergence in public opinion may complicate swift compliance. By design, legalised human rights are general in nature, creating space for different interpretations in order to ensure political acceptance and universal applicability. Thus, while the CRC Committee has sought to improve the public understanding of the convention rights, these rights provide space for different values, which are, by tradition and culture, embedded in the relationships with children, influencing both the material content of children's rights and how rights are decided upon and balanced against children's autonomy as well as parents' rights and the states' interests.

This tension may be also heightened by the *dynamic* interpretation of the CRC. Søvig's chapter reveals that various critiques of Norway's legal protection of children's rights arise from demands that were not necessarily contemplated at the time of ratification in the early 1990s. For instance, the Government and majority in the Supreme Court have resisted certain interpretations of the CRC committee in the field of immigration on the grounds that the Committee has gone beyond the CRC's text. While legal certainty is important, it should be recalled that states make wide-ranging commitments on ensuring the 'best interests of the child', meaning that dynamic or strong interpretation was certainly not unforeseeable.

1.5.2 PRACTICES AND PROFESSIONALISM

Advancing child rights is, however, not simply a societal question of values. In many cases, the book reveals that the primary obstacle is professional and institutional practices. One constant theme is the absence of organizational guidelines, sufficient professional focus and competency, and expert resistance to change. The literature on public administration and organizational behaviour is blunt on the challenges of policy implementation in daily practice. Education and training, competences and skills, working cultures and traditions, attitudes and emotions, come into play when political goals and ambitions are to be transferred throughout state and local authorities in Norway. These shape how public employees and staff work with children and determine to a certain degree whether children's rights are implemented.

The role of professional and institutional practices factor is particularly heightened by two aspects of the welfare state. The first is that professionals are given considerable autonomy in Norway. High levels of discretion are privileged in both bureaucratic culture and legislative design. This gives professionals space to innovate and adapt but also to resist change – whether it is access to services, quality of teaching, or police patrolling of minorities. The moderate score of Norway on accountability may be an indication of a lesser focus on rules as well as sanctions for under-performance. Second, a reliance on mutual trust between service providers and citizens (including children), and the allowance for board professional discretion, risks a problematic paternalism.³⁸ Service providers may secure welfare social rights to many children, but may be less attuned to attending to difference, ensuring genuine participation by children (and their families) individuals, or accepting complaints or challenges to expert wisdom (e.g., whether it is on the dangers of solitary confinement or effective bullying strategy).

In this context, a transverse challenge is to secure children's right to participate in matters concerning them. We see it in the chapters in child protection, children with disabilities, unaccompanied asylum-seeking minors, LGBTIQ children, just to highlight a few. Thorsnes notes in chapter 13 that while Norway generally has a well-functioning and patient-centric health care system, the 'health care service for trans children is not adequate, and knowledge among health care professionals needs to be strengthened in order to interact with children in a safe and respectful

38. Some argue that such paternalism on rights may be a general feature of Nordic and Scandinavian welfare states (see discussion in Langford and Karlsson Schaffer, 2015). Scharff Smith (2011:42) argued that 'the fact that Scandinavian welfare states are large, powerful and arguably often trusted by the public, can lead both towards humane policies on the one hand and effective control on the other hand'.

manner'. The traditional view on children is that they lack the competency to make qualified and autonomous decisions (Archard & Skivenes 2009), or children should be protected against the responsibility of making decisions or being informed about troublesome matters. This view of children is not easily changed amongst people and professionals, and would probably require comprehensive effort in training and guidelines, as well as oversight mechanisms to change. Ensuring genuine participation would require a transformed mindset on what children are and can be; and for some groups of children, this professional mindset and knowledge is decisive for their life prospects. Chapter 12 on sexual orientation and gender identity so clearly make evident. Intersex children have possible harmful surgeries that are irreversible and, for some children, surgery is performed without their consent or without a proper informed consent. Similar challenges are identified in Chapter 4 on child sexual abuse. The likelihood of reporting to police or a child protection agency is hugely dependent on the professionals that are in contact with the child. While various factors influence reporting rates, staff with obligations to report suspicion of sexual abuse under-report; which raises questions about knowledge and awareness about sexual abuse of children.

The documented deficits and problems in implementing children's rights (and surely we have not uncovered all) show that there are blind spots that should be addressed both on a systemic level and through improvement of individual understanding and interpretation of legislation and regulations amongst professionals working with children. From a frontline position, professionals will usually experience resources as scarce and, surely, the allocation of increased and targeted resources on improving identified blind spots may help. The field of disability services for children appears particularly under-resourced and chapter authors and organisations have identified the need for increased budgets in areas like poverty reduction, prevention of abuse and care for asylum children.³⁹ However, resources do not seem to be a major challenge in many areas of Norwegian public administration. Furthermore, as argued in Chapter 7 on poverty, there are problems children encounter that are not likely to be improved by increased economic support to the family. Instead, a systemic change may be called for, which would include incorporating the CRC in action plans in all areas concerning children. Broader policy approaches, as discussed in Chapter 8 on equal opportunity and child care, show the importance of early education through kindergarten for children's childhood and future adulthood. More profound, is to ensure that public administration and courts are designed and built on the principles of child friendliness. Adapted

39. See chapter by Fløtten and Redd Barna (2018).

from the guidelines for child-friendly justice, developed by the Council of Europe (2010), the systems that are working with and meeting children should be ‘accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child’ (p. 17).

Integrating a child perspective throughout the public sector and professional practice would thus be critical. Organizational planning, buildings and systems design, and the training of staff and decision makers, should to a much larger degree be made with children in mind. Internationally and in Norway, there is a growing movement of ‘experts by experience’, amongst them groups of children and young adults that have experience with public service providers (see chapter 3). These children work with professionals in local authorities to ensure that they become more child friendly and focused. Emerging evidence suggests that such user-based input is effective. Hearing from former service users, such as children that have been in the child protection system, about how they have experienced the lack of participation and respect, and not being heard or listened to by professionals and courts, seems to have a strong effect on staff and professionals. Children also bring examples of good interactions and practices they have encountered.

Professionals, at a minimum, but the general population as well, arguably need to be educated in children’s rights and the obligations that the Norwegian state has taken on. The CRC represents a new, although almost 30 years-old now, understanding of societies and the relation between individuals. The convention prescribes that children should be regarded as individuals with independent interests, and on equal footing as adults in a society. This is a radical shift of orientation, and if states are serious about their ratification of the CRC, the knowledge and thinking following children’s rights should also be reflected in the curriculum for education programs. Moreover, such education must be effective. Even if children in kindergarten and elementary school are already educated about their rights, the impacts of the education programs for the younger children maybe not particularly successful, as found generally by UNICEF (Jerome, Emerson, Lundy and Orr, 2015) and in the case of Norway in this book (see chapter 14).

1.5.3 GOVERNANCE AND GEOGRAPHY

Norway’s governance structure was regularly identified as a cause of non-compliance or poor implementation. Highly decentralized, much of the responsibility for children’s rights is delegated to municipalities, geographically spread and sparsely populated (a majority are small with 3 000–5 000 citizens). The difficulties of

assuring equal treatment and a sufficient range of services and competencies available for children's needs in general and as well as specifically for particular groups of children, arguably explains the wide variations in outcomes across the country (see particularly chapter 2).

One of the causes for this variation appears to be the internal allocation of resources by municipalities. The CRC has addressed this issue critically in *all* their concluding observations on Norway.⁴⁰ In their responses, the government's response has accepted that 'very large differences exist between municipalities vis-à-vis staffing and coverage',⁴¹ and as mentioned above, the Child Welfare Act has been amended in order to entitle children to services within this field. Nonetheless, the government and parliament has been reluctant to introduce substantial measures to reduce the differences, partly due to the autonomous position of the municipalities.⁴² However, the government could also consider whether sufficient resources are always allocated to municipalities. If small municipalities are to remain, they may require extra resources in order to fulfil their obligations. Without considerable bottom-up or top-down pressure, or a change in governance structure, it is difficult to see how under-performing Norwegian municipalities will improve in the future.

Questions can also be raised about the design of national and municipal programmes for specialised services, for example children with disabilities. Chapter 11 demonstrates blatantly how public agencies do not manage to offer services to disabled children that give them sufficient opportunities to interact with peers, to access education. The descriptions of the frustrations and fatigue that parents of disabled children experience when applying for services that their children have a right to receive, are schoolbook illustrations of dysfunctional bureaucracies.

However, the challenges of decentralisation are not simply a question of governance. It is also geography. Chapter 5 on children in detention pinpoints the dilemma of providing care and closeness to family for children, versus providing suitable detention facilities for children (e.g. separated from adults). Yet, it is arguably time that Norway invests in a higher level of specialization and education in the criminal justice system in order to meet the specific needs for the child in different parts of the country. This raises a question of resources in a sparsely populated country (with many small local communities separated by mountains and fjords). Although compared to many countries, also similarly small countries,

40. CRC/C/15/Add.23, para. 24, CRC/C/15/Add.126, para. 15, CRC/C/15/Add.263, para. 15 and CRC/C/NOR/CO/4, para. 16.

41. CRC/C/NOR/5-6, para 146.

42. Cf. CRC/C/NOR/5-6, paras. 11–12.

Norway lies behind in this regard.⁴³ While the specific Norwegian pragmatic legal culture has also not favored specialization,⁴⁴ the express provisions of the Covenant raise the question as to whether geography and tradition can continue to forestall more child-centric systems in criminal justice, especially with rising urbanization.

1.5.4 PATCHY DATA COLLECTION

An important aspect of a child-centric reorientation is to ensure sufficient research and collection of data for children's rights and not just improvement of the general welfare. Policy action is heavily guided or influenced by data. Although Norway possesses a comprehensive statistical information bank on its citizens, data on civil and political rights for children is especially lacking and is not collected and reported in any systematic manner by the state or SSB (see Chapter 6). In some cases, Norway has been critiqued for the lack of such data, e.g. racial profiling by police, but has taken no action to redress the information gap.

Thus, the likelihood that policy action to address or ensure children's rights is properly evidence-based is questionable. A new indicator imitative is needed on children's rights. In Chapter 2, the authors set out a range of areas in which new indicators are needed for children's rights in Norway. Moreover, in chapter 5, the authors use a UN OHCHR-based template for analysing necessary indicators in the criminal justice system and recommend a set of 13 indicators (at least half of which are not currently collected).

1.6 CONCLUSION

This book sets out to assess the seeming implementation paradox between Norway's high rankings on children's rights and the consistent critiques of its performance. The evidence assembled in this volume is both a testament to the remarkable progress in realising children's rights but also a set of remaining and emerging problems and blindspots. In some instances, a high ranking does not mean that the rights have been fully realised, while in other cases relevant issues of concern are not captured in their global indexes. Our analysis of this paradoxical outcome suggests it is partly caused by the complexity of the CRC and the

43. See Pruin (2010), pp. 1513–1556 and Dünkel et. al. (2010), pp. 1623–1690.

44. See Jørn Øyrehagen Sunde, *Managing the unmanageable – An essay concerning legal culture as an analytical tool*, in Søren Koch, Knut Einar Skodvin & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2017, Bergen: Fagbokforlaget, s. 15–16.

challenge of ensuring any society can keep pace with the transformatory demands embodied in the convention. Yet, there are a number of cross-cutting concerns that appear in many of the chapters. High levels of professional discretion, expert resistance to some changes, and the decentralisation of core state functions, mean that the realisation of children's rights can be highly varied across time, place and group. There is a still way to go before matching the child-centric vision of the Norwegian state with action and improved data and measurement is but one of many ways to identifying concrete paths forward.

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2

Children's Rights' Indexes: Measuring Norway's Performance

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ABSTRACT Global indexes are commonly used to measure a country's performance, including on the implementation of human rights conventions. Such audit-like tools project neutrality and avoid the charges of anecdotal evidence. However, indexes suffer from multiple challenges, from the selection of themes through to the accuracy and regularity of data and comparability across countries. In this chapter, the authors aim to identify indicators that better capture implementation of child rights in Norway. The result is a dashboard of 25 indicators, covering life quality, standard of living, education, health/security, protection, liberty, discrimination, participation, and accountability. In addition to identifying indicators that are comparable, it places emphasis on data that is regularly collected and disaggregated across the country. The chapter shows that Norway performs well on a general level but there are serious challenges for selected groups or regions. Moreover, there is an urgent need for improved data, particularly on children's civil rights and right to participation and protection from discrimination.

KEYWORDS indexes | children's rights | implementation | data | CRC | dashboard approaches

2.1 INTRODUCTION

In June 2017, CNN announced that Norway was the 'best' country in the world in which to be a child (Emmanuel 2017). Based on a Save the Children index, Norway was the best average performer in indicators on infant mortality, malnutrition, school attendance, child labour, early marriage, adolescent births, displacement by conflict, and child homicide. This ranking is consistent with a range of other indexes. In the newly established Kids Rights Index, Norway is ranked second, particularly due to its strong performance on 'policy environment'. Moreover, in 2015, Norway was at the top of the UNDP human development index, first in the EIU democracy index, second in the GJP rule of law index, second in the CIRI human rights index, and third in the gender gap index (Langford and Karlsson Schaffer, 2015:26).

Using such indexes to measure human rights achievements is alluring and now commonplace. For controversial topics such as human rights, these audit-like tools project neutrality and avoid the charges of anecdotal evidence. They provide a mutually acceptable means of assessment and communication for actors (Rosga and Satterthwaithe, 2009:280). Moreover, quantitative measurement provides an ideal communications tool. It promises clear, comprehensible and simple snapshots of complex situations, constituting a 'technology of distance' which is 'well suited for communication that goes beyond the boundaries of locality and communication' (Porter, 1995:viii, ix).

However, there are multiple challenges with the design and use of many common global indexes in the field of human rights (Langford and Fukuda-Parr, 2012). There are questions over the choice of indicators, measurement techniques, statistical significance, and policy relevance – and critical flaws are apparent in many of the above-named indexes. This chapter therefore seeks to establish a more robust basis for using indexes to measure Norway's performance on child rights, especially since indicators play an important role in setting the policy and legislative agenda. We therefore ask which indexes currently provide the most accurate measurement? Which indexes must we create in order to complement existing rankings? How do we interpret and use these indexes? And what sort of data is needed in order to provide better measurement in the future?

The chapter proceeds as follows. Section 2 discusses the general limitations of global rankings and provides an assessment of current global and European indexes. After concluding that none of the existing indexes are suitable, we propose in section 3 a dashboard of 25 indicators, which covers a spectrum of children's rights and are more relevant to children's rights in Norway. In section 4, we set out and analyse the proposed indicators and in section 5 propose the development of additional indicators.

2.2 LIMITATIONS OF CURRENT GLOBAL INDEXES

Why should we be concerned over the current crop of global indexes on rights and children? Doesn't the strong performance of Norway in these measures conform with the idea of Nordic exceptionalism and everyday observations of child rights in Norway? Such presumptions and observations may have a value or even be largely correct. Nonetheless, it is important to consider the standard critiques of global indexes and scrutinize whether these indexes survive such a critique.

2.2.1 CRITIQUES OF INDEXES

The first concern with indexes is *relevance* or construct validity. Do the indicators in an index match the rights being considered? The very strengths of quantification (simplification and abstraction in applying a single measurable definition across different contexts) are its Achilles' heel. The problem of relevance is exacerbated by the fact that many of the constituent indicators were created for purposes other than measuring children's rights. The Kid's Rights Index provides a very good example. Education is one of five indicators that make up the index, but it measures only one aspect of the right to education: accessibility. The indicator is based on participation rates in primary and secondary school; enrolment ratios in primary/secondary school; female survival rate in primary school; and the net attendance ratio in urban and rural primary schools. Yet, these measurements do not address any of the other elements of the right to education. There is no indicator for quality; affordability; acceptability; or issues of discrimination or equity. This relevance problem in how the Kids Rights Index is compounded goes even further than the makeup of the five indicators. The themes chosen are almost exclusively socio-economic rights. However, we know from reports from the UN Committee on the Rights of the Child on Norway that the harshest criticism is in the field of civil rights (such as asylum and child protection) and discrimination (e.g. disability).

Second, there is the challenge concerning the *reliability* of data. Recorded observations may not be an accurate reflection of the reality that a measuring instrument is trying to capture.¹ There are of course the practical challenges of missing data and technical dilemmas such as the weightings given to respondent groups or indicators in composite indexes. A particularly difficult challenge for many civil rights indicators is

1. The full implications of using unreliable of data are demonstrated by Yamin and Falb (2012). In Afghanistan, estimated maternal deaths in one study dropped slightly from 1640 to 1,575 deaths per 100,000 live births between 1980 and 2008. However, the (enormous) confidence interval was largely unchanged (632–3,527 deaths), which means that it is “simply impossible to say whether and to what extent levels of maternal mortality have declined in Afghanistan over the past few decades”.

that recorded violations may actually increase as the state improves compliance – particularly those concerning violence, death or displacement. This is so because efforts to address the problems are often accompanied by better data measurement. Thus, any index needs to be carefully scrutinized for the reliability of its data.

Human bias is also a challenge. In the process of data creation, subjectivity enters. This can affect reliability when classifying an event as a violation: conducting surveys in different cultural or linguistic contexts may bias responses or inflect the design of surveys and classification scales. Even data that is meant to capture subjectivity – such as perception/barometer surveys – need to be used cautiously: an individual's response to a survey question may not correspond to her/his actual behaviour or even her/his attitudes and questions may be understood differently across national contexts.² Subjectivity is also affected by who controls data. National statistical agencies do not collect data on most civil and political rights – leaving this to academic institutes and NGOs. Yet, when national state agencies do collect data – e.g. socio-economic outcomes – there is a risk of political interference. A review of the education indicator in the Kid's Rights Index raises immediate questions over the reliability of data from some countries.

Third, there is the problem of excessive *aggregation*. Higher levels of aggregation are valuable because an overall and summary picture of the magnitude of achievement and deficits, progress and regress is provided. This makes it possible to illustrate broad trends and highlight major areas of concern. By the same token, indexes that seek to aggregate across many countries or issues often do not provide adequate detail and differentiation. For instance, data truncation is a particular problem with global data sets (Barsh, 1993:102–103; Landman, 2004:943). Highly diverse situations are grouped together in a single category, such as in the Freedom House Index, where a large number of countries are given a top score of one (1) for political rights.³ This problem is abundantly clear in the Kid's Rights Index. The top thirty countries are separated by only 4.5 per cent (scores range from 0.952 to 0.997) and no information on statistical significance in differences between countries is provided. Thus, one should report statistical significance, improve and expand the data points, and/or separate off different types of comparable countries (e.g., creating a separate index for high income countries) (see, e.g., Randolph et al. 2009).

The fourth challenge is *action-orientation* and *perverse incentives*. Global indicators may be too abstract to indicate relevant action at the country level (Wilde

2. The framing and phrasing of the questions, the nature of the survey instrument and the context in which the questions are being asked can be critical in shaping the responses.

3. This masks, e.g., important differences between these countries which include all Western countries, most East European countries and Israel.

and Nahem, 2011, Orkin et al., 2011) or, even worse, suggest the wrong action. Perverse incentives may be created whereby actors prioritize actions that will be quantitatively measured rather than those intended to meet the objective behind the indicator (Black and White, 2004). For example, a state can quickly raise the Kid's Rights Index by prioritising access in education even if they sacrifice or ignore educational quality in the process.⁴

The final challenge is *interpretation and publicity*: what indicators 'actually communicate, and to whom, may not be what their producers and promulgators sought to communicate' (Merry, 2006:10). One particular problem for human rights practice is that some countries may be judged too lightly or harshly because of problems in the data or method rather than the actual situation. This risk is particularly prominent in ranking methods but exists in any approach that seeks to arrive at a normative conclusion. The report accompanying the Kid's Rights Index provides a somewhat alarming illustration of a monotonic focus on indicators. With little reflexivity about the way in which the enabling environment indicator is measured they castigate Italy (ranked 81st), Canada (72nd) and Luxembourg (56th) for their lack of progress but give 'honorable mentions' to Thailand (21st) and Tunisia (10th). These latter states 'rank relatively high, compared to their economic status, as they do exceptionally well in cultivating an enabling environment for child rights' (KidsRights Index 2017). Such a critique of complacent of wealthy states is welcome. But the uncritical conclusion that Thailand and Tunisia perform *better* is highly questionable and could actually contribute to complacency in the future by these very states.

As in any other area, qualitative and cross-checking methods are needed for interpretation, and awareness is needed as to how data will be used in the public sphere. This risk is paramount in an area such as the implementation of the child's rights convention. It covers so many rights and issues that it is highly unlikely that a state is fully compliant or has achieved a high level of realisation across all rights. However, a high ranking on selected rights may mask or obfuscate remaining problems and challenges. As Davis, Kingsbury and Merry remind, indicators embody a 'theoretical claim about the appropriate standards for evaluating actors' conduct' (Davis et al., 2012:9). If an indicator is loosely matched with a standard or simply achieves prominence, it can quickly take on a normative life of its own.⁵

4. One only has to observe the effect of the MDGs: teacher-student ratios rose to 1:250 in some African countries (Langford et al. 2013).

2.2.2 EXISTING INDEXES

In light of these concerns, we analysed a number of the leading child rights-related indexes that seek to measure comprehensively (1) specific rights (2) over time and (3) across all or most countries. The aim of the assessment is to evaluate the existing indexes and how they use indicators in making claims about the state of child rights in different countries. In assessing indicators in the field of human rights, it is important to develop criteria which blend common statistical and policy criteria with more human rights-specific requirements and concerns over the perverse incentives (see discussion in Langford, 2013). In this report, we partly adapt the SMART criteria for this purpose.⁶ A number of human rights considerations are introduced (particularly relevance) and we focus more on measurability over time as this will be necessary for ongoing evaluation. Table 2.1 sets out our adapted SMART criteria.

TABLE 2.1 Adapted SMART criteria for indicators

Specific	Does the indicator measure what it sets out to (validity)?
Measurable	Is data available? Is the data reliable? Is the data legitimate?
Action-oriented	Does the indicator indicate relevant policy action? Will it encourage perverse incentives? Does it have a strong in-built theory of change?
Relevant	Is there a connection with particular human rights? Can the data be disaggregated for discrimination grounds?
Time-based	Are the data collected periodically? Are the data comparable across time?

5. For example, the Millennium Declaration elevated the \$1 US dollar a day indicator from being one marker of extreme income poverty to being *the* standard of income poverty itself and possibly the minimum core of the right to an adequate standard of living. But the indicator conveniently blind us to the fact that the world's poorest would 'grow' from one billion to 2.5 billion if we used \$2 a day as a yardstick, and even more if we included health and education costs in actual measurement (Pogge, 2010, Fischer, 2013).
6. The SMART criteria were first introduced as a management technique in Doran (1981). In the field of indicators, they are commonly articulated as follows: Specific – target a specific area for improvement; Measurable – quantify or suggest an indicator of progress; Action-oriented – specify what is to be done; Relevant – a valid measure of the object/outcome; Time-bound – specifying when the measurement will occur and be tracked over time. There are many variations: see, e.g., Save the Children, SMART Indicators, available at <https://sites.google.com/site/savethechildrendme/Home/smart-indicators>.

After a survey of global indexes of children's rights and/or outcomes, we identified six indexes that might meet these criteria. These were the Kid's Rights Index, Social Progress Index, UNICEF Innocenti Report Card, Child Development Index, Children's Rights and Business Atlas, and Realization of Child Rights Index. In Annex 2, we discuss each index and score its performance on these criteria on a scale of 1 (weak) to 3 (strong) with sub-scores to indicate differences. These scores were then collated in order to rank the different indexes.

Only a few indexes score better than 10 out of 15 in total. Even the indexes that score well (often for measurement reasons) are problematic from a relevance perspective. Civil and political rights are excluded, and a narrow group of indicators are used for socio-economic rights with the risk that the indexes not only provide a misleading picture but encourage questionable policy actions. We therefore propose a different way to analyse quantitatively the realization of children's rights in Norway: a dashboard approach.

2.3 A DASHBOARD APPROACH

Dashboard approaches to indicators emerged in business management but have been used increasingly in the field of public policy. After earlier experiments with 'panels' of indicators and 'balanced scorecards', the dashboard approach emerged as a way of providing both historical and real-time data in a communicable and transparent manner (Mitchell and Ryder, 2013: 72–73). However, dashboards vary considerably in their function. They can be 'operational' (for real-time responses), 'analytical' (to compare and drill down on different data to optimize performance) and 'strategic' (review progress and develop plans) (Mitchell and Ryder, 2013: 75).

In this case, our focus is primarily *analytical* and *strategic*. An 'analytical' perspective means trying to provide a more nuanced and comprehensive picture of the implementation of children's rights that is customarily not obtained with single indexes. The aim is to provide a more comprehensive set of indicators across social, civil and political rights than is currently provided in existing indexes. The indicators are selected and collated in such a way as to provide a picture of realization, a reasonable 'snapshot'. However, the proposed dashboard contains many 'strategic' elements by focusing on comparative *regional* indexes (Europe), changes over *time*, and *internal variation* in Norway. Time measures are particularly important and enable one to track the direction of performance. Internal variation is useful in determining whether improvements can be made in particular regions. We therefore hope the dashboard may be more relevant for policy action, and updated more regularly.

The supposed ideal numbers of indicators in a dashboard varies considerably in the scholarship. It ranges from four to six through to fifteen to twenty (Seybert, 2012; Harel and Sitko, 2003; Massa and Oehler, 2005). In the case of an analytical approach, the precise number is not particularly relevant although it should be eventually communicable. In this chapter, we propose for the moment nine areas with twenty-six indicators.

In the long run, a more comprehensive approach to indicators could be adopted, whereby all key aspects of each child right in the CRC is measured. This is in the ambition of the UN OHCHR's (2012) indicator initiative: each element of a right is to be matched with structural, process and outcome indicators. The OHCHR methodology is overly focused on structural indicators and is often unclear on the link between the obligations and performance, but if executed properly would provide a more inclusive and accurate picture of measurement and relevance for multiple fields of practice. Following this model, in their chapter on the criminal justice system in this volume, Grønning and Sætre make a concrete proposal for 13 indicators that would track Norway's performance on the two relevant CRC articles. However, most of the proposed indicators are not currently reported and the Norwegian state would need to take steps to collect new data or repackage and report existing data in new ways.

2.3.1 METHOD AND LIMITATIONS

Drawing on the adapted SMART criteria, there were two primary factors for the selection of indicators for the dashboard. The *first demand* was a representative set of rights and issues, and we identify nine different thematic areas: Life, standard of living, education, health/security, protection, liberty, discrimination, participation, and accountability/legal remedies. Given that most existing indexes focus primarily on social rights, it was particularly important to find a better balance between civil and social rights. As noted above, much of the international critique against Norway concerns the former rather than the latter.

The *second demand* was available data of sufficient quality that was rights relevant, and ideally provided a good proxy measurement for many aspects of a specific children's right or rights. Reviews of literature and data sources were conducted and the selection was also discussed in the book workshop and with relevant partners. Despite considerable effort, however, it was often a challenge to find indicators that would meet all or most of our requirements. Although the process of trying to identify indicators highlighted the need for new and disaggregated data. These gaps are discussed below in section 4 and we recommend new indicators and data collection in section 6.

To be sure, it is unlikely that accurate outcome indicators will be available for all rights questions and one may have to be content with process indicators in many areas. This is because some statistics suffer from deep validity problems – it is unclear whether the indicator provides an accurate depiction of the norm under examination. This is unfortunately most present in indicators that measure some of the *most important* aspects of children's rights – such as sexual violence. It is not clear for example whether an increase in the rate of reporting or imprisonment reflects a worsening of the situation or an improvement in reporting. For instance, between 2003 and 2016 in Norway, there has been a slight increase in the proportion of sexual offences against children as a percentage of all reported crimes (0.8 to 2.1 per cent) and an increase in the absolute numbers (SSB, 2018a). It is not clear whether this represents an increase in sexual offences or an increase in reporting. An alternative approach to this problem is to survey the population. In a study from NOVA assessing the prevalence of sexual violations amongst 18-year olds, 27 per cent reported that they had been exposed to a sexual violation at least once in 2007. In 2015, the number had decreased to 23 per cent (Mossige and Stefansen 2016). Similarly, a time studies on violence against children shows that there has been an overall decrease in the percentage of children exposed to sexual violence from those born in 1939–1989. However, for those born from 1990–1995 an increasing amount had experienced childhood violence (Thorsen and Hemdal 2014:70). Thus, complementary information can be obtained directly from victims but it is not clear that self-reported data can be used alone to determine changes in levels of compliance. Given the number of children who are victims of criminal assaults or sexual violations, the issue of sexual violence is, in any case, still a challenge for the protection of child rights in Norway. Moreover, considering the number of children who report unwanted attention online, and that almost one fourth of high school graduates report incidents of sexual violations, one should be very cautious in using reported abuse (or prosecutions) as a basis for measuring the level of child sexual abuse in society.

Thus, the dashboard can in no way reflect the whole picture. It is the first shot in what should be a long-term project that that will require co-operation with many actors. However, we note that such an effort has already begun in the area of health.⁷ In the short-run, this first iteration of the dashboard aims to provide at least a more relevant and nuanced image of outcomes, trends and variations – providing a more holistic understanding of implementation of the CRC in Norway.

7. See: European Cohort Development Project (ECDP), <http://www.mmuperu.co.uk/projects/european-cohort-development-project-ecdp>.

2.3.2 SELECTION

Table 2.2 sets out the indicators we have chosen: twenty-six indicators covering four categories (social rights, civil and political rights, and accountability) and nine themes. The majority of these indicators are *outcome* indicators as they monitor the extent to which individuals and groups actually enjoy a particular right. The remainder are *process* indicators as they measure whether a state has put in place a policy environment – laws, policies, institutions, and resources – in order to achieve a right. In some cases, process indicators will reflect a concrete obligation – often a duty of conduct. In other cases, a process indicator is simply a proxy for determining whether an outcome is likely to have been reached. Some scholars and institutions parcel out an extra category of structural indicators – essential binary process or even outcome indicators but this distinction seems somewhat artificial.

TABLE 2.2 Dashboard of child rights indicators

Right/Area	Indicator	Nature	Type	Time Series
A. Life/Overall	1. Life satisfaction	Outcome	European	5-yearly
	2. Well-being	Outcome	Global	
B. Living standard	3. Poverty – Relative/ Absolute	Outcome	European Time National	Yearly
C. Education	4. Education performance and parental background	Outcome	OECD	5-yearly
	5. Education performance within Norway	Outcome	National	Yearly
	6. Disability access	Process	National	Irregular
	7. Youth in education / drop-out rate	Outcome	OECD National	Yearly
	8. Early childhood contri- bution	Outcome	National	Yearly
D. Health/ Security	9. Teenage suicide	Outcome	OECD	10-yearly
	10. School nurse	Outcome	National	Yearly
	11. Obesity	Outcome	Global	Irregular
	12. Mental health	Outcome	National	Yearly

Right/Area	Indicator	Nature	Type	Time Series
E. Protection	13. Children in care	Outcome	OECD National	Yearly
	14. Homicide	Outcome	Global	Yearly
	15. Bullying	Outcome	European National	10 years Yearly
	16. Internet bullying	Outcome	National	Bi-annual
	17. Unwanted sexual attention	Outcome	National	Bi-annual
F. Liberty	18. Children in prison	Outcome	European	Yearly
	19. Children in custody	Outcome	National	Yearly
G. Discrimination	20. Asylum children	Outcome	National	Varies
	21. LGBT rights	Outcome	European	Yearly
	22. Tolerance and discrimination	Outcome	European/National	Varies
H. Participation	23. Voting age	Process	Global European	Yearly possible
	24. Participation at school	Outcome	National	Bi-annual
I. Accountability	25. Legal access index	Process	Global	Yearly

These indicators, as discussed, do not cover all of the major issues of child rights in Norway. In some cases, the indicators are limited in terms of disaggregation, regularity of collection and comparability with other countries. We have commented on these limitations in the discussion of each of the indicators. In addition, it would also be preferable if other and important aspects of child rights could be measured in Norway. In our conclusion, we set out additional indicators that could be collected.

2.4 ANALYSIS OF IMPLEMENTATION

In this chapter, we set out our dashboard approach to measurement of implementation of children's rights in Norway. As discussed, we have selected nine areas of children's rights, and identified relevant indicators (25 in total). We have also given each indicator a dashboard-score which is clearly subjective, but based on the following method. First, Norway is given a score out of three based on its international performance. A full score of 3 is awarded if Norway is in the top 1–5 amongst OECD countries, 2.5 for rankings 6–15, 2 for 16–30, and 1.5 for 31–34. In the few cases where there is no international ranking, a score of 3 is used as a departure point. Second, this international score is reduced by 0.5–1.5 points when there is a moderate, strong or severe internal variation within the country. Such variation can be across particular categories (e.g., gender, ethnicity and disability) or region/locality. These scores are summated to provide an overall score in the nine different areas.

A. LIFE/OVERALL

The first area is overall life quality and satisfaction for children. The preamble to the CRC establishes that the treaty is directed towards the improvement of children's overall quality of life, including their material, cognitive, and emotional needs. States are obliged to ensure that children receive 'special care and assistance', grow up in an 'environment of happiness, love, and understanding', and be 'fully prepared to live an individual life in society'.⁸ Particular rights are also highly relevant to this category. The right to an adequate standard of living in art. 27 represents a good proxy for all social rights, and is often used as a benchmark for other social rights (Langford and King, 2008). A child's well-being is also used as a benchmark or qualification of a number of social rights (use of force in child protection – art. 9; the right to information – art. 17; the right to a fair trial) and the overall right to care and protection (art. 3). The right to engage play and recreation in art. 31 could also be included here.

In our view, the combination of self-reported life satisfaction (indicator 1) and level of material welfare (indicator 2) provides a good indication of the overall circumstances for children in Norway, even if it must be complemented by the other focused indicators.

8. CRC preamble para 4, 5, and 6.

1. LIFE SATISFACTION

Self-reported measures of well-being, life satisfaction, or happiness are increasingly used as a complement or replacement for traditional measures (such as those based on poverty, income, or access to material goods and services). From a rights perspective, such surveys may provide a broad way to measure outcomes of children's rights at a more aggregate level and take into account children's own voice in the process. However, caution needs to be exercised in comparing such data across countries due to linguistic differences, the subjective nature of the questions, and cultural differences in perceptions of satisfaction or happiness, and lack of regularity in the survey.

Nonetheless, Health Behavior in School-Aged Children (HBSC) have twice collected data on life satisfaction amongst children, which we have reproduced for the years 2001 and 2010: See Figure 2.1. Norway ranks ninth highest in children's life satisfaction in 2010. This is a considerable improvement from 19th place in 2001 and Norway is close to other countries to which it is commonly compared: e.g., Iceland and Netherlands.⁹ Moreover, there is not a large difference amongst the top performers, with the exception of the first two countries ranked (Armenia and Macedonia). However, the score is lower than Norway's overall ranking in the happiness index for the entire population – second in 2010, and second in 2018) (Helliwell, Layard and Sachs, 2013: 22; 2018: 20).¹⁰

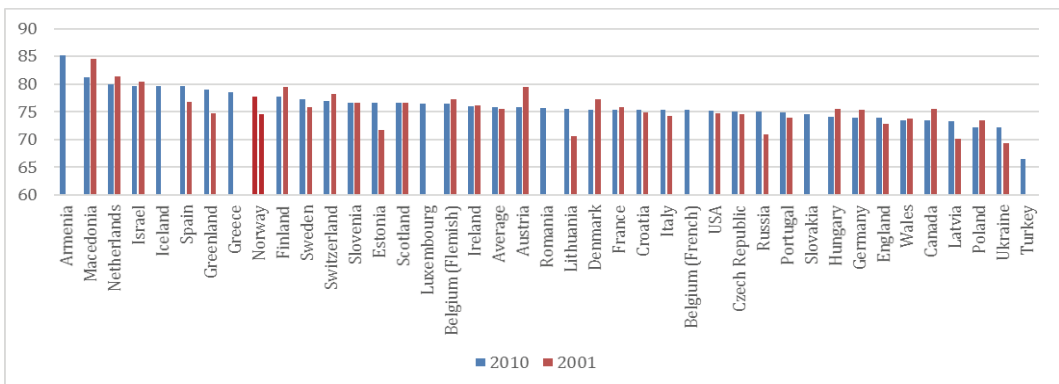


FIGURE 2.1 Children's life satisfaction – across Europe.

Source: HBSC 2010.

9. There is of course a difference in questions on satisfaction and happiness, but they are both subjective considerations on the quality of life.

10. Of course, there is a difference in the questions for life satisfaction and happiness, but the measures are both subjective assessments of the quality of life.

Based on this indicator, we give Norway a dashboard score of 2.5 out of 3, and note the positive development from 2000 to 2010. The message appears to be that Norway does well, although there is potentially room for improvement; and it might be prudent to inquire as to why subjective measures for children are lower than adults.

2. WELL-BEING

An alternative to perception-based surveys is an aggregate index of material aspects concerning the quality of life. In 2013, UNICEF published a well-being index for children in developed countries that is based on five 'objective' sub-indexes: income, health and safety, education, behaviours and risks, and housing and environment. Together the sub-indexes cover 25 different indicators ranging from the child poverty rate through to infant mortality rate, obesity and teenage fertility rate, and rooms per person and homicide rate. The results are displayed in Figure 2.2 and the index is based on the average rank for each of the sub-indexes.

In this well-being index, Norway is ranked highly, in second place just ahead of three other Nordic countries, Iceland, Finland and Sweden. However, while this index is comprehensive in its ambition in trying to measure many dimensions of well-being, it certainly can't be called a 'rights' index given the strong developmental focus in the selection of indicators. When it comes to the material aspect of quality of life, Norway does well, and get a full score on the dashboard. To be sure, there is significant variation on a number of these indicators within Norway but this variation is captured in quite a number of the indicators that follow below.

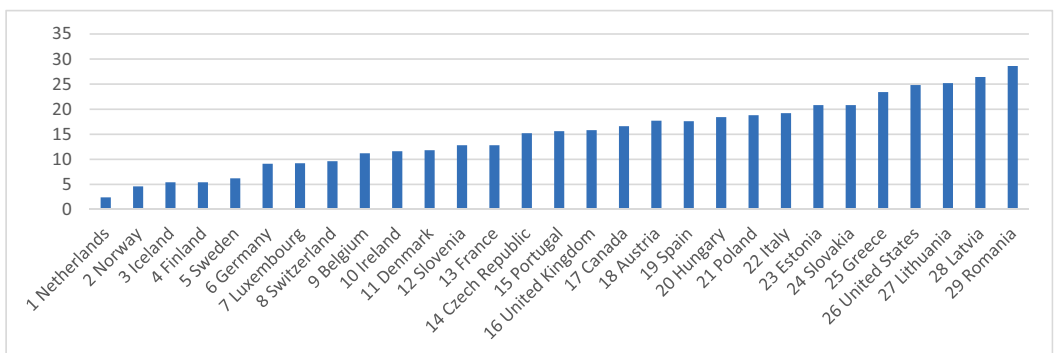


FIGURE 2.2 Children's wellbeing – developed countries.

Source: UNICEF 2013.

B. LIVING STANDARDS AND POVERTY

Article 27 in the CRC specifies ‘the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.’¹¹ States are obliged to secure a child’s standard of living if the parents do not have the means. One concrete measurement of how Norway complies with this duty can be to assess the development of children living in poverty, both compared to other countries, but also over time and for specific groups. Since the late 1970’s, poverty has been understood also as linked to opportunities *relative* to the average population and not just a threshold standard of living (Townsend 1979; see Fløtten Chapter 4). Poverty is also deeply linked to several other protections in the CRC such as the right to social security.¹²

3. POVERTY – RELATIVE AND ABSOLUTE

Globally, Norway scores well on both absolute and relative poverty. Figure 2.3 shows that Norway is ranked fourth on an index measuring the share of persons under 18 living in a household with disposable income less than 60 per cent of the median income.

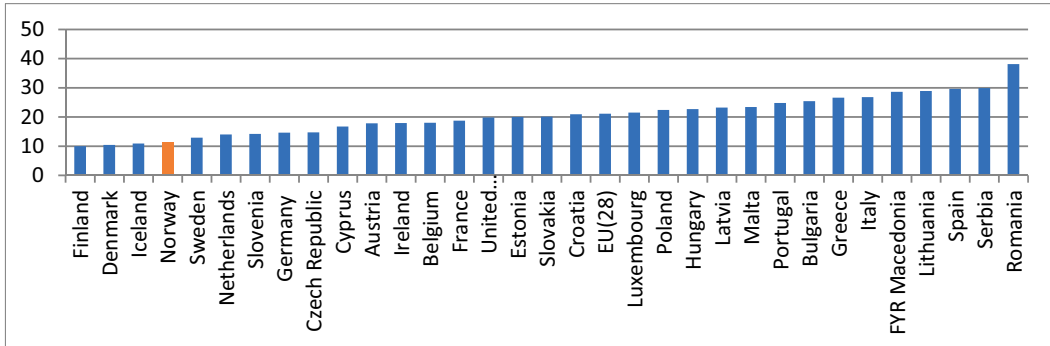


FIGURE 2.3 Share of children living in a household in relative poverty. 2015.

Source: Fløtten chapter 4.

However, the amount of children that are categorized as poor has been increasing since 1990, up to ten percent in 2017: see Figure 2.4. Moreover, Fløtten notes in her chapter that when examining the material deprivation among those in the lowest income quintile, Norway seems to be marginally less able to protect the fami-

11. Art. 27

12. Art. 26.

lies with children than families without children. The difference is small but in some European countries the material deprivation among those worst off economically is *less* in households with dependent children.

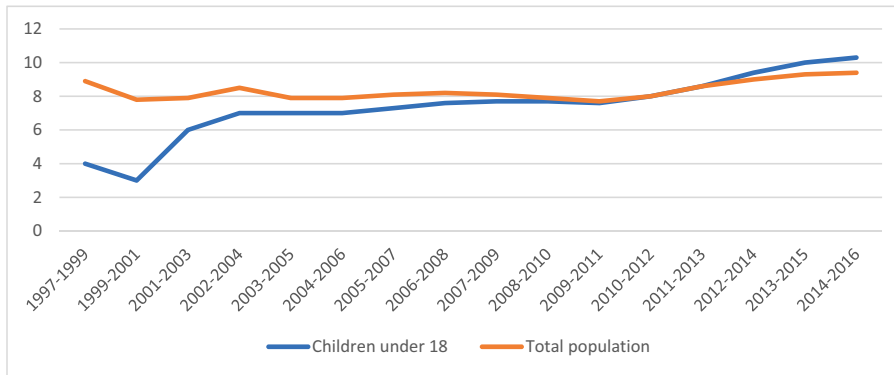


FIGURE 2.4 Share of persons below 18 years of age and the total population living in a household with disposable income less than 60 percent of the national median. 2015.

Source: Epland et al. 2011 for 1997/1999–2006/2008, Statbank SSB for the other periods.

Further, some groups are disproportionately represented. Almost 40 per cent of children with a migrant background are in a low-income family – roughly four times the average child in Norway, see Figure 2.5. Combined with the increase in child poverty, this inequality in the distribution of poverty leads us to give a moderate dashboard score (2.5), highlighting that particular challenges remain.

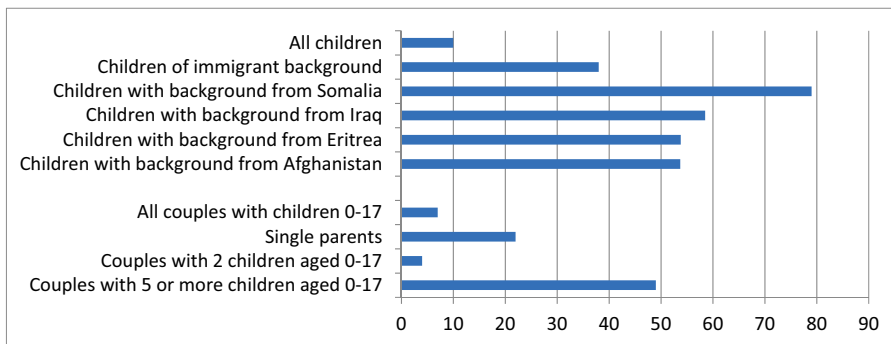


FIGURE 2.5 Share of children at risk of poverty by background 2013–2015.

Source: Fløtten chapter 4.

C. EDUCATION

The right to education is recognised in Articles 28 and 29 of the CRC. Emphasis is placed upon maximising accessibility to all levels of education and ensuring that the content of education is relevant to employment prospects, the development of child's personality and ability, prevention of drop-out, and ensuring children learn respect for human rights. Most international surveys address accessibility (both physical and economic) while regional surveys tend to focus more on the content of education, performance and experiences at school. As general accessibility to education is included partly in the well-being indicator (Indicator 2), we focus here on issues of the strengthening of their abilities (indicators 4, 5 and 8), access for disadvantaged students (indicator 6) and prevention of drop-out (indicator 7).

4. EDUCATIONAL GAP AND PARENTAL BACKGROUND

Several indexes measure outcomes on primary and secondary education, such as PISA, TIMSS, and PIRLS. The most commonly known, and heavily debated, are the PISA surveys concluded by the OECD.¹³ The surveys consist of extensive questionnaires with knowledge tests on reading, math, and science and background questions. The sheer breadth and volume of the PISA-data, as well as its comparability between countries makes it a good starting point for evaluating the efforts of states to fulfil the right to education.

Drawing on the OECD dataset, we assess Norway's performance in limiting the effect of socio-economic background on performance in school. In other words, does Norway seek to develop children's 'child's personality, talents and mental and physical abilities to their fullest potential' (Article 29(2)) by closing the gap in educational outcomes across different socio-economic groups? If a state is to fully comply with the CRC, education should be adapted to enable all students to perform their best regardless of their socio-economic background, including their parents' education.

In the dataset, parental background is represented by the highest education level attained by their parents and we compare the extent to which it affects performance outcomes across OECD countries. As is visible from the table in Annex 2, there is a positive connection between parental education and performance in school across OECD countries in mathematics, science, and reading. However, this table shows that there is a much *weaker* relationship in Norway between parents' education and the performance of Norwegian students. All models are statistically significant¹⁴

13. OECD, see i.e. Sjøberg (2014), Mossing et al. 2016.

14. However, note that the dataset on the OECD average is much smaller, and is consequently much more limited. The two are also significantly correlated as shown in Annex 2.

However, while this weaker relationship between parental education and performance is quite positive the results could also illustrate 'equalising down'. If the upper level of performance is lower in Norway than other states, then one might question whether the price of achieving egalitarian outcomes has been lower overall performance.

If we compare Norway to other countries and focus on the *likelihood* of low performance for disadvantaged students relative to advantaged students, then Norway still performs relatively well. Disadvantaged students have only a twice as high a chance of performing worse and the ratio is slightly better than most Nordic and European countries. However, the lower score of Iceland (and perhaps surprisingly the United Kingdom) suggests that there is room for improvement in Norway. Structural barriers arguably remain.

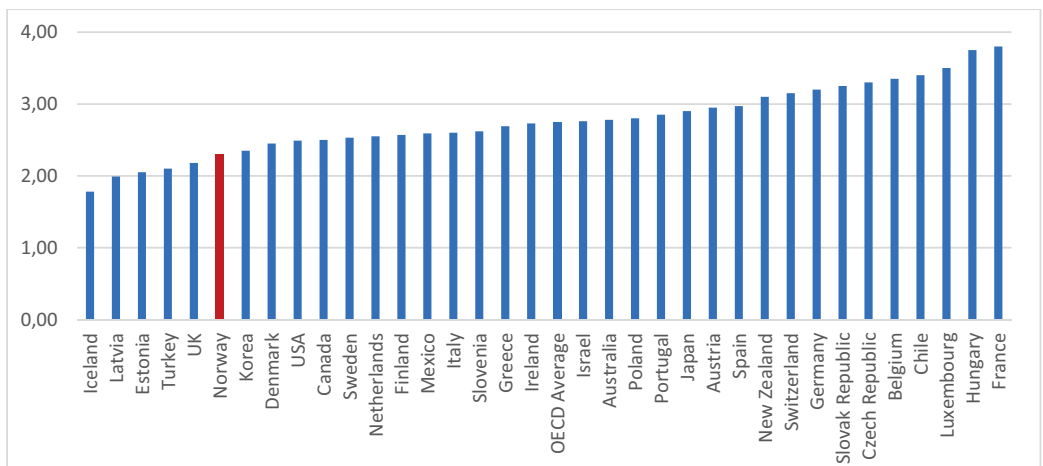


FIGURE 2.6 Likelihood of low performance for disadvantaged student relative to non-disadvantaged students.

Source: OECD 2015.

The above indicator suggest that although Norway may be complying with legal demand to give access to education, there is still room to ensure that all children have a chance to improve their abilities. With a statistically significant correlation between parental education and performance on the PISA-test, it is clear that challenges remain with regard to reducing the effect of socio-economic differences in school. Still, Norway fares comparatively well in the OECD, and this contributes to a dashboard score of 2.5.

5. EDUCATIONAL PERFORMANCE

If we examine the overall performance of students in the PISA tests, Norway is ranked number 18 amongst the OECD states (OECD, 2018:5). However, the right to education and improvement of children's abilities should also be achieved without reference to geography. However, uneven results across the country suggest that this might not be the case. Every year, Norwegian students on levels 5, 8, and 9 must participate in national tests (Utdanningsdirektoratet 2016). These tests are standardized and modelled on the PISA-test. The results are published by county, and reveal some regional differences. Generally, Oslo scores well above the rest – particularly with regards to the top percentile in reading, math, and English. We find a similar trend at the lower end of the scale, with Norway's northern most county Finnmark at the bottom.

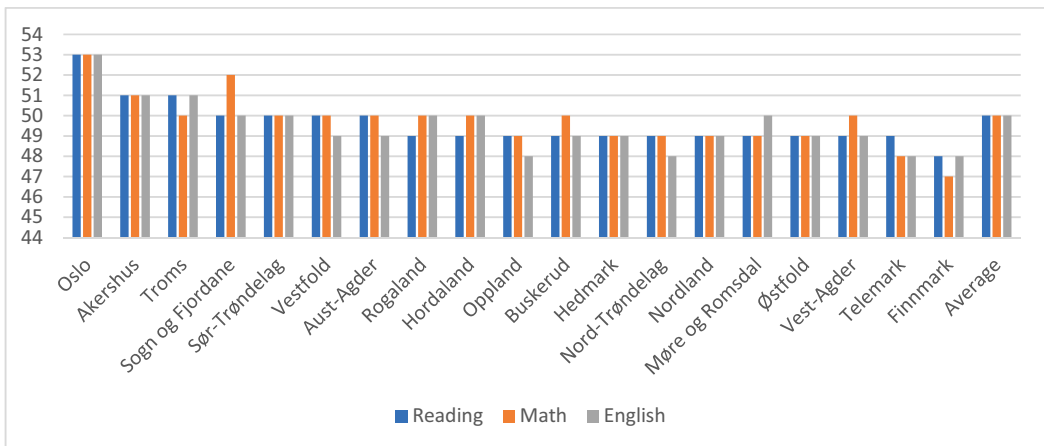


FIGURE 2.7 Variation within Norway.

Source: Utdanningsdirektoratet 2016.

However, Finnmark is also one of the counties with the lowest turnout for the national tests. The figures divide between those who have been exempted for formal reasons (targeted teaching, special education) and those who refrain from showing up. While Oslo has a large group of students who qualify for the first category, much less of Finnmark's absence is explained by formal reasons. The disaggregated results also reveal that the larger cities, with the exception of Drammen and Fredrikstad, score on or above average on all the tests. The tests thus reveal some regional differences although the level of performance for students is not necessarily a reflection of the quality of education, or access to education. Nonetheless, it shows potential room to improve.

Given that the results on the national tests show large regional differences, and the difference between rural and urban areas, Norway gets a medium score of 2 on the dashboard.

6. ACCESS TO SCHOOLS FOR CHILDREN WITH DISABILITIES

While Norway scores highly on average in relation to access to education (both physical and economic), attention also needs to be paid to those groups that face particular access challenges. There is no formal and regular measurement of the extent to which there is sufficient reasonable accommodation of children with disabilities. However, an analysis conducted by the Norwegian Handicap Association and the research institute IRIS in 2014, revealed that 80 percent of Norwegian schools have insufficient access for students with physical disabilities (Likestillings- og diskrimineringsombudet 2013). The supplementary report by the equality and non-discrimination ombud to the Committee on the Rights of Persons with Disabilities commented on the study by IRIS, emphasized that the likelihood of compliance with the right to access to schools was very low due to old school buildings and lacking upgrades. The challenges with participation in education were also highlighted in a supplementary report to the CRC in 2017 (Forum for barnekonvensjonen, 2017).

Obviously, such an indicator is not ideal as it is only focused on process not outcomes and there is no regular measurement. However, we were unable to locate other indicators despite children with disabilities arguably facing the greatest barriers in accessing school. Moreover, in chapter 12, Tøssebro and Wendelborg (chapter 12) show that there are large variances in the access to education and services for children with disabilities. Even though children with disabilities start out with a high level of participation at school, this falls rapidly with age. Thus, we have selected this largely structural indicator of available access as a first step. However, a concrete survey of parent's experiences over time might provide a better measure of children with disabilities access to education. In any case, the lack of data implies that the access for children with disabilities is not necessarily prioritised, it contributes to a low dashboard score of 2.

7. YOUTH DROPOUT RATE

Article 28(1)(e) provides that states must take 'measures to encourage regular attendance at schools and the reduction of drop-out rates'. Through the NEET indicator (Not in education, employed, or in training), the OECD measures how

youth continue with education, employment, or neither of the two. Given the mandatory character of education, the measurement includes youth from 18–24, but cannot be disaggregated by year. In Norway, 10 percent fall within the NEET category. While this is below the OECD average, Norway is not the best performer. Countries such as Iceland, Denmark, Luxembourg, and the Netherlands lead.

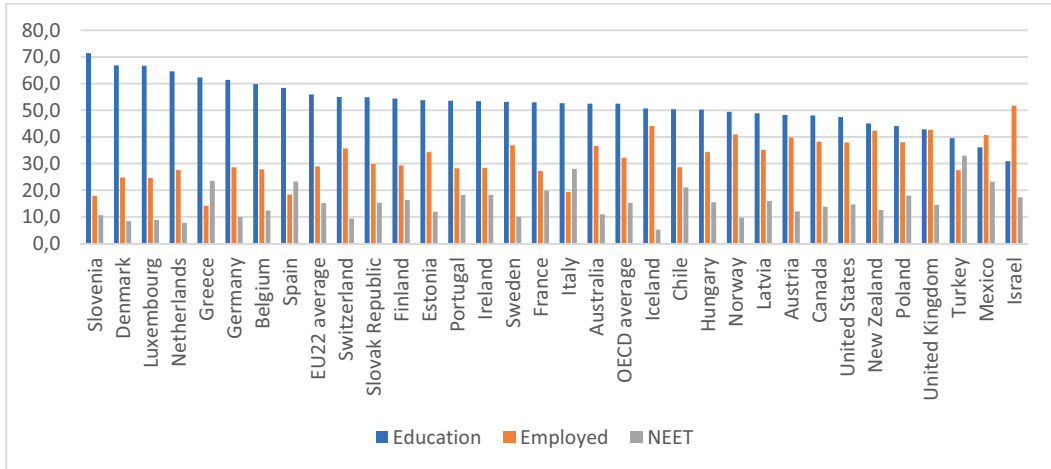


FIGURE 2.8 Percentage of 18–24-year-olds in education/not in education, by work status. Source: OECD 2016.

Internally, within Norway there are significant variations if we focus specifically on school dropout figures – with a low of 10 per cent in some counties and over 20 per cent in other counties. See Figure 2.9. Summarising the comparative and internal indicators, Norway performs comparatively well when it comes to the share of youth between 18 and 24 in education and employment. However, a figure of ten percent of youth out of employment and education is still quite high in a wealthy country with an otherwise low unemployment rate. It is to be remembered that states are to use the ‘maximum extent of their available resources’ to achieve economic, social and cultural rights such as the right to education (see Article 4, CRC). Moreover, there are also large regional differences. Those two indicators combined lower Norway’s score from a 3 to a 2.

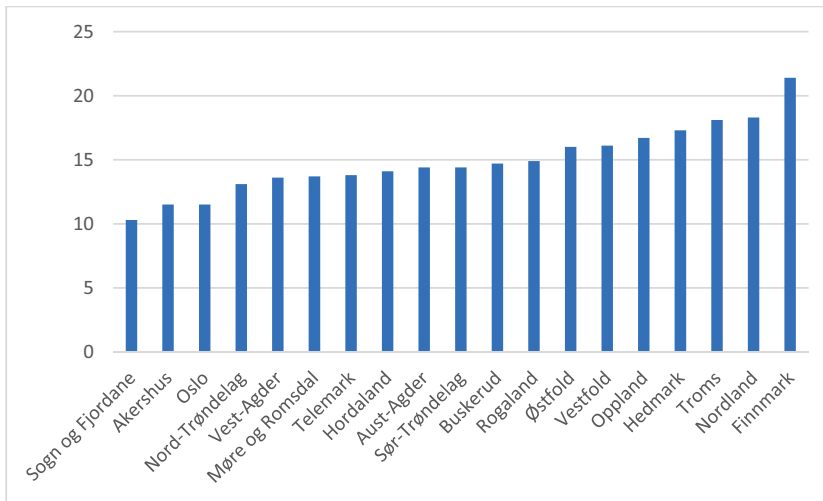


FIGURE 2.9 Percentage of students who dropped out of high school.

Source: SSB 2018b.

8. EARLY CHILDHOOD EDUCATION

Access to early childhood education is conditionally recognized in the CRC as a right, and other provisions have been drawn upon by the Committee to strongly recommend its provision (see Chapter 8). In Article 18, States Parties commit to rendering ‘appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.’ Moreover, access can be a very important means of reducing inequality of opportunity and the Committee on the Rights of the Child has encouraged states in this direction.

As seen in Figure 2.10, more than 90 percent of Norwegian children between the ages of 1 and 5 attended kindergarten in 2016. Since 2006, there has been a substantive increase in participation, up from 80 percent. However, as discussed by Drange in Chapter 14, Norway performs comparatively less well in relation to children up to 3 years of age. Moreover, participation by children with a migrant background is only 75 per cent in the age bracket 1–5 years (Folkehelseinstituttet, 2018). The positive trend in the increase of children in Kindergarten and the generally high percentage of children that attend Kindergarten ensures Norway almost the top-score on the dashboard (2.5).

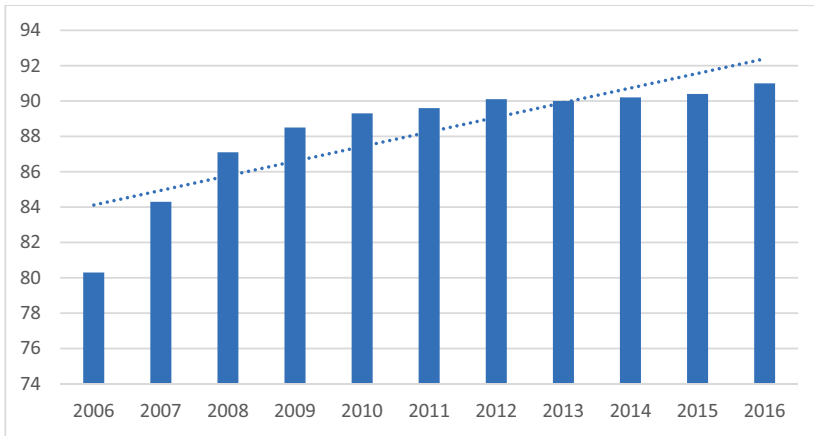


FIGURE 2.10 Percentage of children in kindergarten 1–5 years.

Source: SSB 2018b.

D. HEALTH/SECURITY

Article 24 in the CRC guarantees children the right to the ‘highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.’ In measuring implementation on the right to health we have selected indicators on suicide, school nurses, obesity, and general mental health. All are elements in Art. 24(2) and were chosen for the following reasons. First, the incidence of teenage suicide has been selected in order to track the follow-up of children’s health and reduction of child mortality. Second, the presence of school nurses has been included as a measurement of access to primary health care, and is an option available for children independent of parental involvement. Third, obesity in children has emerged as a critical health issue for children in many if not most countries in the world. Finally, an indicator on mental health directly addresses anxiety and depression in children. We note that other indicators in the chapter also address health issues (i.e. bullying, poverty, LGBT rights).

9. TEENAGE SUICIDE

The Nordic countries are often ranked highly in indices of life satisfaction, human development and happiness. However, the Nordic states also score comparatively high on suicide rates. Although official suicide rates may be questioned (e.g. misreporting of the causes of death), they can give an indication of the psychological well-being of the population.

The WHO and the OECD have collected data on suicide rates amongst teenagers over several periods of time. However, the most recent dataset with information on all Scandinavian countries dates back to 2012. Consequently, there may be some alterations in the rates. Comparing countries in the OECD on suicide rates, and teen suicide rates, the Nordic countries score below average, i.e. they have a higher rate of teenage suicide. Although the rate in Norway appears to be decreasing, it is still comparatively high – indicating a gap in the perception of well-being – and results in a dashboard score of 2. On a slightly positive note, Norway has improved its position within the OECD from fifth worst in 2000 and sixth worst in 1990 – where teenage suicides were almost double the rate in 2012.

10. SCHOOL NURSE

The presence of nurses at schools is not an explicit requirement of the CRC, neither in relation to the right to health or schooling. However, school nurses in every school are recommended by School Nurses International as a means of promoting both physical and mental health of students (e.g. addressing bullying); a range of countries have reported on their presence in their reports to the Committee on the Rights of the Child; and research indicates that it can be a highly effective intervention (Strunk, 2008).

In Norway, school nurses have a daily or weekly presence at schools. The official recommended number of school nurses per child is 286. This is higher than in most other countries (see Baltag, Pachyna and Hall, 2015). Figure 2.11 shows the number of students per nurse in primary school, distributed by counties. None of the counties are close to the recommended amount. Moreover, only one Norwegian county is close to the best-performing schools in the USA in an earlier study, for example (Guttu, Engelke, Swanson, 2004). The numbers are not disaggregated per school, so one should keep in mind that some schools are closer in reaching the target than others. Still, the overall tendency is that there are not enough school nurses in primary school according to the government's own standard. The deviations from the recommended number of students per school nurse in combination with regional differences gives Norway a dashboard score of 2.5.

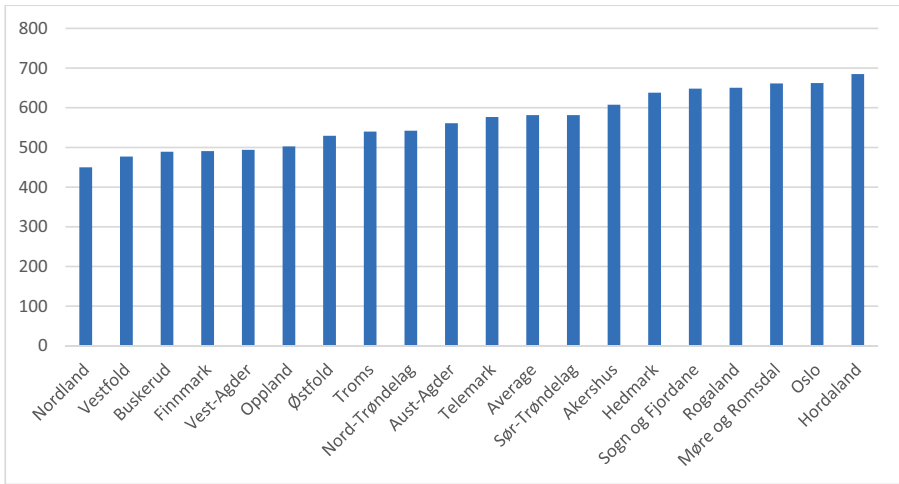


FIGURE 2.11 Students per school nurse in primary school.

Source: SSB 2017.¹⁵

11. OBESITY

Today, more people die of obesity than malnutrition. The latter however is immediately deadlier for children than adults but obesity presents multiple challenges for children's health, which can be accentuated later in life. Obesity has been rising in all countries, including Norway, but comparison across countries is challenging. Children are measured at different ages. Figure 2.12 compares children between the ages of 10 and 12 in countries with data on these ages. This indicates that Norway lies at the lower end of the comparative scale. However, 14 per cent of children are significantly overweight or obese and in some regions of Norway the percentage is almost double as high, (Biehl et al. 2013; Folkehelseinstitutt, 2014) leading to a score of 2.

15. Data from SSB: <http://www.ssb.no/a/barnogunge/2017/tabeller/skole/skole0100.html> (accessed 06.02.2018); Haugen og Hartvedt (2016)

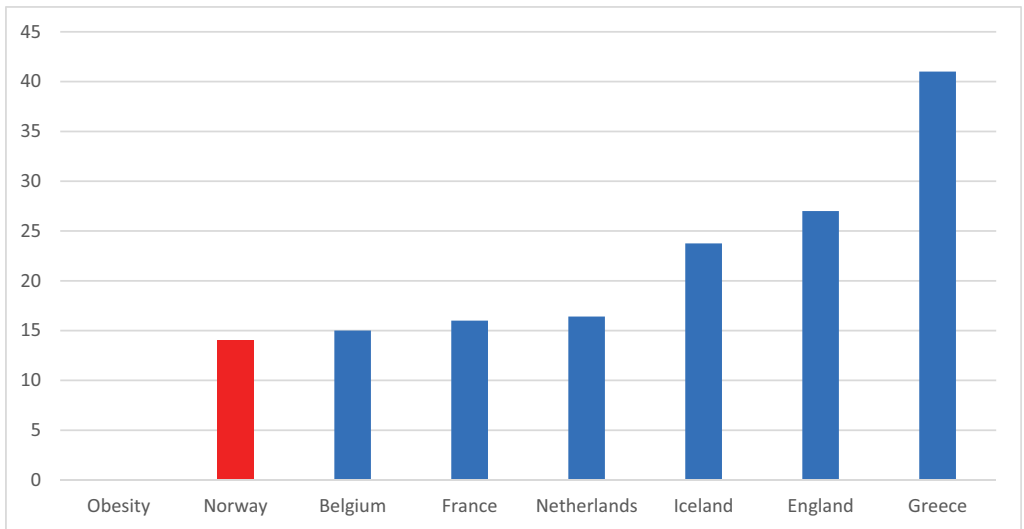


FIGURE 2.12 Percentage of children that are overweight (including obesity) (2010).

Source: World Obesity Index, 2010.

12. MENTAL HEALTH

Article 24 of the CRC requires states to take all appropriate measures towards ensuring that all children enjoy the highest attainable standard of health. The Committee has expressed its concern with the ‘increase in mental ill-health among adolescents’ noting amongst other problems ‘developmental and behavioural disorders’, ‘depression’ and ‘self-harm and suicide’.¹⁶ In August 2018, the BBC questioned the Nordics rank as one of the happiest regions in the world based on a new report on mental health issues among young people in the region (Boseley, 2018). The data showed that a large proportion of young people are suffering or struggling with mental health (Andreasson, 2018).

Ungdata collects data on anxiety and depression in young people. As we can see in Figure 2.13, almost 30 per cent of girls in senior year of high school have depressive symptoms (Bakken, 2017). This is twice as high as girls in grade 8. As with all surveys, there may be issues of under- or over-reporting, but the high share of girls reporting depressive symptoms – as well as the difference between girls and boys – is startling. Moreover, the abovementioned survey from, the Happiness Research Institute, on assignment from the Nordic Council of Ministers, found

16. *General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, UN doc. CRC/C/GC/1 (2013), para. 38.

that Norway is among the worst-performing in the Nordic countries in relation to depressive symptoms. However, Norway performs comparatively better than Germany, UK, France and Russia (Andreassen 2018:15). Despite a very high international ranking, the score is reduced to 2 on the basis of variation by gender and the overall high level of symptoms reported.

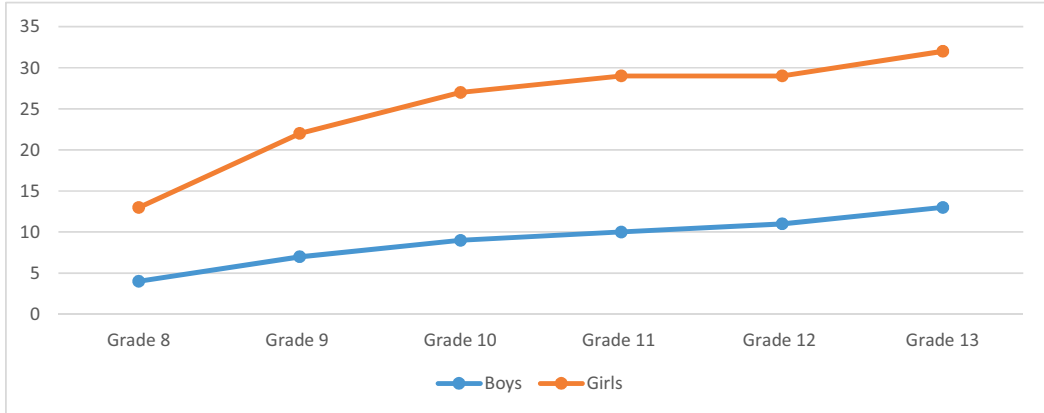


FIGURE 2.13 Share of boys and girls with depressive symptoms. Grade 8–12.
Source: NOVA 2017.

E. PROTECTION

A child's right to protection and accompanying measures constitutes one of the principal elements of the CRC: see Article 3(2) and (3). It covers protection of the child's well-being (Article 3) and privacy and family life (Article 15), against violence (Article 19) and in child welfare (Article 20). In our analysis, we focus on child welfare (with a focus on removal from the home), homicide (fundamental protection of the right to life), bullying and unwanted sexual awareness. The latter are not only relevant to protection (of well-being and against violence) but can also be seen in conjunction with the indicators of health (and education).

13. CHILDREN IN CARE

Despite the existence of a strong welfare state that is meant to support families, Norwegian child protection services have been strongly criticised in recent years. The criticism has come in media around the world and from citizens and civil society organizations, the UN Children's Committee and various public bodies,

individuals and organizations (eg Lewis, 2015; Whewell, 2016; see also Part 2 above). However, many other consider that the criticism has been exaggerated (Øverlien, Hafstad, Myhre and Skjørten, 2018).

Comparing how child protection services perform across different countries is difficult as service provision cannot be measured on a regular scale. Countries need to find the right balance between, on one hand, removing children and providing quality alternative care and, on the other hand, providing support for parents so that children can remain within their families. From the perspective of the CRC, the best interests of the child can inflect decision-making (see chapter 3). However, comparative statistics do not necessarily capture or reflect this optimisation frontier. For example, if we look at Table 2.3, we see that the number of children removed is higher in advanced welfare states than more liberal states such as the United States, Ireland and England. Compared to eight high-income countries with similar systems, Norway is in the top 5 in the number of children removed from the family, cf. Table 2.3 below. However, this should not take away attention from the fact that there are large variations in the number of children removed from the family – and that Norway's level is similar to other advanced welfare states. In addition, multiple factors affect the quality of child welfare services.

TABLE 2.3 Numbers of children (0–17) in care at year end by country

Country	Year	Children placed out of home (and per 1,000 children)	Total number of children placed out of home (percent of children) 2016
Switzerland ^a	2012	793 (10.4)	
Norway	2013	11,405 (10.1)	15865 (14.07)
Finland	2012	10,365 (9.6)	
Germany	2012	118,530 (9)	
Sweden	2012	15,646 (8.2)	30510 (13.97)
England	2013 (March)	68,110 (6)	
Ireland	2012	6,332 (5.5)	
USA, Massachusetts	2012 (2013)	7,302 (5.2) (398,482 (5.4))	

a. *Cantons Basel-Landschaft & Basel-Stadt* only, and entries per year for involuntary and voluntary placements.

There is also considerable variation between counties in Norway in terms of the rates of removal across the country (see chapter 3). One possible explanation for this may be that policy guidance is not adopted or applied consistently across the country, as argued by Falch-Eriksen and Skivenes in their chapter. With major variations in outcomes of important decisions, children within the same system can experience equal treatment in different cases and different treatment in similar cases. These authors also note the high numbers of children with an immigrant background that are removed from their family. While it is difficult to judge whether the absolute numbers of children removed is contrary to or consistent with a child’s best interest, the high levels of internal variation suggest that there may not be consistency, suggesting room to improve and resulting in a lower dashboard score (2).

14. HOMICIDE

Levels of intentional homicides provide a good measure of protection of the right to life and fulfilment of the right to health. The data is collected by the UNODC and WHO and is the most internationally recognized of various indicators of homicide and suicide for reliability and validity. We note that it includes suicide which means there is a partial overlap with Indicator 9 above. Figure 2.14 shows that Norway has a lower rate of homicide than most of its neighbours and large European states. The exception is 2011 which concerned the July 22 bombings and shootings and in which children were the primary victims. The indicator results, nonetheless, in a full dashboard score.

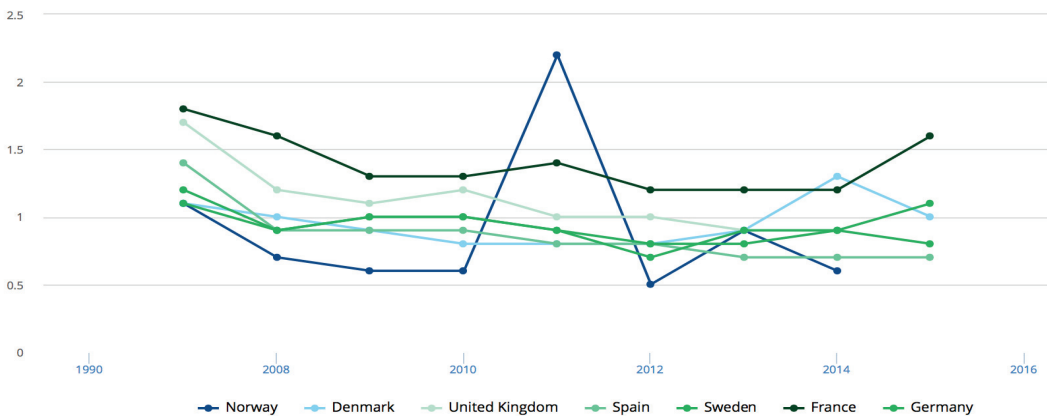


FIGURE 2.14 International homicides (per 100,000 people).
Source: World Development Indicators.

15. BULLYING

Bullying remains a challenge for states in ensuring equal access to education for everyone. In the context of the CRC, General Comment 1 from Committee on the Rights of the child specifies that: 'A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of article 29 (1).'¹⁷ The Norwegian Education Act (*opplæringsloven*) also establishes a duty to ensure a safe learning environment.¹⁸ As such, the formal requirements with regards to protection from bullying should be in compliance with the CRC, however, reports from pupils reveal that bullying still remains an issue (Wendelborg, 2018).¹⁹

Bullying has been in focus for many years in Norway, and the topic is prevalent in the national media. Every year, the Education Directorate orders a study of the study environment in schools, including bullying. Participation is high: 76 per cent of all students between 5th grade and high school seniors responded. Figure 2.15 shows the development in the number of children who report that they are being bullied 2 to 3 times in a month. Since 2013, the general trend appears to be a decline in bullying. However, the recent results reveal an increase in those who report being bullied at school. Still, one should note that formalities with the survey that came into force from 2013 – time of year, formulation of questions – may have impacted the outcome (Wendelborg 2018:8).²⁰

The PISA-test also collects information on how children feel about the environment at school, including feeling like an outsider, awkward, and out of place (OECD 2015). In the 2015 results, more than 5,100 Norwegian pupils responded to questions regarding their own experiences at school. As is visible from the annexes, 11.9 per cent of the respondents report feeling like an outsider at school and 17.2 per cent feel awkward and out of place. These are clearly not direct questions regarding bullying, but it does provide a reflection of the number of children that do not experience inclusion within the school environment. Apart from Sweden, the Nordics score a little better than average. Out of the more than 483,000 pupils that answered the question of feeling like an outsider, 18.2 per cent report that they agree with the statement. A similar percentage, 20.1 per cent, report feeling awkward and out of place.

17. General Comment No. 1, §19, see also chapter by Lile.

18. *Opplæringsloven* §9a-3 and §9a-4.

19. Data collected by Child Helpline International (2013), the international network of child helplines, reveals that a majority of those who call into helplines in Norway have been bullied in one form or another. Given that the data reflect those who actively call to share their problems, the data should not be seen as a reflection of the students as a whole. However, it indicates that many still suffer from psychological or physical bullying.

20. *Ibid* p. 8.

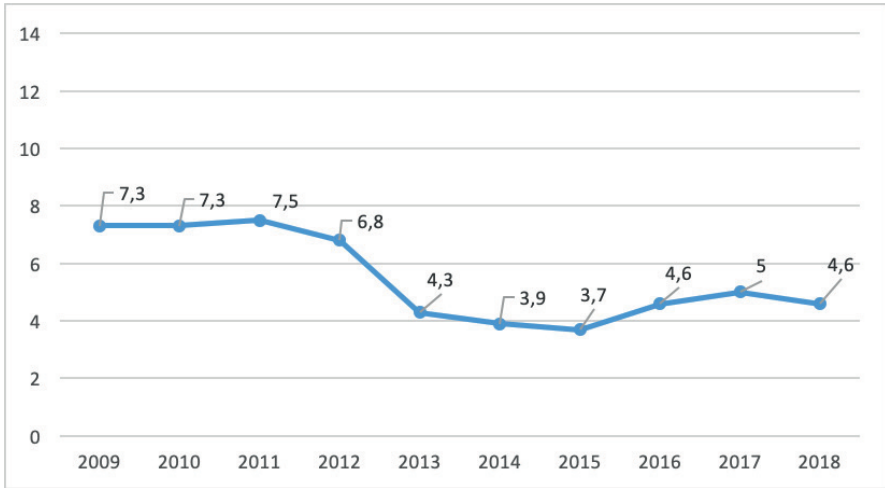


FIGURE 2.15 Bullying of children in Norway.
Source: Wendelborg 2018.

WHO also gathers data on bullying in the survey *Health Behavior in School-Aged Children* (HBSC). As we can see in figure 2.16, the number of children that report having been bullied in Norway has decreased from 2001 to 2010 – although Norway is still in the middle of the European ranking.

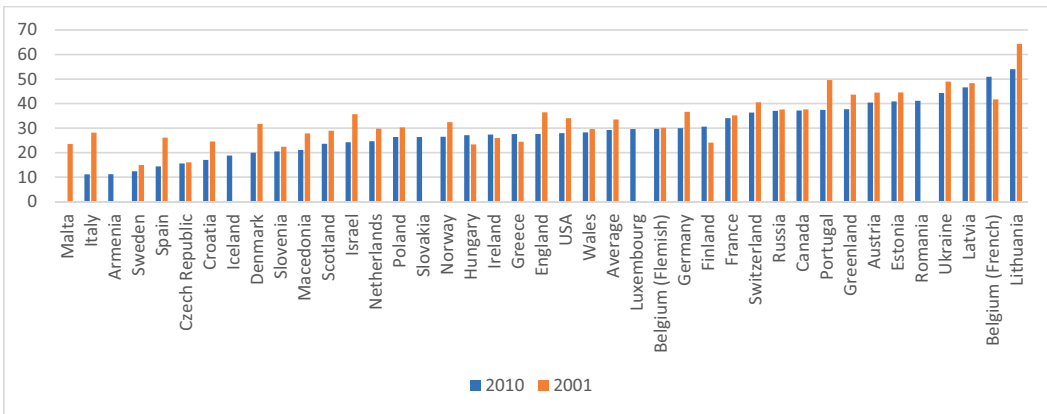


FIGURE 2.16 Bullying of children across Europe.
Source: HBSC 2017.

The numbers from HBSC and *Elevundersøkelsen* show that the number of children that report being bullied has decreased in the last decade. However, as problematized above, some of the decrease may simply reflect the change in questions.

Despite the trend, Norway's slight average result in a European context leads to a dashboard score of 2.

16. ONLINE BULLYING

For many children, bullying has moved from the physical to virtual sphere. There has been a significant increase in the number of children with access to technological tools such as mobile phones, computers, smart tablets, etc. In the annual report on children and the media, *Medietilsynet* (2017) reports that 97 per cent of children between the ages of 9 and 16 have access to mobile phones at home, and that this has increased by more than 20 per cent since 2012. Further, 85 per cent have access to a computer, and 85 per cent have access to smart tablets.

In 2016, 7 per cent of the children surveyed had been victims of internet bullying (*Medietilsynet* 2017:58). However, the numbers from *Elevundersøkelsen* are somewhat lower, as 2 per cent of those asked reported being digitally bullied monthly, while another 8 per cent had experienced it, but rarely (*Wendelborg* 2018). Time series data on internet bullying is somewhat inconsistent as there has been a rapid development in programs for communication on computers, mobile phones, and smart tablets. *Barn og Medier-undersøkelsen* changed their questions between 2010 and 2012 as well as 2014 and 2016, making it somewhat difficult to compare.

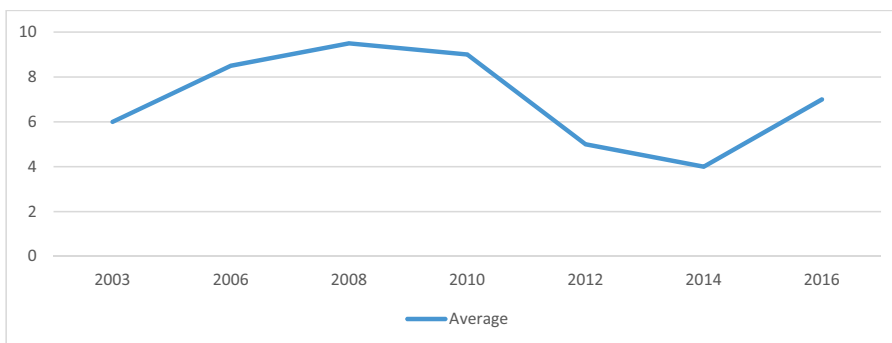


FIGURE 2.17 Children bullied online (in chat rooms 2003–2010).

Source: *Medietilsynet* 2010.

However, we can still observe some trends in the data available. Figure 2.17 shows the development with regards to bullying in chat rooms (both on computer and mobile phone) from 2003–2010 and bullying online from 2012–2016. The data indicates a decrease in 2012 and 2014, but the number of children that report being bullied online increases again in 2016. *Medietilsynet* report that the number of chil-

dren that experience bullying is quite stable. The change from 2010 to 2012 could be due to the change in questions. In their report, Medietilsynet explain the rise in 2016 by an increased percentage of 16-year olds participating in the survey, as older children are bullied more online (Medietilsynet 2018:58). The lack of international comparative data results in an initial score of 3 which is downgraded to 2.5 on account of the level of bullying and general consistency of the phenomenon.

17. UNWANTED SEXUAL ATTENTION

With the rise of internet usage, children also report unwanted comments of a sexual character, often associated with grooming (Medietilsynet 2017:48). A total of 4805 children participated in Medietilsynets (2018) latest survey, and the data show that the number of those exposed is quite stable at 21 percent. However, the difference between boys and girls is quite large. As Figure 2.18 shows, 30 per cent of girl respondents in the ages 13–16 had received unwanted comments in 2010. In 2016, 28 per cent of girls and 13 per cent of boys received unwanted sexual attention. However, older girls face a particular risk. At 16 years old, 40 per cent of girls have been exposed to unwanted sexual comments in the last year (Medietilsynet 2017:48).

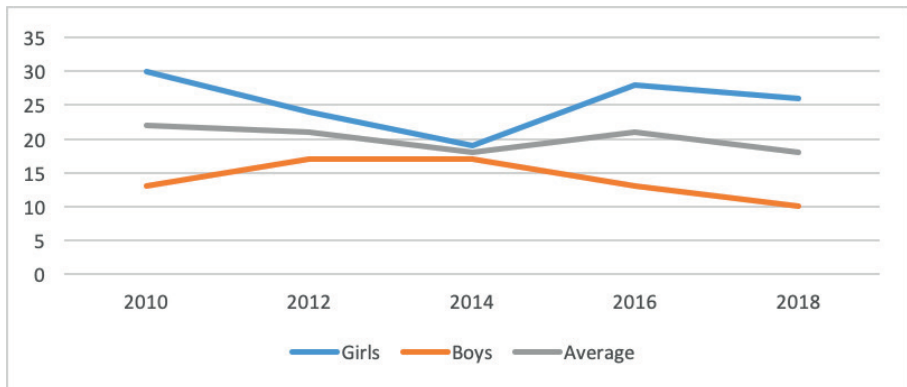


FIGURE 2.18 Unwanted sexual comments.

Source: Medietilsynet 2018.

It would also be useful to measure the numbers and changes in online instances of abuse. However, we have been unable to identify a suitable indicator or regular measurement. In summary, the large proportion of girls that are subject to unwanted sexual comments is conspicuous; and the rate of boys that are exposed is not comforting either. The absence of a positive trend and the high share of children and the difference between girls and boys that are exposed to unwanted sexual comments result in a low dashboard score (1.5).

F. LIBERTY

The right to liberty for children is largely addressed in the CRC in the context of policing and imprisonment, although article 15 also recognises children's rights to freedom of movement and association. As *Gröning* and *Sætre* state in their chapter, imprisonment is the most long-lasting and most intrusive form of deprivation of liberty for children.

18. CHILDREN IN PRISON

Gröning and Sætre note that in the last few years the number of children in Norwegian prisons has fallen dramatically. In 2008, there were 24 children in prison, while in 2014 and 2015 there was only one, although the number rose to 6 in 2016. They ascribe this general fall to the ratification of the CRC and legal amendments aimed at reducing the number of children in prison. Indeed, the number of children sentenced was reduced by three-quarters between 2002 and 2016. This low number is reflected in a ranking we have performed based on the EU's criminal justice statistics for the year 2013 (the last year that Norway reported). It shows the percentage of children in prison as a proportion of the number of children (0 to 18). Norway is ranked second after Sweden. A full score of 3 is thus given.

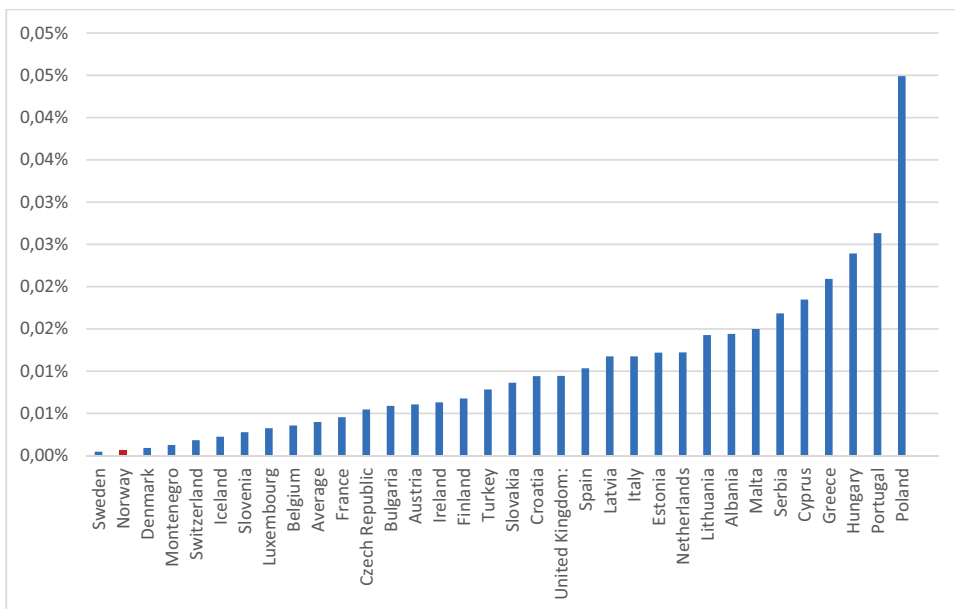


FIGURE 2.19 Juvenile prison population 2013 per capita.

Source: EU Criminal Justice Statistics 2016.

19. CHILDREN IN CUSTODY – TIME

However, this comparative ranking and generally low level of children in prison masks two definitional choices. First, it does not include all children that are sentenced to imprisonment by the courts. This number is significantly higher than the number of children that are in prison at each time as a large number of children have effectively served their sentence before the final judgment. *Grønning* and *Sætre* note from a CRC perspective, that this should be taken into account and that Norway has not included the number of children sentenced to prison in its most recent State party report to the CRC Committee – only those that are in prison. Secondly, it does not include children in custody who may not be sentenced to imprisonment but are detained as part of an arrest or trial process; the possible presence of racial profiling in arrests for which Norway has provided no contrary evidence; nor the conditions of detention – including the continued use of solitary confinement of some or even many children (see chapters 5 and 6). Figure 2.20 therefore shows the number of children in custody and the average days spent there. The number is significantly higher than for imprisonment but has been declining. However, the average number of days in custody is perhaps more stable, fluctuating around 120 days. Thus, one trend appears to be fewer children in custody, but longer periods in custody, without significant attention to either racial profiling or conditions of detention (see chapter 6). With these qualification, we give only a dashboard score of 2. But with simply better measurement by the authorities of claimed improvements, it is potentially a score that could rise.

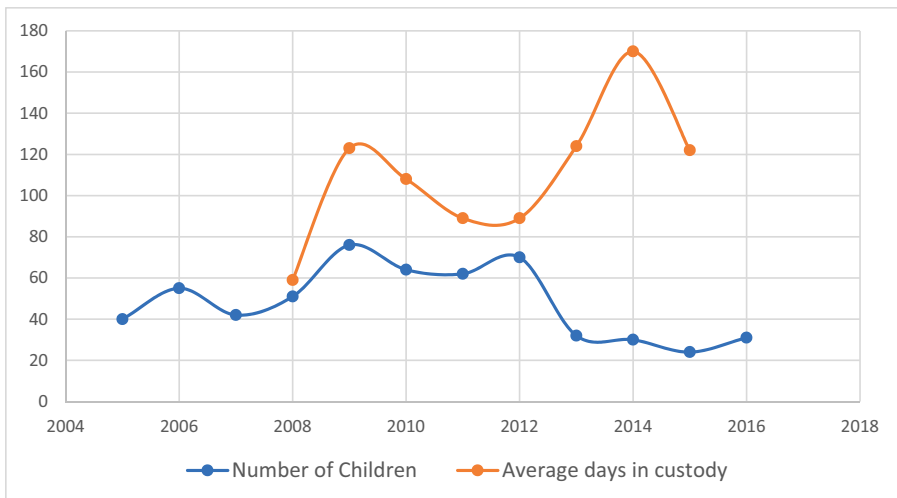


FIGURE 2.20 Number of children in court custody and average number of days.
Source: Grendstad and Hilde chapter 5.

G. DISCRIMINATION

Non-discrimination is a fundamental duty in the CRC. According to Article 2, states must respect and ensure that no child is discriminated under Article 2. This applies to all types of discrimination, related to race, complexion, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other. The duty is universal in all rights, and in some indicators, the principle of non-discrimination is integrated, including child poverty, bullying, unwanted sexual awareness and children in custody. At the same time, discrimination is one of the rights most difficult to measure. This because available data is often not disaggregated and because it is difficult to prove the intention or effect of discrimination, as well as being difficult to compare across countries within categories such as ethnicity and disability. In this chapter we have chosen three indicators of discrimination, treatment of asylum children, LGBT rights and tolerance. Other grounds of discrimination are partially captured in other indicators: e.g. national origin (indicator 3), gender (indicator 17), and disability (indicator 8).

20. ASYLUM CHILDREN

The situation of asylum children (alone or with their family or others) has generated significant discussion in Norway, especially asylum and deportation procedures/rules and the general living conditions. In its concluding observations on Norway, the Committee on Child Rights (2018) issued critical comments of both aspects, suggesting possible areas for measurement.

In relation to asylum and expulsion procedures, the Committee called for a child's right to be heard to be strengthened in asylum and expulsion procedures,²¹ requested the state consider automatically reassessing temporary residency permits of unaccompanied children (including the option of lengthening them),²² and recommended that 'under no circumstances' should children and their families be deported back to countries where there is a risk of irreparable harm for the children.²³ Raw data is, of course, available on the numbers of children granted asylum, deported or granted temporary residence permits. The challenge with this data, however, is that it does not necessarily match closely with the specific CRC obligations. For instance, there is no general right to asylum in the CRC. However,

21. CRC (2018), para. 14(c).

22. Ibid. para. 32(a).

23. Ibid. para. 32(b).

once a child is within the jurisdiction of the state, Article 3(1) applies “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.” General trends in granting of asylum or levels of deportation (see Eurostat (2018) for example) may be a proxy for a state’s general commitment to ensuring that children’s best interests are served in asylum procedures, but outcomes might be explained by the varying individual circumstances of asylum seekers or changing situations in their countries of origin. Likewise, it might be possible to consider using the refugee resettlement quota as a proxy for a state’s commitment, but such an indicator is likely to be misleading: e.g., the quota can be increased after a political agreement to impose greater restrictions on in-country individual asylum applications. Another possible and promising indicator is to calculate the number of asylum children deported to countries considered unsafe by an independent agency like the UNCHR or LandInfo – particularly given critiques of Norway’s failure to follow the advice of these agencies. This gives an indication to how seriously a state views threats to the child. The challenge with this measure though is contested interpretations over both safety (including between UNHCR and Landinfo) and whether it is acceptable to send children back to deemed safe areas of a land but with which they have no relationship (e.g., Kabul in Afghanistan). However, in our view the creation of such an indicator might be a useful indication of a government’s general commitment to asylum rights.

In relation to general conditions, the Committee called for an investigation into the disappearance of children out of reception centres, requested that children and their families be placed into reception centres for the shortest time possible, recommended an increase in resources to reception centres (to guarantee adequate conditions), stated that children cannot be placed in detention based on their immigration status and underscored that unaccompanied children in *all* municipalities must receive good quality care.²⁴ For these issues, it is possible to locate indicators that match more directly on to the human rights concerns, although the problem is that this data is often not collected or published *regularly* by the state.

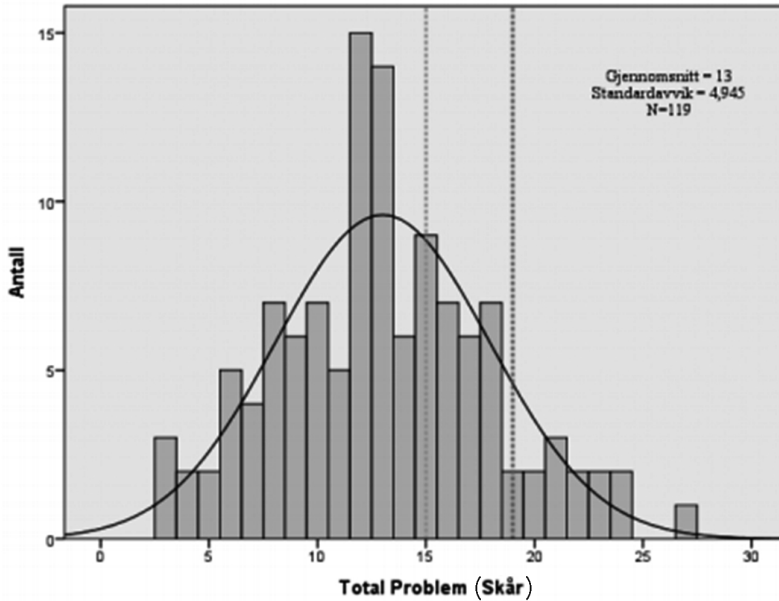
We suggest therefore two indicators concerning such conditions for children – one focused on mental health, the other on liberty rights. The living conditions of children seeking asylum was placed on the political agenda in Norway with the white paper *Barn på flukt* (Child refugees).²⁵ Following the white paper, NTNU Social Research in cooperation with the Norwegian Institute for Urban and

24. Ibid. para. 32(b), (c), (e), (f) and (g).

25. See Meld. St. 27 2011-2012 ‘Barn på flukt’.

Regional Research (NIBR) and Nord-Trøndelag University College (HiNT) issued a report on commission from the Ministry of Children, Equality and Inclusion and the Ministry of Justice (Berg and Rose Tronstad (eds), 2015). It is the first systematic review of the living conditions for children seeking asylum in Norway. While much of the data in the report is qualitative, it provides a good foundation for the measurement of implementation if continued on a regular basis. The authors also recommend that SSB follow up and produce regular statistics on the matter.

The report includes data on participation in society (school, kindergarten, health etc.) and mental health for children seeking asylum. Overall, it highlights a number of challenges in securing the rights of children seeking asylum. An overarching concern for these children is the uncertainty in knowing whether or not they will be granted asylum (Berg and Rose Tronstad, 2015:166). The *Strengths and Difficulties Questionnaire (SDQ)* measures mental health in children/youth and we have selected this measure as a relevant and useful proxy for capturing various aspects of a child's living conditions (but also indirectly whether the asylum procedures and expulsion procedures – the first point of discussion above – are reasonable, as potential deportation to unsafe conditions would presumably greatly raise a child's fear). Scores up to 15 are perceived as 'normal', while those above 15 (and particularly above 20) are critical. Figure 2.21 shows the score for children seeking asylum in Norway. As the figure shows, the percentage of children seeking asylum with mental health challenges is quite high (Berg and Rose Tronstad, 2015: 41–42). This survey could be repeated regularly, and it provides importantly a disaggregated complement to the subjective indicator on all children's life satisfaction: see indicator 1 above.



Number of children (antall) by SDQ score (total problem skår). Average = 13, standard deviation = 4,945.

FIGURE 2.21 Children seeking asylum in Norway, SDQ score.

Source: Berg and Trondstad 2015:41.

The second indicator concerns the detention of children. The majority of immigrant children that are forcibly returned from Norway (for example, rejected asylum seekers) are only arrested and not detained. According to various governmental sources on the use of arrest and detention of families with children pursuant to the Immigration Act, families are almost always arrested where deportation can be carried out quickly.²⁶ However, as Figure 2.22 indicates, a significant number of children have been detained for more than 24 hours, despite repeated warnings about the harmful effects detention of children brings about (see chapter 6 on policing in this volume by *Aasgaard and Langford*). In 2013 and 2014, the numbers were particularly high. These numbers declined in 2015 and 2016 although it is notable that the CRC committee demanded that no children be detained on the basis of their immigration status. In 2018, the number could be considered formally zero after the cessation of the use of Trandum detention centre for children and families. However, the new centres in which families are placed are highly restricted in relation to freedom of movement (see chapter 6).

26. See e.g. Innst. 78 L (2011–2012) s. 14; Prop 126 L (2016–2017) p. 48.

In light of the above indicators (especially the SDO survey), the lack of data, and commentary for the CRC committee, a score of 2 is given.

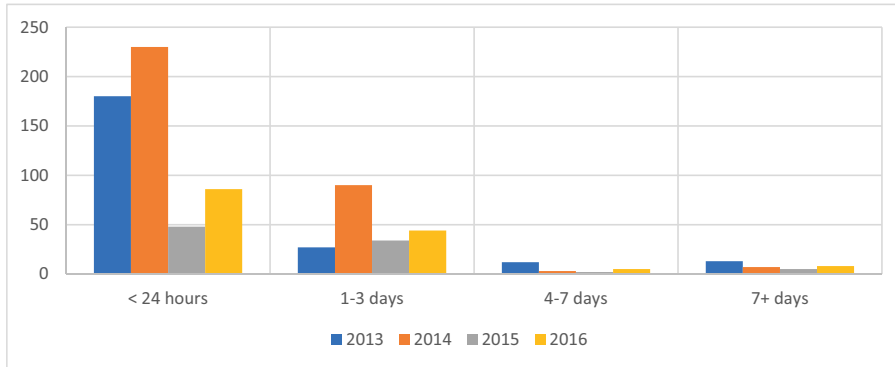


FIGURE 2.22 Children at Trandum Detention Centre 2013–2016.

Source: Prop. 126 L (2016–2017), table 7.1.

21. LGBT RIGHTS

Our second choice concerns sexual orientation and gender identity. Gender-based roles are often strongly institutionalised for children in both the public and private sphere. Moreover, children that express, or are perceived to have, a heterodox sexual orientation or gender identity are more likely to be victims of bullying (see chapters 13 and 14). Measuring Norway's efforts to respect and ensure that LGBTI children's rights is challenging and no regular data series exists on their experiences other effectiveness of different interventions – and certainly not comparatively.

Therefore, we have chosen a structural indicator – the securing of LGBT rights within law. Given that law in this area can affect public and expert attitudes, it may also reflect one sign of overall process. Using the ILGA index, which focuses on an array of legal protections, we see that Norway ranks highly, resulting in the highest score. See Figure 2.23. However, this ranking is only recent. As Thorsnes documents in chapter 13, Norway only recently moved up various transgender indexes after it recognised an independent legal right to gender identity. This means that children are permitted to change their formal gender without being required to change their sex.

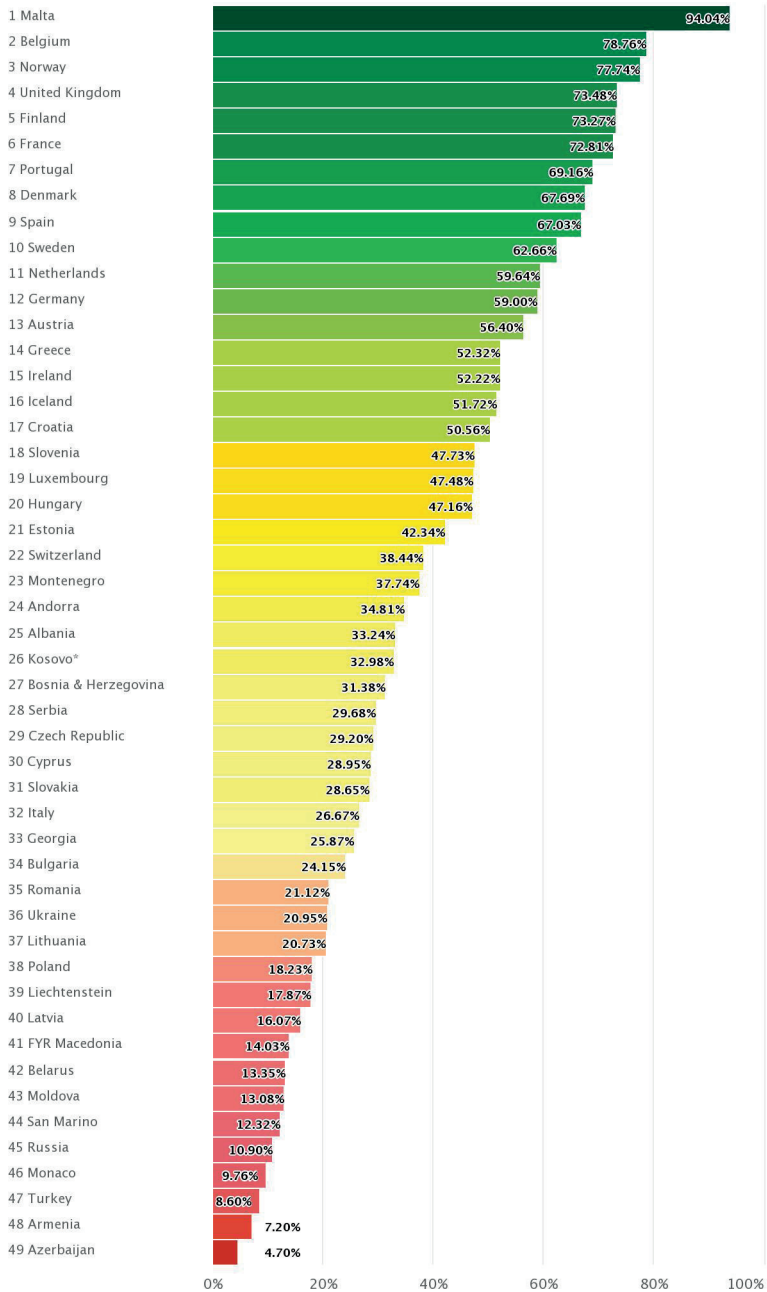


FIGURE 2.23 ILGA Index of LGBT Rights in Law.

Source: ILGA.

22. TOLERANCE AND DISCRIMINATION

Indicators on discrimination should also reflect the voice of those who may be subject to discrimination, even if it may be a subjective experience. The OECD measures how children and young adults with another nationality or minority background themselves experience discrimination. As can be seen in Figure 2.24, approximately 10 percent of Norwegian children and adolescents report that they have experienced discrimination in the period 2002 to 2012. It is lower than the EU average and in other Nordic countries, but for foreign-born who arrived as children it is higher than a number of European countries. Combined with other data on discrimination in Norway (see chapter 6; Midtbøen og Rogstad, 2012), this results in a relatively high score of 2.

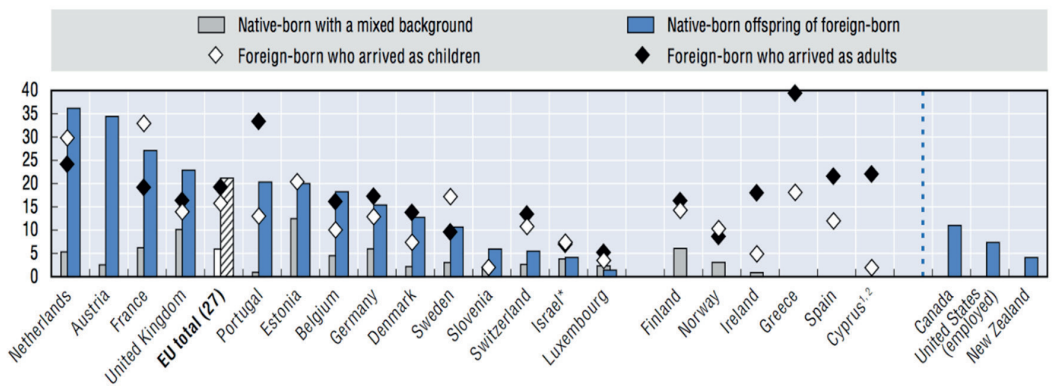


FIGURE 2.24 Share of 15–34 year olds that report discrimination 2002–2012.
Source: OECD.

H. PARTICIPATION

A child's right to be heard is a foundational right in the CRC. Article 12 specifies that children have the right to express their views freely in all matters affecting them. They are to be given due weight in accordance with age and maturity of the child. This right to be heard should be also understood in conjunction with articles 13, 14, and 15 on freedom of expression, freedom of thought, conscience and religion, and freedom of association and assembly. We have chosen three indicators for this purpose: legal voting age, civic engagement, and participation at school.

23. VOTING AGE

The UN Convention on the Rights of the Child Article 1 defines the child as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ As such, those under the age of 18 should still be considered children under the law, except in special domestic circumstances. This characterization of those under the age of 18 as children is well reflected in the voting age around the world. However, Article 12 emphasizes that states ‘shall assure the child who is capable of forming his or her own views the right to express those views freely’ (Emphasis added). Limiting participation based on age may reflect a stereotypical understanding of maturity. In this respect, the Convention provides a basis to at least make a claim that a voting age younger than 18 would be appropriate – particularly given topics such as democracy in school are common in many countries. Moreover, children can also be criminally responsible at a much younger age – meaning that election results can affect children. Legislatures are empowered to pass laws of coercion which can lead to the detention and imprisonment of children.

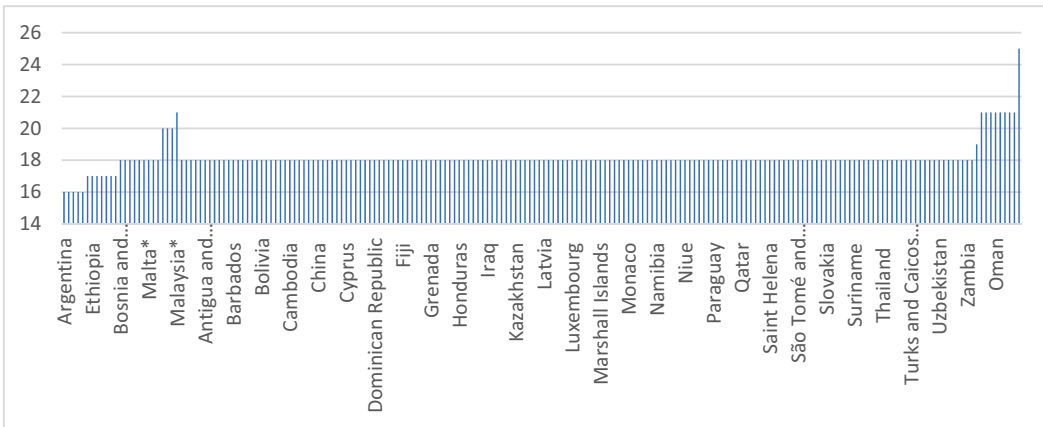


FIGURE 2.25 Global voting age.

Therefore, we have coded the voting age in all states in the world in which elections are formally held. The majority of states, including Norway, have a voting age of 18: see Figures 2.25 and 2.26. However, a small number of states differentiate voting age in local elections and general elections, or within an election. Less convincingly, some countries have extended voting rights for children who fulfil specific criteria – i.e. children who are married, or members of armed forces.

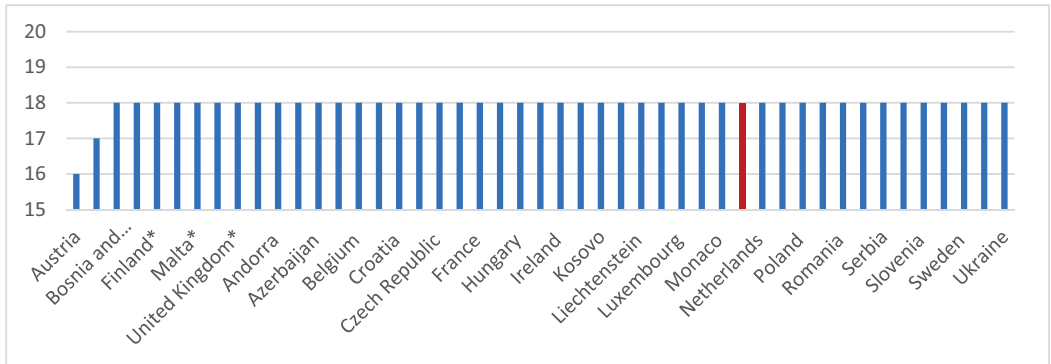


FIGURE 2.26 Voting age in Europe.

* Asterisk indicates lower voting age in local elections.

In Norway, a trial was with the lowering of the voting age in local elections to 16 years, in a selection of 20 municipalities from the different counties. However, in the latest proposition from the Norwegian government to the Norwegian Parliament on municipalities,²⁷ the suggestion was to not proceed any further with the project. The proposition was passed, and the right to vote for those between 16 and 18 has not been extended or continued in the municipalities where it was tested. The Norwegian Ombudsman for Children has criticized the decision (Barneombudet 2017), following an evaluation that showed positive results. Given that Norway has maintained the 18-year threshold despite a trial period with voting rights for 16-year-olds, which received a positive evaluation, leads us to give Norway a medium score of 2.5 on this account.

Although voting is perhaps the easiest way to measure child participation, there are other ways by which youth can engage with policy development. Moving beyond the right to be heard in Art. 12 of the convention, civic engagement captures the right to freedom of expression,²⁸ freedom of association and freedom of peaceful assembly.²⁹ For example, Figure 2.27 shows how Norwegian youth, grade 8, participate in different civic organizations. Not surprisingly, the most common participation is to collect money, and almost 40 percent of eight graders participated in this manner in 2009. It is important to note that there are two national events each year with fundraising as the primary aim: Operasjon Dagsverk

27. See Prop 128 S (2017) "Proposisjon til Stortinget: Kommuneproposisjonen 2018" available at <https://www.regjeringen.no/no/dokumenter/prop.-128-s-20162017/id2552727/sec1>

28. CRC Art. 13.

29. CRC Art. 15.

(OD) and TV-aksjonen. However, participation beyond collecting money is quite low.

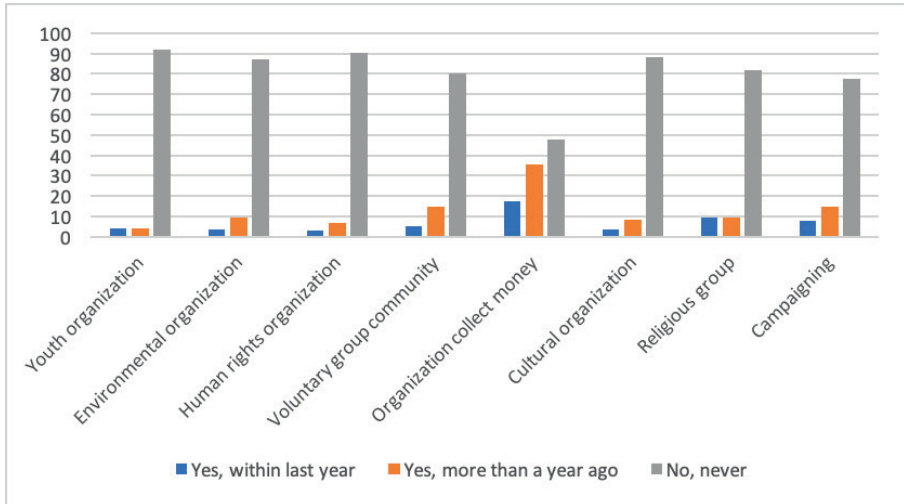


FIGURE 2.27 Participation in civic organizations for Norwegian youth (grade 8).

Source: ICCS 2009.

24. PARTICIPATION AT SCHOOL

In the annual *Elevundersøkelsen*, one of the categories deals with participation and the right to be heard at school. The students are asked if they are able to participate in deciding how the class should work in the different courses, whether it is easy for them to participate in student democracy (in the council or as representatives), whether the school listens to their suggestions, and if they have a say on their class environment. Figure 2.28 and 2.29 shows the distribution of answers from pupils in grade 7 and grade 10. The answers are scaled from 1–5 (i.e. to a very large degree, to a large degree, neither nor, to a lesser degree, not at all) (Utdanningsdirektoratet 2018). As we can see from the figures, students' experiences are relatively stable in the different grades, with a weak positive increase in level of satisfaction from 2013–2014 to 2016–2017. At the same time, there is a 0.5 point difference between grade 7 and 10, where the younger children report a higher level of participation.

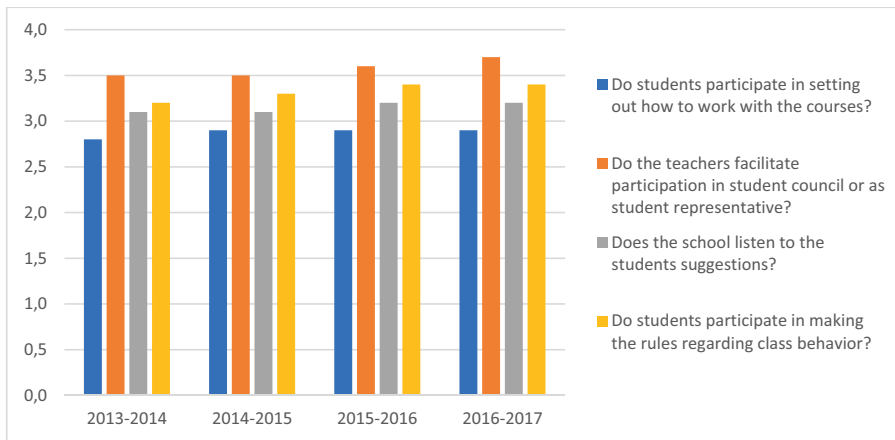


FIGURE 2.28 Grade 10.

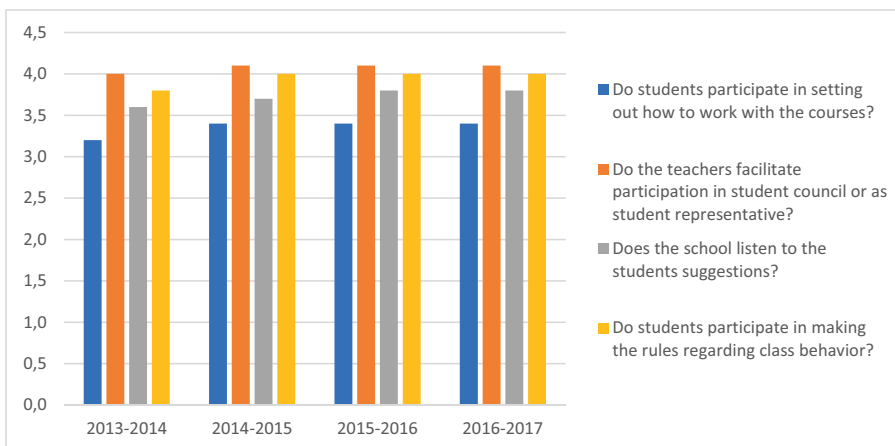


FIGURE 2.29 Grade 7.

Compared to other questions in the survey, the numbers for participation are remarkably lower (Utdanningsdirektoratet 2017). With regards to participation in deciding how the class should function, the answers for grade 10 fall just above average, while they are somewhat higher for grade 7. The answers on all indicators are quite consistent, revealing that students are less satisfied with participation with age, and that there might be room for improvement with regards to school democracy and participation. Therefore only a moderate score of 2.5 is given.

I. ACCOUNTABILITY

A key aspect of human rights is access to remedies and a general system of accountability although these terms are not specifically mentioned in the CRC. States parties to the CRC are required though to adopt appropriate legislative, administrative, and other measures to implement the Covenant.³⁰ This requires that some forms of accountability will be necessary so that the state can ensure that non-compliance is detected and addressed. Moreover, it is arguable that the right to be heard and the duty to adopt legislative measures can ground an obligation to provide children access to justice including legal remedies, or at least require the state to justify its absence. Such access to justice should arguably cover the legal status of children, their right to bring a case, their right to be heard in a case, legal assistance, and the ability of others to intervene on the part of the child.

25. LEGAL ACCESS

Norway has incorporated the Convention on the Rights of the Child in domestic law and in 1981 became the first country in the world to establish an Ombudsperson for children. However, incorporation or the existence of an ombudsperson is a poor comparative measure of accountability. The balance of power between different institutions in different domestic realities makes it difficult to establish that a specific ombudsman for children is better than a unified institution for human rights issues. To rank the power of the institution on their formal powers to protect children's rights, an in-depth study of both the children's ombudsmen and the children's department of the national human rights institutions or ombudsmen would be required.

However, the Child Rights International Network (CRIN) has collected information about children's access to justice globally and publishes country-specific and comparative reports.³¹ The ranking includes the legal status of the CRC, the legal status of the child, access to courts for children, and practical barriers for access to justice. The combination of a global ranking and country reports allows for bilateral comparisons as well as insight on possible weaknesses.

Figure 2.30 and 2.31 below shows how the countries in the OECD rank on legal access. The higher the bar, the easier the access. Norway comes in at number ten,

30. Art. 4.

31. Country reports were prepared by CRIN and partners from around the globe and cover 197 jurisdictions. The reports were amended according to comments and feedback provided by experts – including Ministries of Justice, State permanent missions to the UN, national human rights institutions, NGOs, children's rights advocates, academics, lawyers, judges and others.

behind countries such as Latvia, Finland, and Portugal – which leads to a dashboard score of 2.5. The ranking includes the legal status of the CRC, the legal status of the child, access to courts for children, and practical barriers for access to justice. This ranking does not cover the fact that Norway has yet to ratify the optional protocol to the CRC, but the ranking shows that there are other barriers to access for children in Norway – particularly on practicalities.

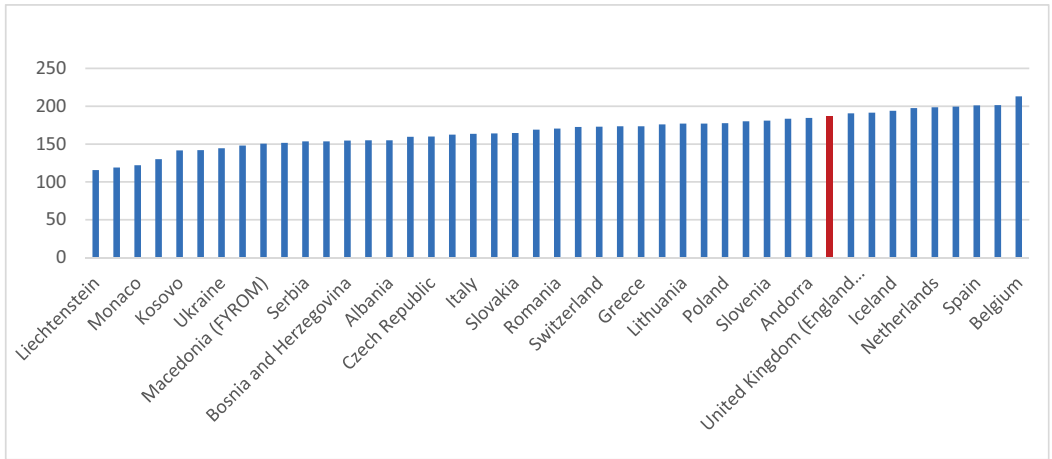


FIGURE 2.30 Legal access for children ranking.

Source: CRIN 2017.

The following graph provide the individual scores for each legal access indicator.

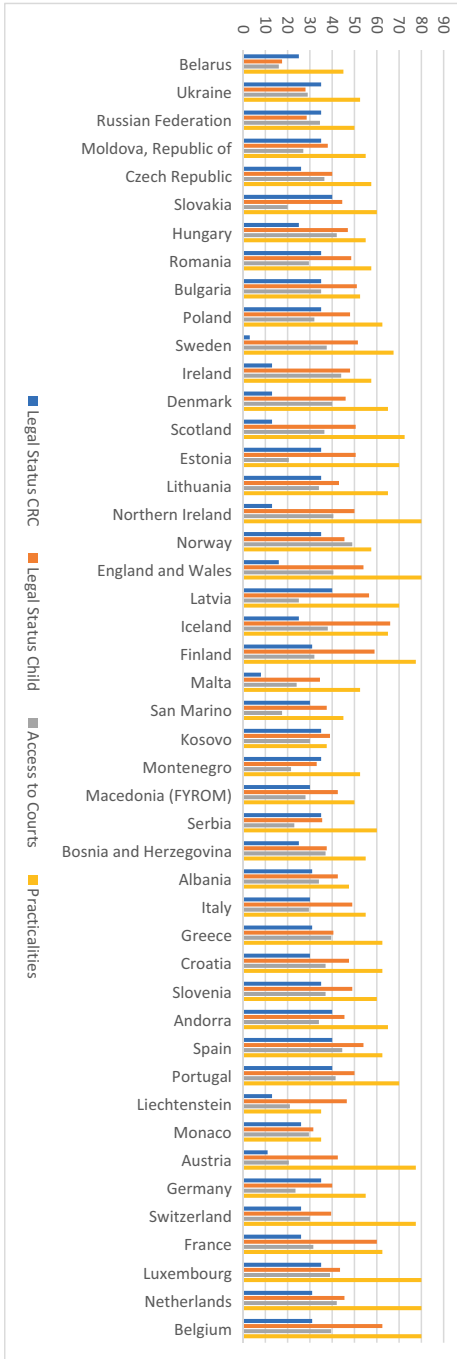


FIGURE 2.31 Legal access children.

2.5 DASHBOARD

In Figure 2.32, we have attempted to summarize the results of each indicator in terms of the 'dashboard score'. Using traffic light colouring and coding, we have indicated for each indicator overall (third column) whether Norway is performing very well (dark green, 3), relatively well (light green, 2.5), moderately well (orange, 2), moderate (purple, 1.5) or poorly (red, 1). This overall assessment is based on comparison with other European and developed countries, internal variation, and the relevant norm – which in some cases is explicitly set by the Committee or Norwegian government.

Eyeballing this table, we can identify a clear number of areas where Norway is performing well, particularly on social welfarist indicators such as overall life satisfaction, health, education and use of prison for child offenders. However, the scores fall when they are disaggregated according to region or a ground of discrimination (e.g., disability, ethnicity). Some of the trends are in a negative direction (e.g. income poverty) while others are moving in a positive direction (e.g. teenage suicides). Turning to the civil and political indicators, we find a more mixed picture. We have graded areas such as protection (e.g. verbal, physical and digital bullying) as poor or moderate while scores for political rights and accountability are rated as average. While one can argue and quibble over each assessment, the dashboard indicates that the key challenges lie most in engagement of disadvantaged groups with welfare systems, protection from third parties, and participation in civil, political and legal arenas.

Right/Area	Indicator	Overall	Trend	Total
A. Life/Overall	1. Life satisfaction			2.5
	2. Well-being		↑	3
B. Living standard	3. Poverty – Relative/Absolute		↓	2.5
C. Education	4. Equality of access - Parental background		↑	2.5
	5. Performance within Norway			2
	6. Disability access			2
	7. Youth in education / drop-out rate			2
	8. Early childhood		↑	2.5
D. Health/Security	9. Teenage suicide		↑	2
	10. School nurse			2.5
	11. Obesity		↓	2
	12. Mental health			2
E. Protection	13. Children in care			2
	14. Homicide		↑	3
	15. Bullying		↑	2
	16. Internet bullying		↓	2.5
	17. Unwanted sexual attention		↑	1.5
F. Liberty	18. Children in prison			3
	19. Children in custody			2
G. Discrimination	20. Asylum children			2
	21. LGBT rights			3
	22. Tolerance and discrimination			2
H. Participation	23. Voting age		↓	2.5
	24. Participation at school		↓	2.5
I. Accountability	25. Legal access index			2.5

FIGURE 2.32 Dashboard of selected indicators.

2.6 DEVELOPMENT OF NEW INDICATORS

This review and selection of existing indicators underlies the need to improve the measurement of children's rights. Some particular areas that require attention are

discussed below. This, however, is not an exhaustive list. In terms of moving forward, one could focus on key *core* indicators that are needed or move right-by-right in seeking to develop a *comprehensive* set of indicators. Below we name some areas that require in our view immediate attention.

2.6.1 CIVIL RIGHTS

Although there is data on the numbers of children in detention and the length of stay in custody, there are several issues related to prisoners that should be considered in order to evaluate Norway's compliance with the CRC. In their chapters, Gröning and Sætre find deficiencies in the treatment of children kept in custody or in custody, and emphasize the need for follow-up and supervision measures for children, and across all districts. Furthermore, they recommend development of indicators on the number of children in custody and alternatives to imprisonment and how long they are imprisoned. Related to imprisonment of children is the use of power against children in public (and private) institutions. The use of force or compulsion is meant to be recorded, and summary data of use of power should be made available.

Racial profiling has been a regular concern for the CRC committee and the European Commission against racism and intolerance. In the United States and in some states in Europe, profiling has been the subject of extensive research and development of statistics. In Norway, the situation is very different (see chapter 6). The subject has largely only been dealt with by the media for specific alleged events, for example, in December 2017, Statistics Norway admitted that they could not estimate the number of arrests and prosecutions affected by racial profiling (Andersen, Holtmark and Mohn 2017: 23). There is thus a great lack of both quantitative and qualitative research on racial or ethnic profiling, both in terms of adults and children.

2.6.2 THE RIGHT TO BE HEARD AND PARTICIPATION

A core right in the CRC is the right to be heard and participate. It is also a right that can be particularly challenging to measure. It is possible to count whether children can participate in matters pertaining to themselves (e.g. elections), but it is more difficult to count whether they are heard (e.g., through youth councils). Nevertheless, concrete and operationalisable goals should be established for children's participation than we have today, both in public, in politics, in education, in the family and in conflicts. For example, part of the right to be heard and partici-

pation in education is captured in the Peer Examination with questions about influence. In terms of publicity and politics, there is room for participation through, for example, youth councils. Data on youth councils and their impact is lacking, with little available data on whether they are active and what areas they work within. Finally, all legal cases should be made available in Law Data to facilitate research on child hearing.

2.6.3 ACCESS TO SERVICES

Few regular studies have been conducted on the accessibility and quality of school for children with disabilities. One study showed, however, the existence of major challenges. In order to ensure that work on access goes forward, such research should be systematic and regular. Access to school is not the only a challenge for particularly vulnerable groups. In dealing with the welfare system, there are significant differences in the use of disability-related services that are designed for families. Services created to assist families in difficult situations, but which in practice have proven to be difficult to understand or access. The municipalities should have an overview of children or families with special needs. These figures can be linked to numbers on the use of public services to look for discrepancies and uncover needs. Another possible indicator should capture the length of time between applications for services to those granted.

2.6.4 DISCRIMINATION

Some children face higher levels of discrimination or neglect. Regular surveys of children's experiences with discrimination (especially between the ages of 12 and 18) would be preferable and should be disaggregated by gender and ethnic background where possible and address other facets of discrimination. In addition, better indicators could be collected for highly vulnerable groups such as child asylum seekers aged 15–18, including access to education during stay, completed age tests and deportation to unsafe countries. Other groups particularly vulnerable to discrimination are children who do not fit into the traditional understanding of gender and sexuality.

2.6.5 HUMAN RIGHTS EDUCATION

There is little available data on the implementation and effectiveness of human rights education in Norway despite the clear obligation in the CRC. Possible ways of measuring human rights education are through the content of syllabus and

knowledge objectives and outcomes for primary and secondary school, upper secondary school and teacher education as well as the outcomes discussed in chapter 14.

2.7 CONCLUSION

Glancing at various global indexes, it appears Norway is performing well with regards to the implementation of child rights. However, as seen from the dashboard of indicators, several challenges remain to secure better protection of rights, and ensure that rights realization in a positive direction. While Norwegian children enjoy a comparatively high life satisfaction and well-being, the rate of teenage suicide is still high, and the poverty rate is increasing. Similarly, despite successful efforts to reduce early childhood inequalities, children from disadvantaged groups still experience marked unequal outcomes on different indicators and question marks can be raised over discrimination in the public sphere. Schools struggle to consistently secure an inclusive environment, the implementation of the right to be heard is uneven, and the right to legal remedies largely ignored.

A challenge with measuring by numbers is to both find and identify acceptable and relevant indicators. With regards to the implementation of the CRC, this chapter only scratches the surface. Through our analysis, we have identified many desirable indicators, especially those that capture the right to be heard in the public sphere, civil rights to liberty and bodily autonomy, protection from discrimination and quality human rights education and adequate care in institutions and detention. For some of these indicators there is selected data available, however, it is largely insufficient in capturing the specificity of child rights implementation, or is not updated to reflect the current situation. Thus, further development of indicators should be on the agenda to facilitate critical overview of implementation of child rights in Norway.

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ANNEXES

ANNEX 1. ASSESSING THE EXISTING INDEXES

1.1 KidsRights Index

The KidsRights Index was established in 2013.³² It ranks how all parties to the CRC adhere to and are equipped to improve children's rights. Numeric data is sourced from UNICEF on life, health, education, protection, and child rights environment while the CRC Concluding Observations is used to construct the enabling environment indicator. As discussed above, there are multiple problems with this indicator. Other challenges include the gap in the interpretation of the state of children's rights in the countries based on the Concluding Observations. As such, it may be misleading and ineffective when it comes to comparison between countries. Moreover, there is no consideration of the challenges of quantifying concluding observations (see Kälin, 2013, O'Flaherty, 2006, Langford et al., 2017). We have scored the index at 9.6 out of 15.

1.2 Social Progress Index

The Social Progress Index is an aggregate index of social and environmental indicators that capture three dimensions of social progress: 'basic human needs', 'foundations of wellbeing and opportunity'.³³ The index measures social progress strictly using outcomes of success rather than effort. For example, how much a country spends on healthcare is viewed as much less important than the health and wellness actually achieved. However, a challenge with the social progress index is that it is difficult to understand how the scores are calculated for the different indicators, and that there is a variance in when the data was updated last. The latter may influence the actual understanding of an issue if it is not properly communicated. We scored the index as 10.9 out of 15.

32. Kid's Rights Index available at <https://www.kidsrightsindex.org/> (accessed 08.08.2017)

33. Social Progress Index available at <http://www.socialprogressindex.com/> (accessed 08.08.2017)

1.3 UNICEF – Innocenti Report Card

The Innocenti Report Card measures inequality and well-being in industrialized countries.³⁴ It relies on data from the EU, national surveys, the WHO, HBSC, the World Bank, ILO, IUS, and GSHS. The aim is to measure inequalities in child well-being in 41 EU/OECD countries to monitor those most disadvantaged as well as the societal impact. Well-being is measured by indicators on health, education, income, and life satisfaction. The Report Card has the perspective that inequality is permissible *if* they benefit all, and arise from a position of equality of opportunity. This is the baseline for the Report Card. A challenge with the report card is that it is somewhat difficult to access the data, and that it to a large degree relies on national statistics. This can create issues for comparability. It also does not cover civil and political rights explicitly. We scored the index at 11.9 out of 15.

1.4 Save the Children – Child Development Index

The Child Development Index was released in 2008 and is self-labeled as the first index to rank countries on child development.³⁵ It aims to track the progress or regress in how countries perform on child development factors: under 5 mortality rate, underweight in children under 5, and enrolment in primary school. The goal is to influence policy makers by pointing to general specific developments. However, the index is very narrow in the interpretation of development and ranks countries according to the more physical aspects of child development. Further, it relies on data from 2006, and is not a sufficient measurement of the current situation. We have given it a score of 11 out of 15.

1.5 Child's rights and Business Atlas (UNICEF + Global Child Forum)

The Child's Rights Atlas assesses the risk of infringing on children's rights for companies before investing in countries.³⁶ Following the Protect, Respect, and Remedy Framework, the atlas focuses on how states commit to implement children's rights (structural), how they implement their commitments (process), and whether or not there are cases with violations (outcome). The ranking relies on qualitative data collected through questionnaires, and focuses on state protection,

34. UNICEF Innocenti Report Card available at <https://www.unicef-irc.org/publications/series/report-card/> (accessed 08.08.2017)

35. Save the Children UK Child Development Index available at <https://resourcecentre.savethechildren.net/library/child-development-index-2012-progress-challenges-and-inequality> (accessed 08.08.2017)

36. UNICEF and Global Child Forum Children's Rights and Business Atlas available at <http://www.childrensrighsatlas.org/> (accessed 08.08.2017)

industry infringement, and industry respect for children's rights. The Child's Rights and Business Atlas is an impact assessment tool, however, rather than a ranking of rights. A closer look of the data also reveals the disaggregated numbers, but not which sources the numbers come from. It thus scores low on measurability and periodicity. It was given a score of 9.3 out of 15.

1.6 Realization of Children's Rights Index

The index is developed by Humanium based on the CRC and the best interest of the child.³⁷ It relies on data from what the hosts label "trusted sources" – which appear to be UNICEF, WHO, and HDI. It aims to measure the general realization of children's rights. The index is an indicative value from 0–10 (where 10 is best realization, and 0 is no realization) based on quantitative measures. The statistical measurements are grouped and given weighted values (life, education, food, health, water, identity, freedom, and protection). There are many challenges with the Realization of Children's Rights Index. Most importantly, it is very difficult to access information on calculation of rankings. The index is expressed through a map that gives limited information about the realization of children's rights. The selected issue-areas are aggregated without information about what is being measured – for example the content of the 'education' index. On the country level, the ranking is explained without reference to sources, limiting the credibility of the report. With regards to the data, Humanium lists sources used as a foundation in other indexes that give a much clearer view of child right implementation than the realization of children's rights index. We have given the index a score of 5.9 out of 15.

1.7 Overall assessment

In Annex Table 1 we set out our overall assessment of, and score for, each criterion for each index. The individual evaluation of each criterion qualitatively can be obtained from the authors. As can be seen, the best-performing index is the UNICEF Innocenti measure but it still struggles in a number of areas: e.g. data availability and coverage of a broad selection of children's rights.

37. Realization of Children's Rights Index available at <http://www.humanium.org/en/rcri/> (accessed 08.08.2017)

Annex Table 1. An index of indexes

		Kids Rights Index	Social Progress Index	UNICEF Innocenti Report Card	Child Development Index	Children's Rights & Business Atlas	Realization of Child Rights Index
S	Measure what it sets out to – validity	2	2.3	2.6	2	2	1.6
M	Availability of data sources Reliability of data Legitimacy of data	1.6	2	2.3	2	1.3	1
A	Indicates correct policy action Doesn't encourage perverse incentives In-built theory of change	2	3	2	3	2	1
R	Connection with human rights Disaggregation for discrimination	2	2.6	3	2.6	3	1
T	Periodic data collection Data comparability across time	2	1(3)	2	1	1	1.3
	Total (out of 15)	9.6	10.9	11.9	11	9.3	5.9

ANNEX 2. CORRELATIONS EDUCATION

Correlation between mean schooling of parents and child performance in science, reading, and math

Correlations					
		MeanSchooling	MeanScience	MeanReading	MeanMath
Mean Schooling	Pearson Correlation	1	,481**	,501**	,571**
	Sig. (2-tailed)		,003	,002	,000
	N	36	36	36	36

** . Correlation is significant at the 0.01 level (2-tailed).

Relationship between higher education of parents and the children's performance on PISA for Norwegian Students

Math Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,173 ^a	,030	,030	77,40812

a. Predictors: (Constant), Highest Education of parents (ISCED)

Science Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,150 ^a	,022	,022	91,39872

a. Predictors: (Constant), Highest Education of parents (ISCED)

Reading Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,143 ^a	,020	,020	90,89151

a. Predictors: (Constant), Highest Education of parents (ISCED)

Effect of the mean schooling of parents on mean performance across OECD countries

Math Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,571 ^a	,326	,306	23,19816

a. Predictors: (Constant), MeanSchooling

Science Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,481 ^a	,231	,209	24,28035

a. Predictors: (Constant), MeanSchooling

Reading Model Summary				
Model	R	R Square	Adjusted R Square	Std. Error
1	,501 ^a	,251	,229	21,09529

a. Predictors: (Constant), MeanSchooling

Correlation between mean schooling of parents and child performance in science, reading, and math

Correlations					
		MeanSchooling	MeanScience	MeanReading	MeanMath
Mean Schooling	Pearson Correlation	1	,481**	,501**	,571**
	Sig. (2-tailed)		,003	,002	,000
	N	36	36	36	36

** . Correlation is significant at the 0.01 level (2-tailed).

Part II

SELECTED CIVIL AND SOCIAL RIGHTS

3

Right to Protection¹

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ABSTRACT This chapter examines children’s right to protection against all forms of detrimental care, as outlined in article 19 of the UN Convention on the Rights of the Child, and how the Norwegian political-administrative system has implemented this right. The authors present first the core elements of the Norwegian family service-oriented child protection system and discuss how this system approaches children and families in need of assistance. Secondly, they discuss if the system adheres to human right standards and identify five possible blind spots: the challenge of pluralism; wide-ranging discretionary practices; lacking professional education; insufficient protection of the liberty of the child; and lack of space for the voice of the child. We finally discuss whether children are sufficiently protected, and conclude that although Norwegian child protection services can be ranked high in an international comparison, there is significant space for improvement.

KEYWORDS child protection | child welfare | CRC | rights | discretion | liberty

3.1 INTRODUCTION

The Norwegian child protection system is designed to protect children who experience detrimental care or the risk thereof. Services can consist of voluntary interventions, or coercive interventions where parents lose custody or even lose their parental rights altogether. Interventions are set in motion by claims of an acute or ongoing risk to the child’s health and overall development, either caused by parents or the child itself. According to the United Nations Convention on the Rights of the Child (CRC), protection is a *right* ‘to each child’ within the jurisdiction of

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the signatory authority of the nation-state. In our case, this means Norway. The CRC thereby provides the right of protection to any child within its jurisdiction. At least, that is the formal ambition and expressed idea of the convention. In this chapter, we will examine how the Norwegian state upholds its obligation to protect children at risk of harm as a matter of right.

Article 19.1 in the CRC clearly states a wide area where 'children have a right to protection, namely from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.'² To achieve this end, the CRC includes a broad-brushed organizational design for child protection services in Art. 19.2. In order to ensure that children are *de facto* protected against detrimental care, the 'protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement'. Thus, the CRC itself, in Art. 19, provides criteria for ensuring the required protection.

Most modern child protection systems would claim that the CRC, and international human rights, are upheld when interventions are undertaken to protect children. By so doing, modern child protection systems implicitly commit to basic principles of liberty and equality underpinning cosmopolitan human rights, and which are not dependent upon any national context (Dworkin, 1977; Habermas, 1996). Child protection is usually premised on universally protecting children through individual rights of the child. The Committee on the Rights of the Child's General Comment No. 8 (2006) argues that a lead objective is that Article 19 asserts children's equal human right to full respect for their dignity and physical and personal integrity. This implies perhaps most importantly that measures should always be guided by a decision that takes the individual child's best interest as a primary consideration during decision-making. This liberal tenet of the CRC is fundamental to understand how the human rights standard work: 'Art. 3.1. [i]n 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'.

Central to any child protection system is the question of how political-administrative practices define and interpret children's needs on the one side, and what

2. The term 'violence' is supposed to be interpreted broadly. In this chapter, we will use the term violence as any aspect of the care context that is to the detriment for the child, from mild violence like neglect to hard physical abuse.

constitutes abuse and neglect on the other side. In sum, these two factors constitute the threshold of intervention, viz. when a child protection organization (cf. CRC Art. 19.2) is activated to protect a child against different levels of detrimental care (cf. CRC Art. 19.1). In this chapter, we approach children's right to protection by *first* describing the children that are protected by the child protection system in Norway. We will discuss how the legal-administrative bodies that have the responsibility for protecting children in Norway function and how they relate to CRC Art. 19. *Secondly*, we will discuss five possible blind spots to a Norwegian child protection system that is supposed to adhere to the human rights standard set by the CRC. We will discuss whether children are sufficiently protected, and delineate how a threshold of intervention that is based upon a human rights standard can be useful so that the children's needs mirror practice.

3.2 THE NORWEGIAN SYSTEM OF CHILD PROTECTION

3.2.1 RIGHTS AND THE NORWEGIAN SYSTEM

The present legislative basis for protecting children is the Child Welfare Act of 1992.³ The legal reform introduced a child-centric type of protection, granting each child far more protection compared to previous legislation, which was more family- and parent-oriented.⁴ The new legal code gave a higher priority to the protection of the integrity of each child, and thereby a type of individual protection that was more in line with a normatively rights-based child protection system, albeit one that was not formally rights-based. By 1992, it was admitted that children carried a special membership within the state and that the state needed to respond accordingly if the individual child were subjected to detrimental care.⁵

As the 1992 legal code developed during the following decade, international human rights became increasingly embedded in the national legal-political discourse, and eventually, it would also become a hallmark of Norwegian positive law. In 1999, the Human Rights Act (HRA) passed parliament, making international human rights conventions a part of the regular law. From 1999, HRA stipulated that state practices could not conflict with human rights. The HRA included the UN Convention on Civil and Political Rights and Civil, UN Convention on Economic, Social and Cultural Rights, and the European Convention on Human Rights – not the CRC. The most significant aspect of the Human Rights Act was that any legal rule within the HRA took precedence over regular law except the constitution.

3. Barnevernloven (Child Welfare Act, in Norwegian) 1992.

4. Ot.prp.no.44 (1991–1992):12.

5. Ot.prp.nr. 44 (1991–1992).

The 2003 bill that provided the incorporation of the CRC into the HRA did not lead to any broad changes to the system of child protection.⁶ The claim was that Norwegian law was in so-called legal harmony to human rights so that Norwegian child protection services were already indirectly treated as if it were acting in correspondence with the CRC.⁷ Hence, CRC Art. 19.2 and 19.1 have never been dealt with in any explicit manner concerning making Norwegian child protection system a right, although according to the CRC and its human rights ethos, child protection is a right of the child within the CRC.

In 2012, the public discourse on the rights of the child had developed further, when many fundamental rights norms for children became embedded formally as the Norwegian constitution, *Grunnloven*, was amended. It came into effect in 2014.⁸ The authors of the reform claimed the new bill of rights operationalized the most important articles of the CRC into a new constitutional rule: Section 104 provides:

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 following 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 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.⁹

Importantly, this section grants children a right to protection of the child's integrity. It is a strong right when applied to child protection, in the sense that it trumps other considerations, as, e.g. the interest of society, parents or other normative standards not embedded in the constitution (Dworkin, 1981). In neither 2003 nor 2012 was there any significant public debate as to what human rights would imply for child protection services. Although the incorporation process of the CRC of 2003 led to certain changes to the Child Welfare Act (CWA), this amendment did not trigger any significant material changes in the legislation. This is predomi-

6. Ot.prp.nr. 44 (2002–2003).

7. Ot.prp.nr. 44 (2002–2003).

8. Dokument 16 (2011–2012).

9. <https://lovdata.no/NLE/lov/1814-05-17> – accessed 18.06.18.

nantly because the amendment-process did not invite any major reform, as it was accompanied by the claim that enforcing children's rights almost did not require any legislative reform. This process contributed to the (debateable) narrative that the Norwegian child protection system was already in conformity with the CRC.

3.2.2 THE NORWEGIAN SYSTEM IN A COMPARATIVE CONTEXT

At the outset, Norway is doing well concerning children's rights in general, ranked first out of 165 countries in the Kids Rights index (2018). When it comes to child protection more specifically, Norway is in seventh place. That being said, the indicators for their child protection measurement is child labor, adolescent birth rate and birth registration, outcomes that vary little among the top-ten-performing countries. CRIN – Child Rights International Network undertakes another comparative assessment, and in their 'Global Report on Access to Justice for Children' Norway is ranked 13. Furthermore, Norway is regularly ranked in the top amongst UNICEF's child well-being index – which is a measure of material conditions; health and security; education; behavior and risk; housing and environment – across 29 OECD countries. This is not surprising as the Norwegian welfare state and educational system have a vast set of social welfare rights set to provide generous systems of welfare redistribution ensuring a sufficient level of welfare, equal liberty, and justice (Pösö, Skivenes, & Hestbæk, 2014).

Through the last three decades of public discourse, children in Norway have increasingly become independent subjects in the development of welfare state measures and schemes of protection. Although the family organization is as solid and strong as ever, the individual child is increasingly located at the receiving end of rights to welfare goods and benefits: They have rights within the education sector, health and social services and a decent childhood free from neglect and detrimental care. In sum, the child's well-being has become a central topic in a steadily more binding normative-political public discourse, which again produces a high score in the child well-being index that UNICEF presents. This development was underlined in September 2017, as the government proposed legislation that gave children a legal right to protection (cf. CWA, sect 1-5), and a corresponding duty for child protection services to provide protection, through an amendment of the existing Child Welfare Act.¹⁰ The amendment of CWA section 1-5 was unanimous and came into effect July 2018.

10. Prop. 169 L (2016–2017).

Despite being ranked high on international comparisons, the Norwegian child protection system has been, and continues to be, harshly criticized. In recent years (2015 and 2016) there has been massive outrage in both social media as well as traditional media. The critique of Norwegian child protection has circled the globe, making ‘*barnevernet*’ (the Norwegian term for child protection services) a derogatory term for a too-intrusive child protection system. The critique has emanated from citizens and civil society organizations, and from both different public agencies and private persons and organizations (e.g., Lewis, 2015; Whewell, 2016). Nevertheless, examining the statistics for removals of children in eight high-income countries, Norway does not have a removal rate that stands out among the top five countries with similar systems, cf. Table 3.1 below. This, however, should not distract from the fact that removal rates do vary a great deal between type of child protection system, e.g., by comparing Switzerland to the risk-oriented system in the USA.

TABLE 3.1 Numbers of children (0–17) in care at year end by country

Country	Year	Children placed out of home and per 1,000 children
Switzerland ^a	2012	793 (10.4)
Norway	2013	11,405 (10.1)
Finland	2012	10,365 (9.6)
Germany	2012	118,530 (9)
Sweden	2012	15,646 (8.2)
England	2013 (March)	68,110 (6)
Ireland	2012	6,332 (5.5)
Massachusetts (USA)	2012 (2013)	7,302 (5.2) (398,482 (5.4))

a. *Cantons Basel-Landschaft & Basel-Stadt only, and entries per year for involuntary and voluntary placements.*

Source: Burns et al., 2017, Chapter 10.

The harsh public discourse concerning Norwegian child protection has probably also contributed to the the European Court of Human Rights (ECtHR) accepting a significant number of cases about child protection. In 2016–2018, the ECtHR decided to hear nine child protection cases that challenge practices of the Norwegian state-apparatus. The objections have been that the child protection system,

without sufficient or legitimate grounds, removes too many children from the parents and the family (see chapter 9 for a discussion of these cases).

If the services removed too many children, it would be a severe violation of children's rights to privacy and family life, as well as a violation of the parents' rights to family life – which are among the most important rights of the Norwegian constitution (Section 102). On a fundamental level, it concerns how the nation-state governs according to its monopoly on the use of coercion. If, however, removals are undertaken because children need protection from detrimental care, the narrative would be quite different. If this would be the case, the child protection system is protecting children's rights and may even be portrayed as standing up for children's rights. In such a scenario, we would see a shift in how convention rights ought to be balanced against each other, and most notably the child's right to protection against the parent's right to privacy and family life. Substantially, the outcome of such proceedings set precedence concerning a principle of toleration of care that set the threshold for interventions in families.

3.2.3 SERVICES AND INTERVENTIONS BY THE NORWEGIAN CHILD PROTECTION SYSTEM¹¹

Child protection systems in modern states are typically categorized into two types (Gilbert, Parton and Skivenes 2011; Gilbert 1997): risk-oriented and service-oriented systems. Norway belongs to the latter category due to its prioritization of in-home measures that are designed to prevent poor care. Furthermore, the Norwegian child protection system is family service-oriented and child-centric as it sees the family as the natural context of care and decides upon measures that are supposed to be in the child's best interests (Skivenes 2011). A risk-oriented system (USA and Estonia are examples) has a relatively high threshold for intervention and a focus on mitigating serious risks to children's health and safety (Gilbert et al. 2011).¹² In service-oriented systems, the aims are to promote healthy childhoods and prevent harm, besides, to mitigate serious risks (Skivenes 2011). The overall ideology of Norwegian child and family politics rests on *family precedence* (Constitution, section 104), which implies that parents carry the ultimate

11. Details on the Norwegian system can be found in Skivenes 2011, Skivenes 2015, Skivenes and Søvig 2017. A detailed outline of the use of coercion and its historical background can be found in Falch-Eriksen 2012. Information on child protection systems in other countries can be found in Gilbert et al. 2011; Skivenes et al. 2015; Burns et al. 2017.

12. The USA has not ratified the CRC, but this is of little consequence to our analysis as the basic principles governing the child protection services in the USA are the same as the CRC.

responsibility for child-rearing and care. Different services within the system are to a certain extent only complementary to the role of the parents. In-home interventions by child protection services are supposed to be guided by a principle service-norm called 'least intrusive alternative,' meaning a guiding legal-normative ethos of professional practice to intervene early and in proportionality to the detriment that the care context causes to the child, and secure a care context that is sufficiently good. This principle implies that, even with the presence of quite adverse living conditions for the child, in-home services that are voluntary for parents to receive, are the preferred choice. In line with the service-oriented system design, the majority of child protection services are supportive in-home services provided through consent by the parents. In some cases, in-home measures can also include voluntary placement outside the home of the parents, i.e., that the parents consent to such a placement.

On a given day in 2016, approximately 40,000 children received some measure from the child protection services, and approximately 30,000 received in-home measures. This included about 3.5% of the child population in Norway in that year. The total sum of children receiving some measure in 2016 was about 55,000, which amounts to almost 5% of the child population.¹³ During 2016, there were about 10,200 children placed out of home by the child protection system and measured on any given day, the number is about 9,000. In comparison, about 683,000 children in the US were counted as victims of abuse or neglect in 2015, which comprises 9.2 victims per 1,000 children (i.e., 0.92%) in the population (US Department of Health and Human Services, 2015). The differences between Norway and the U.S. in the number of children protected by the child protection system is remarkable, and is an example of how different systems function, as well as the role and functioning of the child protection system and how it may affect children (cf. Gilbert et al. 2011; Burns et al. 2017).

13. Source: <https://www.ssb.no/barneverng/> (accessed July 18, 2017).

TABLE 3.2 Statistics on children and the child protection system

	2008	2010	2012	2014	2016
Child population. <i>N</i> =children	1,103 481	1,114 374	1,122 897	1,125 604	1,127 400
Referrals investigated, per 1000 children	25.2	28.8	30.1	36.3	39.7
Children receiving services (all types), end of year, per 1000 children	28.4	30.4	30.6	29.6	30.7
Children receiving in-home measures, end of year, per 1 000 children	22.6	24.1	23,7	22	22.7
Children placed out of home (with <u>and</u> without care order), end of year, per 1 000 children	8.2	9.0	9.7	10.4	11.3
Children with a formal care order decision, end of year, per 1 000 children	5.8	6.3	7	7.6	8
Children placed out of home without a formal care order decision, end of year, per 1 000 children	2.4	2.8	2.7	2.8	3.1
Emergency placements, during the year, per 1 000 children	0.9	1	1.4	1.3	1.3
New children in the system. * <i>N</i> =children	11,760	13,231	13,583	13,746	15,257

* These numbers may include some young adults (18–22 years old).

Sources: Statistics Norway (2016); Skivenes (2011, 2014); Skivenes and Søvig (2016); Central Unit of the County Boards (2015, 2016).

Children in Norway experience various forms of risks, and combinations thereof on their care context. Not all risks demand that child protection services intervene, but when a risk threatens a child's health and development, then it becomes a reason to intervene; a child becomes 'at risk' and in need of protective services. Currently, we lack specific mapping that would better show the variations of risks, and hence, we lack specific knowledge regarding what the system of child protection aims at when protecting children from detrimental care. Currently, we have access to a very broad-brushed typology.

The variations in both depth and scope of risks feeds into the system of child protection, and how risks manifest themselves will differ in one way or the other on a case-by-case basis. Now, what are the risks that trigger interventions? What do we know? The type of protective services that the child protection system pro-

vided for at-risk children in 2015 was for 36.6% of the children, measures to strengthen the development of the child. This would involve services such as 'visits home/home relief, financial assistance, daycare, after school and leisure activities' (SSB 2015). About 26% of the services aimed to strengthen parental capacity, of which 15% are decisions on open council (SSB 2015). In 2016, the five main reasons for reaching a decision to intervene were: 'lack of parent competence' (10%), 'other conditions relating to parents / family' (5%), 'high degree of conflict in the home' (5%), 'mental disorders of parents' (4%) and 'violence in the home' (3%). In combination with 'no action' taken after due consideration of risk (57%), these five reasons constitute almost 85% of all the cases in child protection. The categories are vague and do not provide any good picture of practice across the field of municipalities in Norway. To illustrate: What does the lack of parent competence entail? What constitute 'other conditions relating to parents'? These are wide and open categories. How do different municipalities determine the competence levels of parents, and evaluate their efforts? There are currently no national guidelines as to how different parental choices and children at risks, are to be evaluated and decided upon. This is not to say that systematic interventions do not occur, but that there is no coherent set of practices that guide decision-making nationally. Hence, we do not have a detailed overview of what risks child protection services aim at intervening against, and thus we lack a systematic account of what happens in child protection and how the rights of parents are maintained. This shortage is pointed out by the UN Committee on the Rights of the Child as late as in June 2018, stating that Norway ought to have an increased focus upon eliminating regional disparities across service offices.¹⁴

Decision-making that involves the use of coercion, with intrusive services or measures, such as placements out of home or involuntary in-home measures (e.g., forced medical treatment, forced in-home measures), has a more distinct protective qualifier for interventions in line with the wording in CRC article 19, and the criteria are laid out in the Child Welfare Act section 4–12:

A care order may be made

- a. if there are serious deficiencies in the everyday care received by the child, or serious deficiencies concerning the personal contact and security needed by a child of his or her age and development,
- b. if the parents fail to ensure that a child who is ill, disabled or in special need of assistance receives the treatment and training required,

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

- c. if the child is mistreated or subjected to other serious abuses at home, or
- d. if it is highly probable that the child's health or development may be seriously harmed because the parents are unable to take adequate responsibility for the child.

In 2016, the distribution of cases handled by the County Board of Child Protection and Social Services (County Board), which is the decision-making body normally set to reach decisions in cases involving coercion, was that the typical article for care order proposals was due to section 4-12(a), followed by (c), then (d) and finally (b). In Table 3.3, the distribution is displayed.

TABLE 3.3 Legal reason and proceeding for care order cases and demands in the period January through August 2017. N=cases and demands

Legal ground of care orders	Number of cases handled	Demands of care order from CPS*	Compliance with CPS' demands (in %)	Cases appealed
Sect. 4-12 a	434	603	87.4%	232
Sect. 4-12 b	2	3	33.3%	2
Sect. 4-12 c	19	32	81.3%	18
Sect. 4-12 d	34	41	46.3%	18
Sect. 4-12	1	1	100.0%	0
Total	442	680	84.41%	237

* There can be several demands for one child or several children in one case.

Source: Central Unity of the County Boards, 2017.

During the last 20 years in Norway, as well as in other countries, there has been a steady increase in services provided by the child protection systems (Gilbert et al. 2011, Burns et al. 2017). The trend is that more children receive services, different types of services have emerged, more children are placed out of their homes, and more workers are employed within the child protection services. To illustrate, in 2004, children receiving any measures on any given day was 28,750, while ten years later, in 2014, the number of children receiving measures on a given day was 37 124. In 2004, there were 2,861 full-time positions in the frontline child protection system according to Statistics Norway, while ten years later the figure has almost doubled to 5,139 positions. This amounts to a development from 2.6 workers per 1000 children to 4.6 workers per 1000 children. Until recently, emergency

removals have been on the increase. In Norway, an emergency removal can only be undertaken if the child is at risk of considerable harm (CWA, section 4-6). Although there has been a decrease in emergency removals during the last two years, the overall increase has been clear during the last eight years. Once effectuated, the chair of the County Board must remove and approve the decision within 48 hours. Once approved, the CPS has six weeks to prepare the case for the County Board, but only two weeks if the municipality intervenes due to the behavior of the child and not the parents (see CWA, section 4-24. e.g., drugs, criminality).

TABLE 3.4 Emergency removals 2009, 2011, 2013, 2015. N=children

	2009	2011	2013	2015	2017
Emergency removals	1,019	1,331	1,609	1,555	1,343

Source: Directorate for Children, Youth and Family Affairs, 2017.

3.3 THE CHILD PROTECTION ORGANIZATION AND ITS STAFF

All the way back to 1896, most of the child protection services have been undertaken at the municipal level. Each of the current 422 municipalities in Norway (per January 1, 2018) have the responsibility to establish a child protection service, and each is the key actors in implementing the objectives laid out by the legislative purpose of the CWA. From 1992 and onwards, the case-work that involved coercion was removed from local municipal child protection services, making municipalities unable to intervene coercively except in emergencies.

Typically, municipalities are either organized according to a specialist model or a generalist model. The specialist model differentiates case work-proceedings and allocates specialized tasks to its workforce. For instance, some caseworkers may work mostly with referrals, while others work with follow-up of families and children. The generalist model rather provides a single caseworker that follows a child and family throughout child protection services – from referrals to decision to intervene on the measure or no measure and the tentative follow-up processes.

Because municipalities differ in size, from the smallest with around 200 inhabitants to the largest of more than 600,000, the size of the workforce will also differ vastly. One office can have a single staff member, while others have multiple underlying departments within a respective service office. When the staff is smaller, they also tend to be following the generalist organizational model, which leaves families and children in the spotlight of only one case-worker and its manager/leader. However, about 47% ($n=201$) of the municipalities have organized their child protection

services in collaboration with other municipalities, and an additional handful ($n=13$) have organized their child protection services under the joint Social welfare, unemployment, and social security services (Statistics Norway 2015).

The CWA of 1992 stipulates that children in need of in-home measures, receive assistance if the parents' consent. Considerations of what constitutes a 'need' and what type of 'assistance' a care-situation calls for, is undertaken locally. These considerations are subject to municipal differences such as the municipal budget, available personnel, and the professional background of the caseworker. Hence, each municipality has been delegated the authority to perform vast discretionary judgments in face-to-face situations with families and children on street-level. Although there is a need to delegate authority to perform discretionary judgments, there will inevitably be large variations due to the decentralization of child protection services. Variations occur across:

1. how 'needs' and 'assistance' are interpreted,
2. what constitutes risks and what constitutes harm,
3. professional backgrounds of that discretion,
4. service-designs,
5. municipality size and local political priorities.

Due to these differences, the threshold of intervention will most likely also vary across municipalities and thereby constitute a direct threat to the basic principle of equality before the law for children in Norway. The duty of each municipality to provide protection efforts for 'in-need'- and 'at-risk' children are identical across all municipalities, meaning that the services and the quality of casework, and decision-making, are supposed to adhere to the same quality standards in both Utsira (with 200+ inhabitants) and Oslo (600,000+ inhabitants).

There are certain tasks specified by law that municipalities are not responsible for, and which are set to state-level child protection and are organized into five regions. These tasks concern the recruitment, training, and follow-up of foster families, and residential care. This means that the state level has a responsibility to guarantee that children who are removed from their homes due to a care order have foster homes and institutions available to them, and that are supposed to fit the needs of the child.¹⁵

15. In addition to the child protection services, which consists of the municipal level, the County Board, and the state level, the Ministry of Children and Equality, the Directorate for Child, Youth and Family Affairs, the Norwegian Board of Health Supervision and the County Governors also play a role in child protection, but not directly with the children and families.

The County Boards operate as courts, and have an independent position to decide in all serious interventions into the family including all cases involving coercion of some kind. There are 12 County Boards in Norway, geographically placed to cover all municipalities. The County Boards reach decisions according to the same fair trial principles that govern the regular courts, and solve disputes through negotiation meetings¹⁶ Similar to regular courts, the County Boards are independent of the Ministry and the county governor, and a decision made by the board may be appealed and reviewed only by the courts. The Norwegian County Board is, therefore, an independent *court-like* administrative body, reaching independent decisions through negotiations within the board. The board is inquisitorial as it is responsible for both clarifications of matters of fact and decisions once the petition is delivered (Skivenes and Søvig 2016). One main reason for establishing the County Board through the CWA was to secure the rule of law so that each child and family are treated equally before the law, and according to that particular child and family's care situation (Skivenes 2002; Falch-Eriksen 2012).¹⁷

Today, the standard arrangement of the County Board is to have three presiding members: the County Board chair—who is a legal scholar—an expert member, and a lay member. These three decision makers are supposed to be equal in their influence and decision-making authority, and each case is decided by a majority decision. A care order decision in child protection cases typically implies that the child is removed from its parents and placed under the care of the municipal CPS. The child may be placed in out-of-home care only when in-home-services have turned out to be ineffective or insufficient. Care order cases may occur when a child's safety, health or development is at risk, and after careful assessment of the needs of the child has been initiated, assessed, prepared and presented and defended by the child welfare services of the municipality. However, the formal decision is not made by the municipal services, but in the County Boards. The decision-making in the County Boards starts with a preparatory meeting between the members of the board, followed by a hearing which normally lasts for about 2–3 days in which the parties presents their case. The court procedures are oral and based on the principle of immediacy of evidence, meaning that only what is presented orally during the hearing may count as evidence (Skivenes and Søvig 2016). Decisions by the County Board can be appealed in full to the District Court, and on a restricted basis to the Court of Appeal and Supreme Court. Despite research suggesting that the design of the County Boards can reach decisions in

16. See the Dispute Act - (NOU 1985: 18; Ot.prp.nr. 44 (1991–1992)).

17. An overview of the care order proceedings in Norway and the role of the county boards can be found in Skivenes and Søvig 2016, and Skivenes and Tonheim 2016.

accordance with the demands set by law and that it is trustworthy in doing so (Falch-Eriksen, 2012; Eriksen & Skivenes, 1997), there has been an ongoing debate in Norway (2016–17). Proposals have been made to dissolve the specialist County Boards and hand over their responsibilities to the District Courts. In sum, this would involve removing competence to reach decisions involving coercion from a well-functioning and specialized County Board system and away from the child protection system itself, to the generalist District Courts. Furthermore, when the courts become the only entity to sanction coercive interventions formally, the casework of the municipality will be the same as it is under the current system, but without the feedback loop within the child protection system itself. Thus, we doubt whether this solution will benefit children and parents. If anything, it removes one of the key reasons for involving the County Board in the first place, namely an intermediate and independent decision-making body situated between the local municipality and the courts.

3.4 EQUALITY AND LIBERTY

As rights are to be equally distributed, as the CRC stipulates for Norway, a child also must be able to exercise the rights or liberties stipulated by the convention itself (and all other conventions where relevant). Although the rights of the CRC are not rights that up till now have a corresponding duty within child protection services, it is up to the ratifying state to operationalize that such an end is met. This has become the case for child protection services in Norway in 2018. By filtering the CWA through the CRC, each child is now owed the same amount and quality of protective measures possible, derived from each right of the convention respectively but also from a generic human rights principle carried by a principle of indivisibility of human rights underlying the CRC itself.

We have so far in this chapter laid out the Norwegian child protection system and pointed out a few systemic weaknesses, such as the provision of services in small municipalities, the lack of suitable statistics, and scepticism towards proposals to remove the County Boards from decision-making. In our view, all of these issues concerning the protection of children at risk of harm and maltreatment are problematic. In the following, we will discuss five topics that we consider possible blind spots in today's child protection system and how they allude to the rights of the child.

3.4.1 BLIND SPOT I: THE CHALLENGE OF PLURALISM – THE CASE OF MIGRATION¹⁸

In modern societies, individual freedoms afford a choice to each, bestowed with these freedoms, to choose between a vast variety of reasonable worldviews regarding how to live life. Acting upon individual freedom establishes on a societal level what is dubbed a ‘fact of reasonable pluralism’ (Rawls, 1993). This *fact* must be seen in combination with the incremental introduction of constitutional rights norms that secure the individual right to choose how to live their lives in a modern society. The gradual realization of individual freedoms, and acting upon such liberty through modern history, have fragmented earlier and more collective and dominating religious, philosophical or sacred worldviews. The fact of reasonable pluralism also reproduces itself and leads to further differentiation of reasonable choices on how to live life. In Weberian terms, it has disenchanted the world and left it open for individuals to strive for whatever reasonable conception of good they might want to choose (Habermas, 1996). The gradual disenchantment with the world, as it were, is also relevant to child protection. The freedom to choose how to provide care for a child, i.e., the parents’ right to privacy and family life, establishes pluralism on a societal level – a pluralism of conceptions of care and of what is considered as a valuable and good life for a child and a family.

One of the most significant challenges to reasonable pluralism is migration. Migration can be thus seen as a test-case to what extent child protection practices are ripe for the fact of reasonable pluralism. Migrants introduce new norms of child rearing into the normative complexity of pluralism of child care within the nation-state. A wide-ranging principle of tolerance is thereby called upon for a multitude of different and incompatible, yet reasonable, child care regimes. Such a principle must become embedded in practices by child protection services in order to uphold the basic right to liberty underpinning human rights in general.

One of the challenges caused by the CRC, being an international human rights convention with global reach, is that it brings with it a cosmopolitan norm of child care and child protection. A signatory state should respect the parental choices ‘*to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention*’ (CRC Art. 5). When families migrate, they come from societies that are, for better or worse, different from Norwegian society. The

18. In this section, we do not discuss the rights of asylum-seeking children that are in Norway, nor the child poverty concerns for migrant children, as these issues are not a general responsibility for the child protection system. In Chapter 10 Lidén discusses asylum-seeking children, and in Chapter 7 Fløtten discusses poverty.

choices of migrating parents, as long as they are reasonable, are meant to be respected as a matter of right.

In Norway, a migrant is defined as (a) persons that are born abroad to foreign-born parents and (b) persons born in Norway to foreign-born parents. Immigration to Norway is a fairly recent trend that began in the late 1960s and has steadily increased since that time. In 2000, 6.6% of the child population were immigrants; in 2011, that figure doubled to 12.7%. The seven largest migrant groups to Norway are Poland, Lithuania, Sweden, Somalia, Germany, Iraq, and Syria (Statistics Norway Jan. 1st 2017). The conceptions of care that immigrants bring from these countries to Norway varies not only according to their national and cultural background but also the sub-cultures within these countries of origin.

Migrant children and families are overrepresented in the Norwegian child protection system concerning in-home measures (Skivenes 2015, Falch-Eriksen 2016). In 2009, approximately 26.5 per 1000 non-immigrant children were in the child protection system, and 51.9 per 1000 immigrant children were in the system. In 2015, approximately 26.7 per 1000 non-immigrant children were in the child protection system, and 44.8 per 1000 immigrant children were in the system. Table 3.5 presents an overview of the statistics for migrant children versus non-migrant children. The statistics shed a somewhat positive light on the issue of overrepresentation of migrant children in the child protection system because the overrepresentation relates to in-home measures, and not cases in need of care-orders. It is, of course, a different matter to be overrepresented in receiving services voluntarily, than to be overrepresented in losing the right to provide care for a child as a result of neglect or abuse. It nevertheless begs the question: Is child protection sensitive enough to what can be dubbed ‘the pluralism of care’? From the point of view of reasonable pluralism and the freedom to choose how to care for a child, it can be argued that the Norwegian child protection system intervenes in a manner consistent with the need to establish whether or not a care regime is reasonable or not. Although in-home services arguably in principle are voluntary and formally benign, it is clear that some of the measures are intrusive and may be very stressful and potentially traumatizing for the family. Furthermore, if migrant parents perceive alienation and a lack of sensitivity, this will further enhance their experience of stress and trauma (Falch-Eriksen, 2016).

TABLE 3.5 Facts and numbers for the immigrant and non-immigrant child (0–17 years) populations. Total number and per 1000, end of year¹⁹

	2015	2012	2009
Non-migrant children in Norway	953,047	969,914	985,859
Migrant children in Norway	172,557	152,983	123,297
Non-migrant children in the child welfare system	25,196 (26.7/1000)	26 824 (27.7/1000)	26 143 (26.5/1000)
Migrant children in the child welfare system	7,729 (44.8/1000)	7,270 (47.5/1000)	6,399 (51.9/1000)
Non-migrant children with in-home services	17,747 (18.8/1000)	20,087 (20.7/1000)	20,297 (20.6/1000)
Migrant children with in-home services	6,274 (36.4/1000)	6,221 (40.6/1000)	5,655 (45.9/1000)
Non-migrant children with care orders	7,449 (7.9/1000)	6,737 (6.9/1000)	5,846 (5.9/1000)
Migrant children with care orders	1,455 (8.4/1000)	1,049 (6.8/1000)	744 (6/1000)

Sources: Kalve and Dyrhaug (2011); Statistics Norway (2016); Skivenes et al. (2015); Dyrhaug and Sky (2015). *N=children, or N per 1000 children.*

Here, we will not go into statistics showing there are differences between immigrants born abroad and immigrant children born in Norway (first and second generation). Furthermore, there are country differences – children from some countries are hugely overrepresented in the child welfare system. The blind spot is simply about illuminating that child protection services intervene a lot more frequently in families with a migration background compared to interventions in what can be dubbed majority population, and that it can be perceived as a matter of discrimination. Namely that the effect of the actions of child protection services reveal that migrating families, taken as a whole, are in one way or the other, not equal before the law.

19. Including both migrant children and children born in Norway of two migrant parents.

3.4.2 BLIND SPOT II: STRONG DISCRETIONARY AUTHORITY AND THE PRINCIPLE OF EQUALITY

An important human rights dimension in child protection practice is the extra-legal norms that must be at play in the field of practice in order to ensure children's rights, i.e., those norms not formally regulated by law. As discretionary competence must be delegated to public servants mandated to perform decision-making adhering to the rights of the child, they must also abide by human rights principles in activities not regulated directly by the law. Hence, for the CRC to be fully implemented in practice, it needs to be integrated into all aspects of professional practice and not only where it is formally required. Neither the parliament nor the rights themselves can directly regulate what to do in every conceivable case 'of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.'²⁰ The variations between cases are too many, and what is best and necessary practice in each case will vary according to matters relevant to the child, the care context and the parents. For instance, sexual abuse and violence are criminal acts, while negligent treatment of children is not. Hence, an extra-legal area of professional practice is not directly regulated by law because services need to be flexible to match every conceivable case. However, no matter how the casework varies, a principle of law must apply according to the principle of equal treatment in equal cases, and its logical opposite, *unequally* in *unequal* cases (cf. Alexy, 2002; Aristotle, 2014).

The delegation of authority provided to caseworkers in their decision-making in child protection services, their decisional autonomy or discretion, resides within a structure of legal standards that keep such discretionary power at bay (Dworkin, 1977; See also Goodin, 1986). In order for the principle of law to be distributed to all subjects equally, and thus uphold the precept referred to as 'equality-before-the-law,' certain principles must nevertheless be maintained in the discretionary space where the individual professional case-workers exercise delegated authority to perform decision-making autonomously. These extra-legal norms must be embedded in professional practice and enforced in a manner so that equal cases are treated equally even though the casework falls within the parameters of the professional caseworkers' autonomy. For example, the thresholds for coercive interventions, *qua* delegated authority, should be implemented and enforced equally in the south of Norway as in the north, in large municipalities as in small municipalities, by generalist systems as well as specialized systems and so on. In short, the formal principle of equality has ramifications for the legal

20. CRC, Art. 19.1.

design of decision-making bodies' and for professional caseworkers populating said bodies, and their ability to evaluate equality and inequality within their delegated authority. What makes this effort all the more complex is that practically no child's situation is equal.

In order to implement children's rights, the parliament has entrusted child protection services with the task of enforcing rights in practice, and stipulated that every decision made by the child protection services has the legal standard of the principle of the child's best interests as a primary consideration (Falch-Eriksen, 2012; Falch-Eriksen & Backe-Hansen, 2018). Since actions chosen by street-level professionals are to a large extent determined by the exercise of discretion, it becomes implied that professionals must be able to justify their actions according to such a fundamental principle. Each professional in each decision made, must be able to answer the question: 'Why is this decision in the child's best interests?' However, the discretionary autonomy accorded to each professional is defined by legal rules, by organizational designs, and directives and guidelines. In sum, it creates standards that each judgment of a professional must uphold and abide by, and no action can run counter to these restrictions. Discretion is not a negative blank space of unrestrained freedom of choice, the delegation of authority provides freedom of judgment that is bound by the nature and content of the delegation. It presupposes professional, amongst other things, knowledge, ethical code and experience, to adequately perform judgments in situations that are both unspecified and ambiguous.

With each professional caseworker, a decision must simultaneously ascribe to the legal standards set by the delegated authority. Although a professional is autonomous, s/he must be held accountable for what type of action-norm s/he proceeds with. In this way, for any given care-context, a professional remains bound by the standards of the CRC and regular law.

The Norwegian system of child protection is notoriously ill-equipped with national professional guidelines and instructions that would steer professional judgments, and particularly guidelines and instructions that are filtered through human rights standards. This is something the Committee on the Rights of the Child stresses as late as June 2018.²¹ This does not mean that there is a lack of guidelines and instructions per se, but that they are not professional – they do not provide concrete instructions to assist professionals in reaching professional judgments. This, in turn, may result in variations in how rights- and legal criteria are interpreted within the space where professional practitioners use discretion.

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

Hence, variations are to be expected regarding, e.g., what threshold of intervention is applied throughout the country. An illustrative study highlights this problem. In a comparison of four countries with a family service system (Norway and Finland) and a risk-oriented system (England and CA, USA), the differences between types of systems and staff assessment when presented with the exact same case scenario, is shown (Berrick et al. 2017). The staff's assessment of risk differed *between* the systems, as well as *within* the country samples. The latter is of specific concern as it displays how frontline professionals differ in their assessment of the needs children have, the level of risk in the situation, and what to do with the case (ibid.). There is also variation at the county boards, as displayed in Figure 3.1.

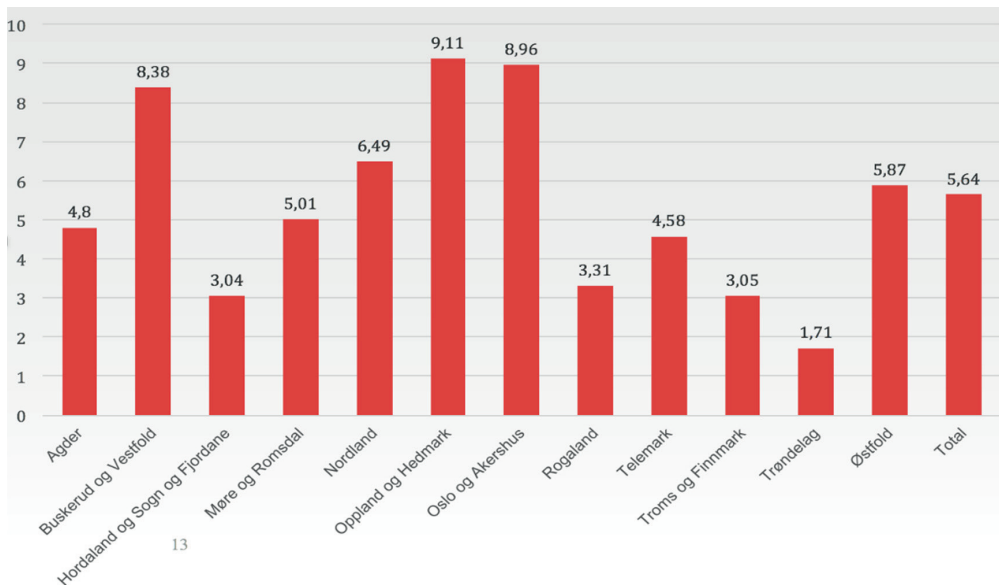


FIGURE 3.1 The number of children in care adopted, measured per 1000 children in care per County Board 2011–2016.

Source: Central Unit of the County Boards.

With huge variations on important decisions, children within the same system of child protection may experience equal treatment when they, in fact, constitute unequal cases, and unequal treatment in equal cases, all dependent upon the services they receive, the office that services them, and the specific caseworker at hand. Given that the present organization of the child protection system in Norway, namely that every municipality must answer the delegated authority to provide

child protection services, this absence of professional guidance is a red flag concerning the protection of children according to Article 19, and the rights set out in the CRC.

3.4.3 BLIND SPOT III: EDUCATION AND BEST PRACTICE

Child protection services are most importantly reflected through its local professional judgments, and how these are made on an organizational- and professional level. The system is designed to optimize decision-making by professionals on a street-level (Lipsky, 1980). CRC Art. 19.1 argues that educational measures are one of four different measures that the signatory state can undertake to protect the child.²² Hence, how knowledge becomes developed, taught and practiced is thereby recognized by the convention to be of immense importance for making sure that the rights of the child are upheld and enforced. The majority of professionals working on the street-level in child protection services are educated in general social work and social work for children (in Norwegian 'sosialt arbeid', 'sosionom,' and 'barnevernspedagog'). In 2016, caseworkers with a professional background in social work for children were 46.8%, whereas general social work was 27.8% among those working on the municipal level. These are three-year bachelor's degrees that are provided by 24 different university colleges and universities throughout the country.

In recent years, efforts have been made in both the educational sector and in the child protection sector to try to couple the field of practice to the educational system. The motivating idea is in line with what Talcott Parsons argued, that professional practice can only be developed when education, the field of practice and research are highly integrated (Cf. Parsons, 1969). The motivating idea has been to couple two different sectors, the educational system on the one hand, and child protection services on the other. These efforts have not been successful with regard to changing the system. However, the Directorate for Child, Youth and Family Affairs, has been authorized with the task of investigating the establishment of a system of authorization by the Ministry of Children and Equality.²³ If authorization is introduced before having integrated education in what is practiced, and the state-of-the-art knowledge, the system of authorization will have a weak and perhaps polarized point of departure as the educational system cannot provide what practice needs. Although the demand towards professional practice

22. The others are administrative, social and legislative measures.

23. This is most visible in the major assignment in the Second Supplement to the Allocation letter to the directorate of 2016.

is only implicit to the convention, it would be contrary to the logic of the CRC not to implement what was perceived to be best practice in each case, since this would be the only option fitting the principle of the child's best interests.²⁴ It will never be in a child's best interest to subject it to second-best practice. Hence, educating caseworkers always to have access to what is conceived to be best practices is an implicit demand from the convention to professionalize, and requires professionalization of child protection services on a continuous basis.

Provided that judgments in child protection are one of the most difficult tasks in the welfare state, where decisions are embedded in both normative and factual complexity and with no easy or quick fix solutions – it is clearly a puzzle why the Norwegian state does not spend resources and require a professional master's degree, which means that it is focused upon professional child protection practice. This is especially puzzling as Norway has high expectations of their child protection personnel.

Furthermore, although Norway has education programmes such as the bachelor's degree in social work for children, this does not mean that Norway has a system of professional education directed towards or relevant for child protection services. On the contrary, there are no education programmes that claim to solely provide personnel to the field of practice in child protection, and there is no system of authorization in place for the child protection caseworker, something that is typical for professions (Abbott, 1988). Professional education is, typically, designed in dialogue with and an aim towards practice, and which presupposes that the field of practice and education is highly integrated (Grimen, 2008; Lipsky, 1980; Parsons, 1969). Compared to, e.g., the university hospital, where the educational institution 'university' is directly coupled to the field of practice in the 'hospital' there is no equivalent in Norwegian child protection education.

Furthermore, and as already touched upon, professional practitioners must be able to present reasons for their decisions and actions, i.e., how they reach their judgments. Reasons that are provided must withstand scrutiny so that professionals can stipulate how other choices would not have been better, fairer, more efficient, etc. This means that each practitioner must possess knowledge of what reasons for actions that can be given, and those that cannot. Such reasons are embedded in professional action norms (Grimen & Molander, 2008). To illustrate, practitioners that do not know what human rights, and especially the rights of the CRC, imply for practice today, most likely cannot be said to know and comprehend the standards for decision-making that they are obligated to engage in.

24. CRC Art. 3.1.

Knowledge of the rights of the child is needed for professional practice as the rights of the child are supposed to govern this practice.

To sum up, we identify two red flags in the Norwegian approach to the education of professionals in the child protection frontline: the length and content of the education.

3.4.4 BLIND SPOT IV: LIBERTY OF THE CHILD AND THE BASIC INTEREST OF THE CHILD AS AN ADULT

Fundamental to a right to choose how to live one's life is a principle of equality. It stipulates that rights must be distributed equally. In this manner, the right to freedoms becomes equally distributed to each person and enables that person than to act upon their rational plan of life, i.e., their own best interest. Equality and liberty, or freedom, are central to a Kantian conception of justice and has to do with the sum of conditions 'under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom' (Kant, 1999). The principle of equality and liberty are fundamental to the Norwegian modern constitutional and democratic legal order and state structure. Constitutional rights norms that protect individual freedoms are basic to 'free institutions' that constrain government, democratic majorities, and others from interfering in the everyday lives of individuals. Individual freedoms have gradually become embedded in the Norwegian legal-political order, and today young adults take for granted that they can choose for themselves how to live life as a matter of right (Falch-Eriksen 2012).

Today, there is a wide range of worldviews that young adults can choose from once adulthood ticks in, where each consists of the complexity of action-norms that constitute choices each young adult can freely choose to act upon or not act upon. Child protection services feed into this pluralism of worldviews and complexity in a special manner. Child protection services must make sure that the child develops in such a manner that it can manage the burden of self-rule that individual freedoms provide. The child must be able to make use of rights altogether in a manner compatible with self-determination once self-determination ticks in at the formal age of adulthood (cf. Shapiro, 1999, Betzler 2015, Feinberg 1980). Hence, the child protection system has to ensure that on some level, the system is designed so that children can manage to live a good enough life once adulthood is reached. Thus, the child's best interest, being a fundamental principle of child protection, is internally linked to the right to personal liberty in adulthood, and that best interests of the child must be internally linked to the best interests of the adult. The protection of a child's development is thus intrinsically directed

towards ensuring that a child can choose for itself and make sure that it lives a life it wants. Accordingly, if the best interests of the child do not correspond with the rational best interests of the young adult, we could retroactively argue that the protection of the child has not been in the child's best interests. If the child cannot manage and choose among world-views that cover a reasonable amount of interests of the child, the care that the child has been subjected to has been detrimental to the child and to the life that child could reasonably want as an adult. Child protection services have thus violated the child's *prospective right to personal liberty* as a young adult (Falch-Eriksen, 2012).

The largest studies of registry data in Norway included all children receiving child protection measures each year from 1990 to 2010. Part of this sample, those born in 1993–1999, were compared to a randomized sample ($n=112\,412$) of individuals that had not been in the child protection system (Backe-Hansen, Madsen, Kristofersen, & Hvinden, 2014; Clausen & Kristofersen, 2008). Outcomes for the young adults in the two samples were examined along four dimensions; education, income, having ever received social assistance and have ever been unemployed. The overall result for the young adults measured in 2005 (Clausen & Kristofersen 2008) is that far fewer young adults (20%) who had experienced child protection measures of different kinds as children, had a positive transition to adulthood (defined as a positive score on three out of four indicators) compared to the young adults without this experience (58%). However, following the group of young adults for an additional four years, there is an increase in positive transitions – for both groups. For the sample with child protection experience, 42% had a positive transition compared to 84% in the non-child protection group (Backe-Hansen et al., 2014). Although there was a doubling of the number of positive transitions for young adults with child welfare experiences, the findings clearly show that far too many young individuals with experiences from the child protection system, do not have a full scale of options to choose how to live their lives. It is fair to state that their childhoods have unfairly burdened them to the extent that they cannot be said to enjoy the freedom to choose, in a reasonable manner, how to live their lives. By protecting the best interests of the child as long as it develops, throughout childhood, it is more likely that adults will be able to act upon their best interests when they become free to choose how to live their lives.²⁵ Consequently, the question that must be pertinent for the Norwegian child protection systems to address is how to improve the outcome for this group of vulnerable children. Furthermore,

25. This argument can seem to be reductionist, but the consequences of such a rational are many. It e.g. sets demands towards having a childhood that is good for each child and that each child's integrity must be respected throughout childhood.

it should be asked what role the child protection system may play in effecting these relatively poor results. For us, this is clearly a red flag.

3.4.5 BLIND SPOT V: THE VOICE OF THE CHILD

According to the CRC, any child that is capable of forming their own views is to be assured that it can express those views freely in all matters the child is affected by. Once the views of the child are heard, the views are to be given due weight in accordance with the age and maturity of the child. Hence, the views of a child that is immature and 17 can be accorded the same weight as a child that is 12 and who is not immature. This is the general rule for children in all matters that concern them. However, the right to be heard is particularly important concerning matters of child protection because these matters constitute what the convention refers to as judicial and administrative proceedings that affect the child. It is the duty upon the nation-state to provide each child the opportunity to be heard, either directly or through a representative, with no exceptions. Hence, when it comes to child protection, there is a strict rights-based demand for hearing the child's views.

If we consider the rationality of hearing the child, it relates to the child's best interest principle. If the child can be said to be able to argue a rational statement about its own interests, it should weigh heavily upon the case at hand no matter what. It means that even though the child's view has no consequence for the decision because the child in the respective case is in need of care and guidance, reasons must be provided for not allowing the child's views to have consequences. Any decision within the child protection services, in matters that pertain to administrative or judicial aspects of the life of the child, must thereby seek to reveal the child's views and decide how to relate to these views.

Internationally as well as in Norway, children's participation is contested and difficult, and again and again research shows that children are not heard or involved in decision making. Children's participation in child protection is particularly difficult. In a state-of-the-art study by van Bijleveld et al. (2013), the discrepancy between children's perceptions and those of professionals is displayed. Whilst the children stated that they wished to participate, the professionals objected to their wishes because the children needed protection, and were viewed as not having sufficient competency (van Bijleveld et al., 2013, cf. also studies displayed in the book on *International Perspectives and Empirical Findings on Child Participation* (2015)). Similar studies of children's participation in child protection cases in Norway show the difficulties and barriers in realizing children's rights to participate in matters concerning them. Furthermore, the more

severe the detriment for a child, the more important it is to hear the child's preferences and wishes. In very minor in-home measures, it would be of less importance than in cases where the child is a youth who has been abused. The expert by experience group Barnevernsproffene has repeatedly brought this issue into light.²⁶ For example, in Norway, Archard and Skivenes (2009) compared written court cases in both England and Norway, including child protection cases in Norway, which showed that decision-makers had an instrumental attitude to children's views. In another Norwegian study published in 2013, Vis and Fossum assessed children's views about care orders and visitation in 142 cases. Their main finding was that the influence of the children's wishes varied widely. A spokesperson for the child was appointed in almost 95 per cent of the cases, and the rulings about placement were in line with the wishes of the child in 39 per cent of the cases, and most commonly if the child was living in public care and did not want to move. Furthermore, a study published in 2015 of children's involvement in the care order decision, concludes that the *'most important person in a care order decision-making process – the child – is not at the center of the proceeding. ...children's views about their needs, interests and perception of the situation are not evident in the County Boards' reasoning in these care order cases, and it is the exception that their opinion is considered'* (Magnussen & Skivenes 2015, p. 705). It is a red flag and worrisome that children in child protection are still not properly included as participants in child protection cases. Surely, there cannot be another person that is more concerned in these cases than the child. Although the amendment to the CWA in 2018 clearly elevates the voice of the child, it does not change materially what has been Norwegian law since 2003. The red flag will prevail until speaking and listening to the child is an integral part of everyday practice in child protection.

3.5 CONCLUDING REMARKS

The main question raised in this chapter is how and to what extent the Norwegian state upholds its obligation to protect children from harm or the risk thereof, as a matter of a right to protection according to CRC Article 19. The scope of the state's responsibilities as set out in Section 2, and comparatively, the Norwegian child protection system scores high on most of the measures for what is considered a good system with respect to the rule of law and due process for involved parties (Burns et al., 2017). That said, we argue that the Norwegian child protection sys-

26. <http://www.forandringsfabrikken.no/#>

tem has blind spots that cast doubts on whether children in Norway are sufficiently protected, and whether our system is sufficiently grounded in the normative purpose of the articles of the CRC. We have identified five areas for improvement that are particularly important, or that the Norwegian state should be better equipped to handle, including increased value pluralism in societies which is accentuated in relation to migration. Further, the wide scope for discretionary decision-making, which threatens the principle of equality, and the issue of the demands of professional competency can be substantially strengthened. Two directly important issues from a child's perspective, are the pattern of deficient involvement of children and the lack of attention and awareness around the conditions for choosing one's life course as an adult. The trend is that more children are receiving protective measures internationally than in Norway, and we must ask if this indicates that more children are in need of protection; or, if more at-risk situations are detected, or if the definition of what should be protected has changed. We believe it is probably a combination of these three drivers, but clearly the CRC and the increased child-focus evident in policy, practice and cultural practices, have increased the awareness and knowledge about children's situation and their needs. Part of the contemporary debates today still concerns the limits of the responsibilities of the child protection systems, and this dilemma is specifically accentuated in relation to the debate on the future of the child and its being equipped to choose its own life course as an adult. Health, religion, and cultural practices are three areas that continue to be contested and are challenging how the border should be drawn between public and private responsibility for children in need for protection.

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4

Child Sexual Abuse

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ABSTRACT This chapter investigates how the rights of the child, in both the UN Convention on the Rights of the Child and the Lanzarote convention, are reflected in official Norwegian efforts to combat child sexual abuse and meet the needs of its victims. With a focus on the criminal justice system, the chapter analyzes law, policy and practice and seeks to shed light on how the rights of minors subjected to sexual abuse in Norway have been formulated, institutionalized and practiced. It argues that dilemmas exist in the balancing of the strong emphasis on and belief in legal strategies on the one hand, and the need for a multi-faceted approach on the other. It also points to challenges related to measuring children's rights given the complexity of child sexual abuse.

KEYWORDS child sexual abuse | CRC | Lanzarote Convention | law in action | procedural law

4.1 INTRODUCTION

Child sexual abuse is a serious offence and is formally sanctioned in every modern society. It is well-documented that victims of child sexual abuse run an elevated risk of short and long-term health consequences including depression, self-harming, suicidal behaviour, low self-esteem and revictimization (Lacelle et al. 2012; Noll et al. 2003). Sexual abuse of children is a serious violation of their fundamental rights according to the Convention on the Rights of the Child (hereafter CRC) and the European Council Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention).

Our aim with this chapter is two-fold; first, we will map and discuss the implementation of the rights of the child according to international conventions by ana-

lysing Norwegian law, policy and practice regarding child sexual abuse, focusing mainly on the criminal justice system. We intend to examine how the conventions have influenced Norwegian policy, legislation and practice and in this way estimate or measure the implementation of children's rights in this area. Second, we will reflect upon the challenges involved in estimating or measuring children's rights related to sexual abuse given the complexity of the issue, and we will discuss whether such measuring is expedient.

The background to this analysis is knowledge of the scope and manifestations of child sexual abuse in Norway and how this crime has been perceived and combatted. In recent decades, thinking on childhood and governments' responsibilities to combat child sexual abuse has changed radically. In the Norway of the 1950s, the sexuality of adolescent girls was regarded as a threat to society and the nuclear family and as something that the state should protect men from being lured into (Ericsson 2005). In recent decades, it is adult sexuality that has come to be seen as dangerous to children. While there has been greater visibility of, and sensitivity towards, sexual abuse of children over the past 40 years, the focus has shifted in terms of causes for concern and measures implemented. A key focal shift during the 1980s was from the dangerous stranger to the dangerous relative (Bakketeig 2000). In 1980, most cases of sexual abuse of children reported to the Oslo police district were committed by strangers, whereas in 1990 family members and others close to the child victims topped the statistics. As there is no evidence that sexual abuse within families or institutions was a new phenomenon in the 1990s, this shift illustrates the power of discourse over public statistics and research. Another development during the past 10 to 15 years has been the increased attention to domestic violence, resulting in a more pluralistic understanding of the concept of 'violence'. Given this insight, when discussing the sexual abuse of children, we need to consider the relationship between public discourse, priorities in public policies and what at a given time is believed to be true about the phenomenon. We therefore discuss whether the relevant legal amendments adopted during the past decade represent an improvement of children's rights in cases of sexual abuse, or whether the measures taken have had unintended negative effects. As we consider the formulation and implementation of the rights of the child, our prime focus is on the victim.

In order to analyse, in the context of sexual abuse, the implementation of the rights of the child according to international conventions in Norwegian law, policy and practice, we have collected two sets of materials. The primary material consists of legislation and work in preparation for its drafting and introduction, governmental white papers, and other representations of policy processes by govern-

mental agencies. The second set of material consists of NGO reports and academic research that shed light on how the rights of minors subjected to sexual abuse in Norway have been formulated, institutionalized and practiced.

In this chapter we first describe the rights of the child in relation to sexual abuse perpetrated against them by identifying relevant law, primarily the CRC, but we also refer to the Lanzarote Convention, ratified by Norway 13 June 2018.¹ Even though this convention only recently entered into force, it has influenced amendments to the Act of Criminal Procedure. We also consider national regulations regarding sexual abuse against children. Previous studies have explored whether national regulations comply with the rights stated in the conventions (see, for example, Hennum 2016 and Søvig 2009). Below, we focus on how these conventions have influenced national legislation.

As legal protection does not guarantee such protection in practice, we also include materials that shed light on 'law in action'. By analysing policy documents (i.e. action plans) we get an understanding of how the Norwegian government have planned for and operationalized their responsibility to combat child sexual abuse over time. National statistics give us information about how many cases of child sexual abuse reach the child welfare or penal system. Relevant research gives us access to information about how the system response works in practice, for instance by addressing questions like: Do relevant professionals have the necessary competence in detecting signs of abuse? Do regulations regarding professional confidentiality stand in the way for professionals passing on the information to the relevant authorities? And what happens when suspicion of abuse is disclosed – do the systems handle the cases in a child-friendly way? The fact that law in action does not necessarily comply with law in the books, forms the basis of a discussion of whether the actions taken actually uphold children's rights in practice, and whether there are areas that need to be reinforced.

First and foremost, it is necessary to define what sexual abuse towards children is and to present what is known about sexual abuse in Norway.

1. European Council Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, into force 1 July 2010.

4.2 DEFINITION OF CHILD SEXUAL ABUSE

4.2.1 ISSUES OF DEFINITION AND KNOWLEDGE OF CHILD SEXUAL ABUSE

CRC Article 19 uses the term ‘sexual abuse’. CRC Article 34 provides for protection of children against ‘sexual abuse’ and ‘sexual exploitation’. General Comment No. 13 (2011) clearly defines the former term as:²

Sexual abuse comprises any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law. Sexual activities are also considered as abuse when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure. Sexual activities between children are not considered as sexual abuse if the children are older than the age limit defined by the State party for consensual sexual activities.

In the judicial context, we define the term child sexual abuse with reference to sections of the Norwegian Penal Code on sex crimes against minors.³ The provisions on sexual abuse of children can be categorized according to the age of the child, the seriousness of the offence and the characteristics of the offence. For the purpose of this chapter, we firstly include sexual acts and relations with minors aged between 14 years and the age of sexual consent, 16 years, namely Sections 302, 303, 304 and 305, and secondly sexual acts and relations with minors under the age of 14, which as of 2015 is defined as rape in Section 299.⁴ These provisions form the core of our analysis. However, we include other aspects of abuse that are unrelated to the child’s age, especially incest (Section 312) and grooming (Section 306). These sections are presented later in the chapter.

4.2.2 CURRENT KNOWLEDGE ON EXTENT, TYPES AND SITUATIONS OF CHILD SEXUAL ABUSE

Sexual abuse of children are criminal acts, which in many cases are difficult to detect. They often occur in the home or other private spaces with no witnesses. Such criminal acts are strongly condemned, especially when the victims are young

2. General Comment No. 13, 2011, on the right of the child to freedom from all forms of violence.

3. Lov om straff av 20. mai 2005, nr 28. (Norwegian Penal Code).

4. The current Penal Code is not yet formally translated into English. When we describe the current legislation, the formulations and terms are taken from the unofficial translation made by the Ministry of Justice and Public Security published In Lovdata.no 2018. In addition, we have made some adjustments to ensure clarity.

children, because they break a powerful moral taboo. Although such a taboo may serve to prevent crimes, it also compels the perpetrator to conceal his or her actions. These aspects make it difficult to obtain information on the prevalence of sexual abuse against children. In the following paragraphs, we consider available figures on the extent and nature of such abuse.

4.2.3 CRIME STATISTICS

Statistics Norway provides crime statistics that indicate how many assumed victims and perpetrators pass through successive stages of the criminal justice process, from reporting to sentencing. As these are numbers on incidents, the same victim may be counted several times. Over the past decade, the number of reported sex crimes against children has steadily increased: against victims aged 0–9 years, from 572 in 2004 to 731 in 2014; against victims aged 10–19 years, from 1,174 in 2004 to 1,725 in 2014.⁵ It is difficult to determine whether these marked increases are due to greater police efforts, growing incidence or a combination of both these factors.

As statistics on age and gender are included in different data sets, we cannot precisely determine the gender composition of the pool of victims. Overall, women and girls are more often registered as victims of sex crimes reported in Norway. In 2014, for example, 3,182 female and 448 male child victims of reported sex crimes were registered, though for some of the sexual offences against minors that we consider in this chapter the gender difference is smaller than for statutory rape.⁶ Although the figures may indicate that girls are victimized more often than boys, it may also be that people around the victims, public officials, including police officers, and the victims themselves are more likely to recognize what has happened to girls as crimes to be reported to the police (Hollander 2004). Table 1 (below) shows the steady increase in the number of victims of reported sexual offenses against minors in the period 2004 to 2014. As the offenses included were pursuant to the former Penal Code, these figures are not directly comparative to those registered after 2015.

5. Source: Statistics bank Statistic Norway table 08637, *Personoffer for anmeldte lovbrudd, etter type lovbrudd og alder. Absolutte tall*. These are the latest figures available, broken down on current age, probably attributable to how several of the provisions and their definitions of sexual abuse changed with the introduction of the Penal Code of 2005 in 2015.

6. Source: Statistics bank Statistic Norway table 08638: *Personoffer for anmeldte lovbrudd, etter type hovedlovbrudd og kjønn. Absolutte tall*. These are the latest figures available, broken down on current age, probably attributable to how several of the provisions and their definitions of sexual abuse changed with the introduction of the Penal Code of 2005 in 2015.

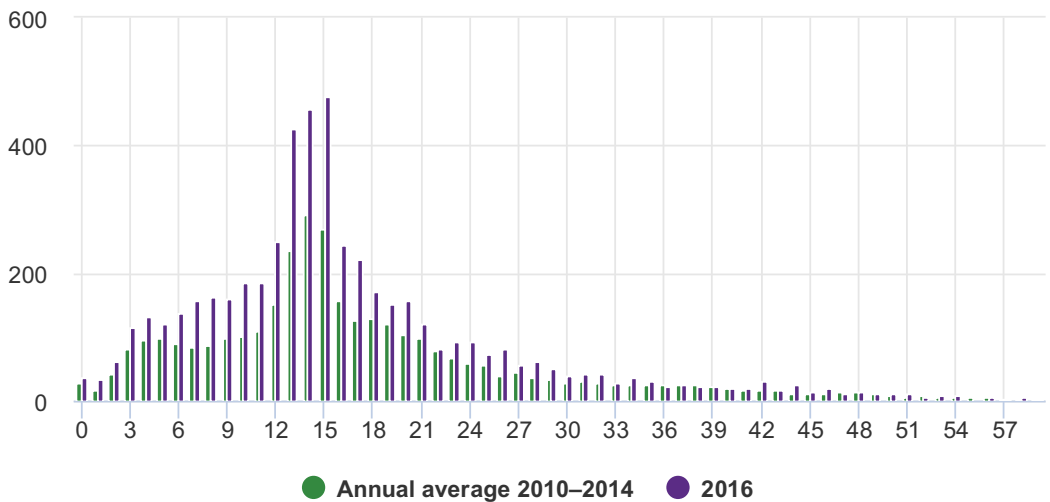
TABLE 4.1 Annual total number of victims of reported offences in two age groups

Age of sex-offense victim	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
0–9	572	540	564	638	642	617	653	672	686	702	731
10–19	1174	1202	1364	1462	1466	1516	1516	1698	1623	1675	1725

Source: Statistics Norway, Table 08637.

More recent and higher resolution statistics on the age distribution of sex-offense victims are presented in this figure from Statistics Norway.

Number

**FIGURE 4.1** Victims of sexual abuse, over the age of one year. Annual average for 2010–2015 and 2016.

Source: SSB, Statistics Banks Table 08634.

In recent decades, many European countries, including Norway, have implemented major reforms to their legislation on child sexual abuse, which makes it difficult to evaluate incidence trends. However, Norwegian politicians and police are seriously concerned about the increase in reported sex crimes against victims in their mid-teens shown in the figure above.

Given these weaknesses in the national statistics on registered cases of child sexual abuse, it is important to complement these figures with other sources of information and to discuss them in light of qualitative research findings.

4.2.4 SURVEYS

Other population-based studies provide valuable information on the extent of child sexual abuse in Norway, its forms and the situations in which it occurs. Since the mid-1990s, several academics have conducted child sexual-abuse surveys among minors and retrospectively among adults (see, for example, Tambs 1994, Clausen & Schei 2005, Steine et al. 2012, Thoresen & Hjelmdal 2014; for an earlier study, see Sætre, Holter & Jebsen 1986). The surveys differ in their definitions of child sexual abuse and methodology, and some of them have low response rates. As some adopt narrow definitions of sexual abuse or largely depend on the respondents' own classifications of what they experienced, which may differ substantially from the Penal Code definition, caution is necessary in interpreting the results. Furthermore, many surveys do not differentiate between victims under or over the age of sexual consent or 18 years. Nevertheless, these surveys offer valuable insights into both the extent of child sexual abuse and, to some degree, the situations in which it occurs.

In one of the most recent studies, three times more women than men retrospectively reported having had their first sexual encounter before the age of 13 with someone at least five years their senior: 10.2% of women and 3.5% of men (Thoresen & Hjelmedal 2014). Steine et al. found in a population-based survey among 706 respondents that 18% of women and 3% of men reported that they had been subjected to unwanted sexual acts before the age of 16 (which is equivalent to the definition in Section 304 but can also include abuse occurring before the age of 14). Retrospective studies have the possible bias that victims of sexual abuse in childhood are overrepresented in those members of the population who as adults suffer from problems of health, crime and substance abuse, which entail a higher risk of mortality and institutionalisation, and therefore to a lesser extent are also represented among survey respondents (Steine et al. 2012). Whereas the above surveys focused on certain types of sexual experience, others asked young people whether they had experienced sexual abuse within a certain time period, typically the last 12 months. In a larger population-based survey ($N = 15\,930$) Schou, Dyb and Graff-Iversen (2007) found that, in the age group 15–16 years, 6.1% of girls and 1.6% of boys had experienced sexual abuse in the past year.

In summary, not only statistics based on public registers but also population-based surveys on child sexual abuse have considerable weaknesses. Taken together, they do indicate approximately how common such abuse is, but the available statistics are not comparable over decades and therefore cannot serve as a reliable starting point for an evaluation of Norwegian efforts to prevent and prosecute child sexual abuse. Later in this chapter, we will return to the issue of low reporting rates in the child welfare and criminal justice systems.

4.2.5 SEXUAL ABUSE IN NORWAY: INCREASINGLY COMPLEX PATTERNS

In the early 1980s, violence against and abuse of children received scant attention in Norway and other countries. However, for several years the women's movement had campaigned for recognition of violence against women as a public problem and in this regard had highlighted that children also suffered as a result of such violence (Whittier 2015). In Norway, the situation started to change in 1983, when child sexual abuse was first brought to public attention by a documentary film shown on national television about a girl who had been subjected to incest, which caused much public debating. The first Norwegian national survey of child sexual abuse followed in 1986 (Sætre, Holter and Jebsen 1986) and reported that 19% of the female and 14% of the male respondents ($N = 2\ 135$) had experienced sexual abuse at least once before the age of 18. These results not only led to a public debate on the extent of the problem but also much use of the term 'moral panic' by some scholars and the public. Telephone helplines, the first centre against incest and most of the Norwegian shelters for victims of violence and abuse were established in the 1980s. Sexual abuse in the family was at the centre of public attention throughout the 1980s, until a new category of sexual offence against children entered the agenda: sexual abuse of children in institutions. Public outrage was sparked by the suspected abuse of children at a kindergarten in the small mid-Norwegian town of Bjugn. Not only kindergarten employees but also local inhabitants were suspected of abuse (Haugsgjerd 1994). In the same period, similar cases also received much attention in Denmark, notably the so-called 'Roum case', and in the United States (Nielsen 1998). The Bjugn case, in which one person was first convicted but later acquitted, focused attention on the critical issue of the validity of evidence.

In subsequent years the public agenda has become more complex, with various forms of violent abuse of children receiving attention. Technological developments have introduced us to new forms of abuse, including Internet-based sexual abuse of children, which has received increasing public and police attention

(Director of Public Prosecutions 2017) and was in June 2018 underlined as an area of concern by the Committee on the Rights of the Child.⁷ Since 2005, there has also been a growing awareness that children are often victims of domestic violence—both directly and indirectly. A broad array of institutions, including the police and welfare services, have experienced an increase in the number of reported cases of domestic abuse (Hjemdal and Danielsen 2017) and some have been given greater responsibility for working on cases of domestic abuse (Meld. St. 24, 2015–2016, Familien – ansvar, frihet og valgmuligheter [The Family – responsibility, freedom, and choices]).

Although domestic violence is presently at the centre of attention, the overall pattern has become more complex in terms of forms of violence and abuse that receive attention from policy makers and the public. Increasingly, domestic violence and sexual abuse are simultaneously addressed in governmental action plans. In the latest action plan (Prop. 12 S, 2016–2017), the sexual abuse of children is not defined separately but as one of several forms of domestic violence. So far, there has been scant empirical research on the consequences of this joint approach on public and official awareness of child sexual abuse.

It is important to recognize that only through political responses and private initiatives to the trends described above have appropriate assistance services, law and guidelines been developed. This context is key to a deeper understanding of the current situation of implementing and protecting children's rights in relation to sexual abuse.

4.2.6 LIMITATIONS

As described above, child sexual abuse encompasses many different acts and raises numerous contentious and complex issues. For the purpose of this chapter,

7. *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, para. 17. “The Committee notes with appreciation the measures taken by the State party to prevent and combat the sexual exploitation and abuse of children, including by strengthening legislation on child sexual abuse and exploitation in the new Penal Code. The Committee is concerned, however, that current plans of action insufficiently focus on the dangers arising online.” Specific concerns are then articulated, including ‘particular vulnerability of girls to sexual abuse and exploitation’, ‘lack of free consent not being at the centre of the definition of rape’, ‘reported increase of online child sexual abuse and exploitation’, ‘reported trend of underreporting of sexual abuse of children’, cases of ‘sexual abuse and exploitation of children committed by persons under the age of 18, and ‘lack of disaggregated data on the different forms of sexual abuse and exploitation of children’. The Committee make a series of recommendations directed at these issues (para. 18).

we firstly focus on criminal acts directed at minors under the age of 16, even though the Convention on the Rights of the Child defines children as being up to the age of 18. The age of sexual consent in Norway is 16 years, which marks a divide in various respects and is also in line with the definition of sexual abuse in General Comment No. 13 (see above), which refers to national regulations on the age of consent. Our choice of definition implies that we do not discuss protecting children's rights in relation to sexual abuse in cases where the child is aged between 16 and 18. Although many of the policies and systems that we present in this chapter also apply when the victims are aged 16 and 17, we have chosen to focus on the system in place for minors aged less than 16.

Secondly, we emphasize sexual acts involving direct contact, either physically or online, between the victim and the perpetrator. Therefore, we do not focus on the production and acquisition of images of child sexual abuse, as this involves much broader issues, though we acknowledge that this topic is important to understanding contemporary vulnerabilities, especially when such production takes place in 'the Global South' (O'Connell Davidson 2005), even though such production and consumption does also not always involve a victim (Gillespie 2017).

Thirdly, while minors may be subjected to sexual abuse in many different situations, we focus specifically on abuse committed by adults against children. Obviously, some children do subject other children to sexual abuse, and in recent years this aspect has received increased attention in research and policymaking.⁸ Although sexual abuse committed by children against other children is an important topic, there are key differences to cases involving adult abusers. When a child commits sexual abuse, the fact that he or she is not only an offender but also a minor may polarize views among professionals, and institutions and organisations that are concerned with victims' wellbeing may not develop measures to assist the perpetrator, even when it is within their expertise to do so (McVeigh 2003). There are signs that this situation is changing (Askeland et al. 2017). Section 308 of the Norwegian Penal Code provides the option of not penalizing, or giving a milder sentence to, the perpetrator if the involved parties are of similar age and developmental stage. Although the policies and systems that we describe in this chapter may be relevant to such situations, we focus exclusively on situations with adult perpetrators.

Finally, we examine issues pertaining to crimes committed by individuals or smaller groups and do not include systematic institutionalized abuses. In the following paragraphs, we present the relevant international obligations and the standards that they establish for Norwegian policymakers and institutions.

8. For an overview, see Askeland et al. 2017.

4.3 INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS TO PROTECT CHILD VICTIMS

4.3.1 THE CRC

According to the CRC, children have a basic right to be protected from sexual abuse. The CRC entered into force on 7 February 1991 and, in 2003, was incorporated into the Norwegian code on human rights (Section 2, No. 4), whereby the CRC applies as national law.⁹ If there is any inconsistency between the CRC and other Norwegian legislation, the convention takes precedence (code on human rights Section 3). National authorities' obligations to respect and secure human rights, as established in the Constitution and relevant international treaties, are also stated in the Norwegian Constitution (Section 92).

Children's right to protection against sexual abuse and exploitation is stated in CRC Articles 19 and 34. Article 19 states that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social *programmes* to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

This article targets abuse committed by the child's parents, guardians or other caregivers and, according to the General Comment, is the most important article regulating violence against children, including sexual abuse (General Comment No. 13, 2011). Article 34 specifically targets sexual exploitation and sexual abuse, stating that:

States Parties [shall] undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in par-

9. Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) av 21. mai 1999 nr. 30. (Code on strengthening of the position of human rights in Norwegian law).

ticular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Four principles are key to the CRC (Smith 2016 updated by Høstmælingen, Kjørholt and Sandberg): non-discrimination; the child's best interests; the right to life, survival and development; and respect for the views of the child. These principles are reflected in the Norwegian Constitution and other national legislation (i.e. the child welfare act). Section 104, Subsection 1 of the Constitution states: '*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*'. Finally, according to Subsection 3: '*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.*' As our subsequent analysis shows, especially in relation to the principle of the child's best interests, tensions arise between the need to criminally prosecute child sexual abusers and the need to protect and support the child.

4.3.2 THE LANZAROTE CONVENTION

The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as 'the Lanzarote Convention', is another important legal instrument regarding children's right to protection from sexual abuse, as it specifically targets child sexual exploitation and abuse. According to the convention, the member states of the Council of Europe and the other signatories hereto shall adopt specific legislation and take measures to prevent sexual abuse, protect child victims and prosecute perpetrators of such abuse. Recognition of the need for stronger protection against child sexual exploitation and for child-sensitive inquiry and judicial procedures in such cases led to the drafting of this Convention (Explanatory Report CETS 201), which was adopted by the

European Committee of Ministers on 12 July 2007 and signed by Norway on 25 October 2007. This convention was ratified by the Norwegian government 13 June 2018 and entered into force 1 October 2018.

As the Lanzarote Convention only recently was incorporated into Norwegian law, its implementation in Norway cannot be assessed. However, as we subsequently demonstrate, it has been referenced as a legal instrument in the development of our national legislation. According to Article 4: 'Each Party shall take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children'. With our focus on the criminal system, we are particularly concerned with certain obligations regarding criminalization and prosecution. For example, Article 18 (a) obligates the State parties to take: 'all necessary legislative or other measures to ensure that intentional conduct *is* criminalised.' This applies to '...engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities'. It also applies to '...engaging in sexual activities with a child where: – use is made of coercion, force or threats; or – abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or – abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.' (Subparagraph b). In this regard, the defining age limit for minors is to be decided by each State Party (ref. no. 2). It is also emphasized that the provisions '...are not intended to govern consensual sexual activities between minors.'¹⁰ The obligation to criminalize also includes children witnessing sexual abuse without participating in the activities (Article 22).

Chapter 7 of the Lanzarote Convention regulates investigation, prosecution and procedural law and includes a detailed list of requirements. Here, we only consider general principles established in Article 30, especially Nos. 1–4, as these relate to prosecution of child sexual abusers. We subsequently consider more specific provisions of the convention when discussing legislation and practice in relation to the Norwegian prosecutorial system. Article 30 states that 'each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights

10. Obligations to criminalize also pertain to the area of prostitution and child pornography, including participation of children in pornographic performances (Article 19–21). There has been some criticism of applying the terms 'prostitution' and 'pornography' to cases involving minors. Some argue that the first should be termed 'commercial exploitation of children' and the second 'Documentation of child sexual abuse'. The obligation to criminalize also includes solicitation of children for sexual purposes (Article 23).

of the child' (No. 1). Furthermore, 'Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate' (No. 2). Article 30 also emphasizes that the states shall ensure that: 'the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay.' The importance of simultaneously respecting the offenders' right to a fair trial is underlined in No. 4, which refers to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Aspects of the significance of the Lanzarote Convention are evident in certain amendments in our national legislation. In preparatory work for reform of the Norwegian Act on Criminal Procedure (ref. Ot. prp. no. 11, 2007–2008) several amendments were proposed to strengthen the position of crime victims in general (for example, improved right to information during the police investigation). For children, it was proposed that the right to make statements outside the courtroom (e.g. during forensic interviews) be expanded to apply to children below 16 years of age, with the opportunity to make statements in court if they preferred this. Previously, in accordance with Section 239, only children younger than 14 years could make statements outside court. The Government concluded that the suggested amendments would contribute to fulfilment of Norway's international obligations towards crime victims and explicitly stated that this also included the obligations set out in the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse.¹¹ The Norwegian Act on Criminal Procedure was subsequently amended to make the process more child-friendly.¹² In this context, the Lanzarote Convention, as well as the CRC and the European Convention on Human Rights, is referred to as an important part of the legal framework for the proposed amendments. We discuss this aspect in greater detail below.

11. (ref. Ot.prp. no. 11 (2007–2008) Om lov om endringer i straffeprosessloven mv. (styrket stilling for fornærmede og etterlatte). Changes in the Act on Criminal Procedure etc. (strengthened position of the aggrieved party and descendants).

12. (ref. Prop. 112 L [2014–2015]) Endringer i straffeprosessloven (avhør av barn og andre særlige sårbare fornærmede og vitner). Changes in the Act on Criminal Procedure (forensic interview with children and other especially vulnerable aggrieved parties and witnesses).

4.4 NATIONAL OBLIGATIONS TO PROTECT CHILD VICTIMS AND DEVELOPMENTS

4.4.1 THE NORWEGIAN PENAL CODE

In 1842, the first prohibition was included in the Penal Code to protect children from sexual abuse (Criminalloven af 1842). Prior to this, sexual abuse between relatives (incest) was prohibited regardless of age. In other words, it was the relationship between the parties and not the child's age that justified criminalization of the sexual abuse (Hennum 1999). That the law has subsequently been amended several times to incorporate prohibitions protecting children from sexual abuse reflects changes in societal and cultural understandings of children and childhood vulnerability. Contemporary society regards children as vulnerable and therefore needing to be legally protected from sexual abuse. Hennum (1999) analysed the penal legislation on child sexual abuse in a historical perspective, showed how the political climate in this respect varied during the 20th century and observed that, in the wake of such crimes, discussions about appropriate sentencing tend to recur. In 1925, for example, politicians and general society were concerned about an increase in rape and child sexual abuse, and it was felt that the penalties should therefore be more severe. This concern led to the introduction of minimum penalties. Two years later, this measure was strongly criticized for being the result of a panic, and the minimum penalties were reduced. As described below, the minimum penalties in cases of child sexual abuse were later increased again.

4.4.2 CURRENT LEGISLATION

Currently, prohibitions against various forms of child sexual abuse are regulated in Chapter 26 of the Penal Code of 2005. Sections 302–305 protect children under the age of 16, whereas Sections 299–301 protect children under the age of 14. The younger the victim, the more severe the penalties are.

Section 299 stipulates a penalty of up to 10 years' imprisonment for a person who engages in sexual activity with a child under the age of 14 (Subparagraph a). This penalty also applies if the perpetrator makes a child under the age of 14 perform such sexual acts on him- or herself. The same penalty applies if a person performs an aggravated sexual act with a child under the age of 14. This term refers to touching of the child's naked genitalia or making them touch themselves (Ot. prp. no. 22, 2008–2009). As of 2015, sexual acts as described in Section 299 are classified as rape. This provision was included to emphasize that children cannot consent to such a sexual act and to underline the severity of committing sexual abuse against children (ref. Ot.prp. no. 22, 2008–2009: 243).

If the sexual act involved penetration as described in Section 300 (i.e. vaginal, oral or anal penetration) the penalty is 3 to 15 years' imprisonment. If the sexual act is assessed as aggravated assault, the sentence is longer: up to 21 years' imprisonment (Section 301). The factors that may result in assessment as aggravated assault include among others repeated abuse, partaking in an act involving more than one perpetrator, and the child being very young at the time of the abuse (see Section 301(a-e)).

Sexual activities against children aged 14–16 years is regulated in Sections 302 and 303. For such offences, the penalty is up to six years' imprisonment if they are not punishable under other articles of the Penal Code as well. As stated above, the same applies if the perpetrator makes a child between 14 and 16 years of age perform acts corresponding to sexual activity on himself/herself. If the abuse is assessed to be an aggravated violation of Section 302, the penalty is up to 15 years' imprisonment (Section 303). In this context, factors that may result in assessment as aggravated violation are among others, the sexual abuse having been committed in an especially painful or offensive manner, the involvement of multiple perpetrators, or the victim having died or suffered considerable harm to body or health as a result of the abuse.

Section 304 targets other sexual offences with children under the age of 16. Such offences are punishable with up to three years' imprisonment provided they do not fall under Section 299 (see above). A typical example is touching a child's genitalia without penetration.

Section 305 targets sexually offensive conduct towards children under 16 years. Such offences are punishable by a fine or up to 1 year's imprisonment and include to exhibit sexually offensive material or perform other indecent conduct in the presence of or directed at a child under 16 years (Subparagraph a). It also includes forcing or inducing a child under 16 to exhibit sexually offensive behaviour or perform other indecent conduct in the case that the offences do not fall within the scope of stricter provisions (Subparagraph b).

Children are also protected against sexual abuse according to other articles of the Penal Code.¹³ Sections 312–313 target sexual offences where the parties are closely related, including incest, and the prohibitions apply regardless of the ages of the involved parties. These may be applied in addition to those referred to above that target sexual abuse of children under 14 or 16. Section 314 targets sexual

13. Section 309 targets child prostitution, whereas Section 310 targets those who are present at presentations of child sexual abuse or at presentations that sexualize children. According to this section, the age limit for being a child is 18 years. The same age limit is set by Section 311, which targets the making of such material (i.e. child pornography).

offences against other persons with whom the child has a personal relationship, for instance foster children.

We now consider important amendments to the Penal Code and the Criminal Procedure Act over the past 20 years in order to assess how they reflect, first, Norwegian society's view of children's right to protection against sexual abuse and, second, implementation of the conventions described above. We focus on three areas of amendments: criminalization of a new offence (i.e. 'grooming'), increased penalties, and more child-friendly criminal procedures.

4.4.3 CRIMINALISATION OF A NEW OFFENCE

Section 306 establishes penalties for the recently recognized offence of 'grooming'. This section targets any person who has arranged a meeting with a child under 16 years of age, and who with intent to commit a sexual offence specified in section 299–304, section 305b) or section 311 first paragraph a) has arrived at the meeting place or a place where the meeting place may be observed. This offence is punishable by a fine or up to 1 year's imprisonment. This prohibition first became law in 2009 and was subsequently amended to fulfil the requirements of the Lanzarote Convention (ref. Ot. prp. no. 22, 2008–2009). This criminalization of grooming, inspired by UK penal legislation, was initiated by the Norwegian Barneombud (Child Ombudsperson) and Save the Children. The Ministry of Justice has emphasized the need for stronger protection of children from sexual abuse. Even though a majority of the replies in the consultation process supported the proposed amendments, there were some concerns. Some indicated the difficulty of finding sufficient proof of the perpetrator's intent to commit abuse and feared that the amendment would not realize its intentions of preventing sexual abuse. Others found it difficult to accept that the offence implied criminalizing the intention to commit sexual abuse. However, as was emphasized in the proposal by the Ministry of Justice and the Police, '...it is not the evil will or intention alone that is criminalized, but the risk of child abuse that is created when the adult takes steps to fulfil [his or her] intentions.' [Our translation] (ref. Ot. prp. no. 18, 2006–2007: 11).

4.4.4 INCREASED PENALTIES

In the past few decades, the penalties for child sexual abuse have been increased several times. In 2010, in proposing amendments to the Penal Code of 1902 regarding child sexual abuse, the Ministry of Justice and the Police explicitly

stated that there was a need to increase penalties for sexual abuse and other serious criminal offences. The Ministry referred to the then government's Soria-Moria Statement, which called for stricter penalties for homicide, other violent crimes and sexual abuse. (Ref. Ot. prp. 97 L, 2009–2010). Harsher penalties were proposed for the new Penal Code of 2005, but as preparations were still necessary before that law could enter into force, amendments were instead made to the Penal Code of 1902. The penalty for sexual relations with a child between 14 and 16 years of age was increased from 5 to 6 years' imprisonment, as in the Penal Code of 2005. In the preparatory work, the Ministry of Justice and Police explicitly stated their intention to introduce a longer prison sentence for rape of children under the age of 14 years. The actual sentences handed down by the courts had been found to be too lenient in comparison to those for other types of crime and in comparison, to the desired severity of penalties for child sexual abuse, which, as emphasized by the Ministry, should not normally be less than 4 years' imprisonment.

A clear motivation for the Norwegian government to increase the penalties was to deter others from committing child sexual abuse.¹⁴ This development was not only punitive but was also meant to reflect societal norms and to demonstrate solidarity with the victims. The criminologist David Garland has investigated the more expressive sides of punishment: *Such measures [punishments] are designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public. Their capacity to control future crime, though always loudly asserted, is often doubtful and in any case is less important than their immediate ability to enact public sentiment, to provide an instant response, to function as a retaliatory measure that can stand as an achievement in itself* (2001: 133). Proposing such amendments may also be a way for the government to communicate to the public that something is being done to prevent children from being exposed to sexual abuse. However, amendments to penalties may have other rationales. As described above, Norwegian penalties for child sexual abuse have varied over the past century. In 1926, the minimum penalty for sexual abuse of a child under 14 years was increased from one to three years' imprisonment. In the 1960s, however, after criticism from the Supreme Court, the minimum penalty was reduced to one year. In several cases, the Supreme Court had stated that they would have ruled differently if they had not been bound by the minimum penalty. In some

14. Prop. 97 L (2009–2010) Endringer i straffeloven 1902 mv. (skjerping av straffen for drap, annen grov vold og seksuallovbrudd.). Changes to the Penal Code of 1902, etc. (increasing the penalty for homicide and other serious offences of physical and sexual violence).

cases,¹⁵ they would have upheld the verdict but recommended that the perpetrator not serve part of his/her sentence.

Such a situation is unlikely to occur today, for a large body of recent research has revealed the severe physical and psychological consequences for children who suffer sexual abuse (Browne & Finkelhor 1986, Paolucci, Genuis & Violato 2001). This knowledge is recognized by the courts and the general awareness among society has also greatly increased. As a result, the imposing of minimum penalties would be unlikely to attract official or public criticism today (see, for example, the arguments regarding severity of penalties in Rt. 2017: 1282). However, there may still be some disagreement between courts and lawmakers' severity of penalties. Arguments in the preparatory work for the implementation of the Penal Code of 2005 show that the government found court sentencing for child sexual abuse to be too low.

4.4.5 CHILD-FRIENDLY JUSTICE

Another important aspect is amendments to legislation that are intended to ease the burden of police reporting and criminal investigation on children. Child-friendly investigation is required by the Lanzarote Convention, which, in Article 35, specifically obligates State parties with regard to investigative interviews of children '...to safeguard the interests of the child and ensure that he or she is not further *traumatised* by the interviews...' (Explanatory report 2007: 34). All necessary legislative or other measures should be taken to ensure that: (a) the interview is conducted 'without unjustified delay'; (b) the interview takes place in premises designed or adapted for this purpose; (c) the interviewers are professionals with special training; (d) the same person conducts all the interviews with the same child; (e) the number of interviews be as few as possible; and (f) the child is accompanied by a legal representative or a person of his or her choice. It is also stated that the videotaped interview should be accepted as evidence during the court proceedings (Article 35, Section 2).

Special regulations regarding children's testimony in cases of child sexual abuse have existed in Norwegian legislation since 1926 (Hennum 1999). At the time, the main provision was that the child did not have to make statements in court, which was a major improvement. In the following paragraphs we describe more recent legal reforms for child-friendly proceedings.

15. See Rt. 1957 pp. 118, 899, 1073, and 1158.

In October 2015, several amendments came into force regarding forensic interviewing of children, including a method now termed ‘facilitated interview’, which refers to an interview designed to meet the special needs of children and adults with mental impairments. Three amendments are noteworthy. Firstly, it became mandatory that the interviews take place in a Statens Barnehus (State Children’s House, hereinafter ‘Barnahus’, described in greater detail below); for example, when it is suspected that a child has been sexually abused (ref. Section 239 f in the Criminal Procedure Act). Interviewing the child in a Barnahus represents a child-friendly, inter-agency approach with the double aim of facilitating the legal process and ensuring that the child and his/her family receives the necessary help to cope with what the child has experienced. Prior to the establishment of the Barnahus,¹⁶ child investigative interviews were conducted in courthouses or police stations. There were no official measures to ensure that the child received support or follow-up after the investigative interview had been conducted (Bakketeig et al. 2012). An evaluation of a sample of children’s experiences after being interviewed at a Barnahus showed positive experiences for the majority of children (Stefansen et al. 2012).

A second amendment in this respect requires that the police conduct child interviews within certain time limits after a suspected offence has been reported to them. Prior to this amendment, interviews were to be conducted as quickly as possible, and no later than two weeks after reporting of a suspected offence. However, these time limits were often exceeded by months rather than weeks, which was a serious problem that needed to be solved. Section 239e still stipulates that the interview shall be conducted as soon as possible, but within one week in child sexual abuse cases if the abuse is suspected to have happened less than two weeks earlier (Subparagraph a), if the child has made a spontaneous and comprehensive statement about the reported offence (Subparagraph b) or if there is reason to believe that the statement is necessary to protect the child (Subparagraph c). If the child is less than six years old the interview is to be conducted within two weeks regardless of the child’s formal status as a witness or an aggrieved party. The two-week limit also applies for all children who have the formal status as an aggrieved party and a facilitated interview is required by the law. In other cases, the time limit is three weeks. The legislation allows for exceptions in specific circumstances that we need not go into here. One purpose of these deadlines, obviously, is to reduce the burden on the child of having to wait for the interview. However, it is also intended to increase the likelihood of obtaining information of eviden-

16. The first Barnahus was established in 2007. As of December 2017, there were 11 Barnahus in Norway.

tiary value from the child. The CRC Committee, in its 2010 comment to Norway's fourth periodic report, expressed concern that children had to wait too long before being interviewed.¹⁷ This amendment is therefore a step in the right direction, although the annual report from the Norwegian Barnahus (2016) indicates that it is demanding to conduct all the interviews within these time limits due to a large increase in the number of investigative interviews.

A third noteworthy amendment is that the forensic interviews must be managed and supervised by a police official with prosecutorial authority, instead of the judge that used to be responsible for such interviews. One implication of this amendment is that the first interview of the child can be conducted without notifying the suspected perpetrator (Section 239b). This is an important amendment, because notifying the perpetrator could put the child at extra risk, for example, of being influenced and/or pressured in cases where a family member is suspected of committing the abuse. However, it is important to consider whether this new provision violates the defendant's rights to question witnesses according to the European Convention on Human Rights Article 6. This question was discussed in the proposal for this amendment, and the Ministry of Justice and Public Security concluded that the defendant's right to a fair trial was fulfilled, as the suspected perpetrator and his defence lawyer are given the opportunity to see the recorded interview and can request that a supplementary interview be conducted with the child, during which their questions may be addressed by the child.¹⁸ However, an obligation to notify the perpetrator has later been proposed in a Committee's proposal for an Act relating to the Conduct of Criminal Cases (the Criminal Procedure Act, see NOU 2016:24).

According to Section 107 a of the Criminal Procedure Act, if there is suspicion that a child has been sexually abused, that child also has a right to legal representation during the investigation and subsequent court proceedings. In 2008, the right to legal representation was extended to a wider range of victims of child sexual abuse (see Ot. prp. nr. 11, 2007–2008), thereby strengthening the child's right to legal representation in cases of sexual abuse.

In summary, the criminalization of grooming, the increased penalties for child sexual abuse and amendments facilitating more child-friendly justice have all contributed to improving children's right to protection against sexual abuse. They also

17. *Consideration of reports submitted by States parties under article 44 of the Convention*. Concluding observations: Norway, UN doc. CRC/C/Nor/Co/4, 12.

18. (Prop 112 L [2014–2015] *Endringer i straffeprosessloven (Avhør av barn og andre særlige sårbare fornærmede og vitner*, p. 59). Changes to the Act on Criminal Procedure (forensic interview with children and other especially vulnerable aggrieved parties and witnesses).

illustrate how the CRC and especially the Lanzarote Convention have influenced Norwegian legislation in this area. In practice, however, there are challenges to fulfilling these legal requirements. In the following section of the chapter we therefore closely examine how the child's right to protection against sexual abuse is upheld in practice.

4.5 POLICY AND PRACTICE

Making the investigative and court systems more child-friendly will have little effect if suspected child abuse is not reported to the police. Even more important is whether suspicion of child sexual abuse is disclosed to anyone. In this section, we examine and discuss key aspects of policy implementation in this field, again focusing primarily on the criminal justice system. Our analysis is primarily based on official documents regarding the combatting of child sexual abuse, as well as on available statistics and research.

4.5.1 APPROACHES TO IDENTIFICATION

Professional competence with regard to child sexual abuse

One approach to identification is through professionals who are in a position to disclose child sexual abuse, including child welfare workers, teachers, health personnel, dentists, asylum detention staff and immigration officers. Such professionals are required to be competent in the area of sexual abuse. A 2007 survey explored whether and to what degree those studying to become child welfare officers or preschool and primary school teachers had received instruction about the CRC, about physical and sexual abuse and about methods of talking to children.¹⁹ The survey found that 56% of the students who wanted to become primary school teachers and 37% of those who wanted to become preschool teachers reported that they had not received any instruction on sexual abuse, whereas all the child welfare students reported that they had received such instruction (Øverlien et al. 2013). The researchers recommended that this subject should be integrated into vocational education plans. A 2016 follow-up study using the same questionnaire as in 2007 revealed improvements in terms of received instruction about sexual abuse and related issues among those training to become preschool

19. This was a survey of 161 child welfare students, 178 primary student teachers and 209 preschool student teachers, in total 548 students.

and primary school teachers but emphasized that there was still a need for more instruction in this area (Øverlien et al. 2016).

This aspect was subsequently addressed by the Ministry for Children and Equality in its action plan to prevent and combat physical and sexual abuse of children, which explicitly set the goal that knowledge about prevention and early intervention should be reinforced in all relevant education programmes.²⁰ In 2015, the Ministry of Education and Research explicitly proposed that competences relevant to dealing with physical and sexual abuse of children should be part of teacher training and that this aspect should therefore be included in education plans. The continuance of this work is also described in the Government's plan for 2017–2021, which incorporates a systematic approach to identifying areas in need of further improvement in the education of professionals.²¹

The importance of improving competences in schools is highlighted by child welfare statistics from the year 2015, which show that schools are the third most important service in reporting concerns about specific children to the child welfare services, even though such reports often refer to problems other than physical and sexual abuse. Surprisingly, kindergartens more often report about child sexual abuse than do schools. Even though kindergartens accounted for only a few of all the reports to the child welfare services in 2015, 33% of those reports were about violence and sexual abuse (Statistics, Bufdir 2015).

Professional confidentiality and obligation to report or prevent violence and abuse

Rules on professional confidentiality are a potential obstacle to communicating information about suspected child abuse. When suspicion of sexual abuse arises, most professionals, however, have a right and often a duty to report their suspicion to the child welfare services, regardless of their obligations of professional confidentiality. This applies, for example, to kindergarten workers and school teachers, health personnel and employees at family centres and crisis shelters.²² They are

20. Tiltaksplan for å bekjempe vold og seksuelle overgrep mot barn og ungdom, 2014–2017: 37 “En god barndom varer livet ut”. (Action plan to combat violence and sexual abuse against children and youth, 2014–2017: 37 “A good childhood is for life”).

21. Prp. 12 S, 2016–2017: Opptappingsplan mot vold og overgrep, 2017–2021 (plan to increase the efforts against violence and abuse)

22. (ref. lov om barnehager 17. juni 2005 nr. 64 §22, lov om grunnskolen og den vidaregående opplæringa (opplæringslova) 17. juli 1998 nr. 61 §15–3, lov om helsepersonell 2. juli 1999 nr. 64 §33, lov om familievern 19. juni 1997 nr. 62 §10, lov om kommunale krisesentertilbud (krisesenterlova) 19. juni 2009 nr. 44, §6)

also obligated to provide information if this is required by child welfare services.²³

If a professional has concrete information indicating that child sexual abuse is about to happen, he or she (as well as any private person involved) is obligated under the Penal Code (Section 196) to act to prevent the abuse. Failing to act on such suspicion is punishable by law (*ibid.*). A 2013 survey of the understanding of rules regarding professional confidentiality among professionals within the healthcare sector, at kindergartens, in child welfare services and in the police force, etc., concluded that such professionals were aware of regulations on professional confidentiality and the obligation to report suspected abuse to the child welfare system. However, this survey also showed that many of the professionals had not read the regulations and that there was insufficient knowledge about some of the exceptions to rules of confidentiality. Fortunately, the professionals did not experience the regulations on professional confidentiality as an important hindrance to inter-agency collaboration (Stang et al. 2013). Detailed consideration of the regulations on professional confidentiality is beyond the scope of this chapter. Suffice it to say that there are legal dilemmas in this context too, for example due to differences in the applicability of regulations between professions. In 2017, a commission that analysed a sample of serious cases of physical and sexual abuse of children in Norway recommended that the regulations on professional confidentiality be simplified to reduce the risk of professionals not acting in cases where they are legally entitled and even obligated to do so (NOU 2017:12).²⁴

4.6 THE SYSTEM RESPONSE

When suspicion of sexual abuse is reported, several agencies may become involved, including general services (i.e. child welfare and family services) and more specialized services such as the Barnahus or incest centres. The involved services may also include agencies representing public bodies and/or civil society, the latter supplementing the public welfare services (Bakketeig et al. 2014, Smette et al. 2017). In addition to welfare services, the police and court systems are also important. In the following paragraphs we focus on the police system and the child welfare services and describe key procedures in cases of child sexual abuse. We

23. (lov om barneverntjenester §6–4).

24. NOU 2017:12 Svikt og svik. Gjennomgang av saker hvor barn har vært utsatt for vold, seksuelle overgrep og alvorlig omsorgssvikt (Evaluation of cases where children have been subjected to violence, sexual abuse and serious neglect).

also consider possible implications of the strengthening of the legislation, as described above. We first consider the child welfare services.

CHILD WELFARE SERVICES

Few cases reported to the child welfare services are registered as child sexual abuse. Of the 58 254 cases reported to the child welfare services in 2016, less than 3% were registered as child sexual abuse. When a suspicion of child sexual abuse is reported to the child welfare services, they have to decide whether to investigate the case or drop it without further investigation. Of the total number of cases of all kinds reported to the child welfare services in 2015, they decided to further investigate 80%. According to the Child Welfare Act, the main rule is that cases requiring further investigation must be finalized within three months after the initial reporting. Of the total number of reports of all kinds in 2015, only 40% resulted in the child welfare services taking action. Of all the child sexual abuse cases in which the child welfare services did decide to take action, only 7% went to County Court (which usually leads to the child being placed outside the family home). In the rest, the County Courts were not involved, meaning that services were provided to the child's home (Bufdir 2015).

REPORTING OF CASES TO THE POLICE

The Government's national plan to combat physical and sexual abuse of children (Proposition [Prp.] 12 S 2016–2017) calls for prioritizing investigation of such cases, strengthening investigative capacity and improving the quality of investigations. The Government emphasizes the need to increase police competence regarding Internet-related sexual abuse of children (p. 71).

If suspicion of child sexual abuse is reported to the police, the child will undergo an investigative interview at a Barnahus. Prior to the interview, the Barnahus personnel organize a joint meeting of concerned professionals, the investigator, Barnahus staff and often also the child welfare services. The purpose of this meeting is to prepare and plan for the investigative interview. If requested by the police and in situations where there is reason to believe that there may be forensic medical evidence, the child undergoes a medical examination, which in 2016 was conducted on 1030 children. After the investigative interview, the Barnahus staff assess whether the child needs psychological treatment. If so, the child may receive a short-term treatment of 15 hours, and if more is needed the Barnahus puts the child in touch with psychological services in his/her local community.

Often, a joint meeting is organized after the investigative interview to decide what further help the child will need from other services, for example the child welfare services.

As mentioned above, it is now mandatory that such interviews be conducted at a Barnahus (ref. Criminal Procedure Code Section 239 f). In 2015, nationwide 5,867 investigative interviews were conducted,²⁵ an increase of 24.2% compared to the year before (Statens Barnehus, 2016). In its report, the Barnahus partly attributes this to an increase in the number of reported cases of children being subjected to sexual abuse and/or Internet-related abuse, as a public disclosure of one such case often leads to many victims being identified. This may be related to police prioritization of Internet-related abuse,²⁶ which may also result in more cases being discovered. However, a slight majority of all the cases the Barnahus handled in 2016 were suspected cases of physical abuse. Of the 5 867 children interviewed, 55.7% were believed to have been exposed to physical violence and 41.9% to sexual abuse. (The rest were other types of offence). Some of the Barnahus also interview suspects who are minors. Most of these are suspects in cases of child sexual abuse. An increase in these offender interviews has recently been reported by the Barnahus, which explain this as a result of their prioritising cases with young offenders. The Committee on the Rights of the Child has underlined the need for research and developing measures to prevent sexual abuse and exploitation of children by other children.²⁷

The crime statistics on numbers of cases that go to trial or are dropped reveal that in 2015 almost two-thirds of the investigated cases of suspected rape of children under 14 years were dropped, as were about half of the cases regarding sexual relations or acts with children under 16 years (Statistics Norway 2015). In other words, while harsher penalties and the efforts to make investigations more child-friendly may be seen as victories in the fight against child sexual abuse, the result for most of these children is that their case never goes to trial.

25. These were first-time interviews. Pursuant to amendments to Norwegian legislation in 2015, supplementary child interviews may be conducted. These are not included in this figure (Police Directorate 2016).

26. The Director of Public Prosecutions' memorandum on targets and priorities for 2017.

27. *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, para. 18.

4.7 CONCLUDING REMARKS

As shown above, both the CRC and the Lanzarote Convention have influenced Norwegian national legislation in several important aspects, including the criminalisation of child sexual abuse, the criminal procedures adopted following an initial report of suspected abuse, the severity of penalties stipulated and the aftercare for victims. Not only national legislation but also government policy documents reflect that the various forms of child sexual abuse are regarded and treated as serious offences. Therefore, we can reasonably conclude that the *intention* among policymakers and legislators to combat child sexual abuse seems to be strong.

Norwegian systems and policies regarding child sexual abuse also reflect a *strong belief* in the penal system as an effective way to combat such crimes. The CRC and the Lanzarote Convention have influenced the development of our criminal procedures towards more child-friendly justice. However, when we look at law in practice, there is compelling evidence that an extremely low percentage of child sexual abuse incidents are reported to the police or the child welfare service, even though most professionals in welfare-related positions are obligated to report suspicion of abuse to the child welfare services. The explanation for this disconcertingly low level of reporting is probably complex, and we need to study the mechanisms that prevent child sexual abuse from being disclosed and reported to responsible professionals and officials. There is also compelling evidence that victims of sexual abuse find it difficult and/or are unwilling to report their abuse experiences to healthcare personnel, child welfare officers or the police. This may be related to how victims are met by the welfare and criminal justice system, but may also be related to the stigma and experience of shame that is often experienced by victims of sexual abuse (McElvaney et al. 2014).

Clearly, what is needed is a multi-faceted approach based not only on awareness that involvement of child welfare and police officials can inhibit disclosure but also on careful listening to the fears and concerns of children and young people to determine what kinds of help will benefit them. This relates to the dilemma of heeding the public interest to prosecute child sexual abuse while serving the best interests of the child. Prosecuting child sexual abuse can be understood as expressing and channelling societal reactions to such criminal offences. The official justification for prosecution and punishment is to deter potential offenders from committing child sexual abuse. However, the child victim may not want the offender to be punished, especially if he/she is the victim's parent or other family member. Furthermore, the threat of punishment may even prevent the child from disclosing the abuse and thus hinder his/her access to necessary assistance. Whatever the victim's opinions and feelings about disclosure, it should be recognized that in some

cases the threat of punishment is at odds with the victim's needs for help and support. Considering the child's best interests as defined in the CRC, there is an evident need to combat child sexual abuse with a multi-faceted approach.

If we return to the question of challenges involved in estimating or measuring children's rights related to sexual abuse, we have pointed at several: There are limitations related to both register data and surveys regarding the measure of the extent of the problem over time. This may be improved by conducting regular longitudinal surveys regarding child sexual abuse, which again require substantial funding. Some methodological problems in this regard will, however, remain as surveys will miss out on vulnerable groups with experiences of child sexual abuse. Lack of reliable and comparable figures means that we do not have a reliable way to assess whether implemented laws and policies affect the extent and expressions of child sexual abuse. There are also limitations as to what measuring children's rights actually tells us. The motivation for combatting child sexual abuse has shifted over time – from protecting the nuclear family in the '50s to later protecting the vulnerable child. These shifts imply that measuring children's rights over time may conceal different social meanings of policies.

Even though the legislation and regulations are developing in line with Norway's international obligations, it is primarily the *intent* of combatting child sexual abuse that we must measure. This may be important knowledge as long as we recognize the limitations. Keeping track of a development in the criminal justice process is also of value. The amendments made seem to have represented important qualitative improvements for children who are enrolled in the criminal justice system as victims. As mentioned above, many victims do however not get the necessary help and most cases do not end up being prosecuted. This may be interpreted as an indication of failure of our welfare and criminal justice systems. But even if cases of child sexual abuse are reported, the child may not want the offender convicted. Hence, a dropped case may not represent a negative result for the child, as long as the child is no longer in an abusive situation. With an aim to measuring the implementation of children's rights, a dropped case may be assessed as a negative result, but it could still be experienced as a positive result by the individual child. The point we want to make is that the complexity of child sexual abuse makes it difficult to interpret what the results of measuring children's rights mean. A measurement regarding law in books may not represent a good result for the individual child in practice. This calls for careful considerations and a realization that more and more qualitative data is required if we are to assess the extent to which the rights of the child in relation to sexual abuse are realized in Norway.

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5

Criminal Justice and Detention¹

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ABSTRACT This chapter evaluates the implementation of the UN Convention on the Rights of the Child (Articles Art. 37 and 40) in the policy and practice of detention of children within the Norwegian criminal justice system. It covers three different forms of detention (pre-trial police custody, pre-trial court-ordered custody and detention as punishment) from a legal and empirical perspective. The chapter finds that Norway has, to a large extent, addressed many critiques from the CRC Committee, including on limitation of the use of detention, conditions for detained children, and the need for various law reforms. However, challenges remain in relation to time-unlimited preventive detention of children and conditions in police detention. Moreover, the authors highlight a cross-cutting challenge within Norway has – the near absence of specialization with regard to youth criminal justice, and conclude that there is a need for the further development of alternatives to traditional criminal justice detention.

KEYWORDS criminal justice | police custody | pre-trial custody | punishment | CRC | children's rights

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5.1 INTRODUCTION

The UN Convention on the Rights of the Child (hereinafter CRC), defines a 'child' as every human being below the age of 18 years.² Departing from this definition, it is clear that also children are subject to the criminal justice system in most jurisdictions.³ Individuals under the age of 18 can be criminally responsible, although the minimum age for criminal responsibility can vary.⁴ Hence, children can also be detained when they have committed a crime, or are suspected to have done so.

At the same time, children are different from adults, as they are not yet fully developed, biologically, psychologically and socially. The CRC thus acknowledges that children are more vulnerable and possess different needs than adults, particularly in the areas of care and upbringing.⁵ The treaty emphasizes the *best interests of the child* as a primary consideration,⁶ and requires specific concern also for those children that are subject to the criminal justice system, which is reflected in the standards regarding detention (Articles 37 and 40). These provisions are also directly applicable in Norway due to incorporation of the CRC in Norwegian law.⁷ This was further strengthened in 2014 through a constitutional revision (section 104) that stipulates that the best interests of the child should be a primary interest in all decisions that involve children.⁸

As in all jurisdictions, however, there is a tension between child protection and the criminal justice perspectives. The CRC itself permits the detention of children yet taking the best interests of the child seriously can be at odds with traditional ideas and measures of criminal justice, not least detention. Notably, Norway has been criticized for not complying with the specific CRC requirements in this area.

2. UN Convention on the Rights of the Child, (CRC) 1989 art. 1. This rule allows for a lower age limit if under the law applicable to the child, majority is attained earlier. This is not the case for Norway. We will in the following consequently use the term "child" when we refer to persons under the age of 18.

3. In this chapter, we will not discuss the background and adequacy of this age limit for the definition of a "child". For such a discussion, see inter alia Holzscheiter (2010), chapters 4–5.

4. The minimum age of criminal responsibility, Justice for children briefing no. 4.

5. Cf. CRC/C/GC/10 *General Comment No. 10 (2007) on Children's rights in juvenile justice* and CRC/C/GC/20 *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*.

6. CRC Art. 3

7. Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) (LOV-1999-05-21-30) See Søvig below in Chapter 9.

8. *Grunnloven (2014) Kongeriket Norges Grunnlov*. Lovdata. Available in translated version: <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>.

Against this background, this chapter evaluates the implementation of the CRC in the current rules and practices of detention of children within the Norwegian *criminal justice system*, with the aid of legal analysis, descriptive statistics, select interviews, and document content analysis.⁹ The Norwegian criminal justice system involves three different forms of detention, namely *pre-trial police custody*, *pre-trial court-ordered custody* and *detention as punishment*, which are regulated by different rule-systems and relate to the CRC in different and complex ways. The aim of this chapter is, in this regard, to provide an overall evaluation of how the Norwegian criminal justice system complies with the requirements in CRC Art. 37 and 40, on the *limitation of the use of detention* and the *conditions for detained children*. Such a systemic approach leaves no room for going deeply into the details, but we provide a needed framework for future research.¹⁰

5.2 CHILD RIGHTS AND CRIMINAL JUSTICE: GENERAL PREMISES

A general premise for the discussion of this chapter is that children can be subject to the measures of the criminal justice system. The CRC obliges all states to establish a minimum age, below which children shall be presumed not to have the capacity to violate the criminal law.¹¹ In Norway, this minimum age of criminal capacity is 15 years, which is in accordance with the CRC.¹² Therefore, only children between 15 and 18 years can be subject to the criminal justice system, and be detained, if they commit crimes. Children below the age of 15 who commit crimes are acquitted but are generally subject to measures within the childcare services.¹³

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9. The discussion of this chapter is thus limited to detention of children that have committed, or are suspected of having committed, crimes. Children are detained in Norway also as a consequence of general policing and immigration law (see chapters by Aasgard/Langford and Lidén in this volume). It is, however, important to deal with detention within these different contexts separately, as they differ with regard to legal aims and functions. A separate treatment of different forms of detention also provides a basis for discussing differences as regards the number, and treatment of detained children.
 10. There are several previous contributions regarding children in detention, where in particular children in custody has been criticized, but no overall evaluation of *all* forms of detention within the criminal justice system that separates these from detention on other grounds has been conducted.
 11. CRC Art. 40(3).
 12. Straffeloven (2005) *Lov om straff (straffeloven)*. Available in translated version: <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf> and CRC/C/GC/10 paras. 32–33 and rule 4 of the *Beijing Rules*- Beijing Rules (1985) “Age of Criminal Responsibility” under *General Principles*.
 13. The Police can, however, undertake certain crime preventive measures also against children below the age of 15, see politiloven, section 13, and the prosecutor can decide to investigate the crime, see straffeprosessloven, section 224 tredje ledd and påtaleinstruksen section 7-4 andre ledd.

If they commit serious crimes or engage in repeated criminality, these children can be placed in a childcare institution. It is here worth noting that the childcare services in Norway historically have played an important role in the field of criminal justice.¹⁴ In the late 1950s to the early 1960s, 85 per cent of all prosecutions were put before the Child Welfare Committee rather than the prosecuting authorities. Without having the precise data, our clear impression is that the criminal justice system plays a more dominant role today. Furthermore, childcare institutions were to a larger degree than today viewed as an alternative means to prison.¹⁵

Our focus in this chapter is, however, on measures within the criminal justice system, and hence on the children that have passed the minimum age of criminal capacity. In Norway (and elsewhere) many of these children – who have passed the minimum age of criminal capacity – commit crimes. In 2014, 4,325 children between the ages 15 and 17 were prosecuted for committing crimes in Norway¹⁶, constituting 1.4% of all prosecutions that year. Children are prosecuted for all types of crimes, including very serious crimes. Yet the most common criminal offences committed by children between the ages 15 and 17 are traffic-related, drug and property crimes.

Children can thus be subject to the Norwegian criminal justice system, and detained within it. However, when this happens, the state is obliged to ensure their rights according to the CRC; and research in this regard has underlined the negative consequences of detention of children.¹⁷ As children are in a process of development, they are more prone to long-lasting harm when placed in unsafe or punitive contexts, provides strong reasons for treating children differently from adults in the criminal justice system.

As mentioned, tensions arise between the CRC's perspective of the child, and the rationality and function of the criminal justice system.¹⁸ These tensions relate to both conceptual and practical aspects of criminal justice. On a general conceptual level, the criminal justice system is traditionally not centered on what is best for the offender (in this case the child), but rather on crime and punishment objectives. These aims are typically understood as *retribution* (punishing those that deserve it, and according to what they deserve) and *crime prevention* (punishing

14. For in-depth analyses of the relation between the criminal justice system and the childcare service see Kjersti Ericsson (1996) and Gerd Hagen (2001).

15. Hagen (2001). pp 164.

16. SSB 2014.

17. See Fornes (2017) Chap. 3 for an overview.

18. On this tension, see *inter alia* Lappi-Seppälä (2011) pp.199–264 and Marieke Persson (2017) pp. 17–19. See also chapter by Aasagard and Langford on policing in this volume.

in order to deter people from committing crimes). In Norway, crime prevention is articulated as the primary aim of punishment. At the same time, retributive goals are clearly present. Only those that can be blamed are held responsible and punished, and only in proportion to their blameworthiness.¹⁹ Consequently, murder is punished more harshly than theft. In this regard, a child's immaturity is relevant for decisions about responsibility and punishment, which is reflected in rules on criminal incapacity for children under the age of 15, and rules about infancy as a mitigating factor in sentencing.²⁰ Such rules are, however, based upon the idea that the child is less blameworthy than the adult, and not upon the type of concern for the child that the CRC is centred on.

In the end, the aim of retribution is difficult to reconcile with the child's best interests. The UN Committee on the Rights of the Child (the CRC committee) has underlined that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.²¹ Nonetheless, the CRC does open for the use of detention as a last resort. In Norway, very serious crimes committed by a child above the minimum age of criminal capacity (15) are understood to require a harsh punishment, i.e., imprisonment, even though it may result in various negative consequences for the child. Against this background, it is important to recognize that different types of crimes, in varying degrees, may trigger tensions between criminal justice and CRC perspectives. These tensions include the victim's point of view and suffering caused, in particular by serious crimes, even when the offender is legally defined as a child.²² In cases of serious criminal offences, there is also a larger room for the use of pre-trial detention than in cases of less serious crimes. The best interest-principle is, in this respect, thus interpreted as capable of being overridden by considerations of criminal justice.²³ In light of this, the *limitation of the use of detention* is central from the CRC perspective, which as we shall see, depends on the existence of alternative measures for dealing with child offenders.

Although detention of children may be acceptable, the manner of detention requires close consideration. The concept of 'detention' relates to a myriad of dif-

19. See Gröning, Husabø and Jacobsen (2016), Chap. 2.

20. Straffeloven, sections 20 a, 78 i and 80 i.

21. CRC/CGC14 General comment No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration, para. 28.

22. See Nicole Hennem (2014), *The aporias of reflexivity: Standpoint, Position and Non-normative Childhoods*, s. 7 for a perspective on this problem.

23. See Freeman (2007) p. 5 and Fornes (2017), Chap. 5.

ferent practical solutions concerning arrests and imprisonment. The *securing of adequate conditions* for detained children is therefore an imperative from the CRC perspective. In this respect, arguments that *may* justify the need of detention have no bearing as such on the nature of detention. In this context, it is important to recall that the criminal justice system is anchored in the constitutional values of the legal order, i.e., the respect of an individuals' dignity, equality and human rights.²⁴ In order to provide security for an individual, the criminal justice system must not only protect the individuals from other individuals' criminal behavior, it must also ensure that public authorities themselves do not exercise power in a manner that violates individual rights, so that also a person suspected or sentenced for a crime is treated with humanity and respect. This is a general requirement that has particular relevance when the person is a child. From our point of view, the CRC must ultimately be understood as an *integrated part* of the criminal justice system, to which any measure within this system must in compliance. Against this background, we shall now take a closer look at the CRC requirements regarding children in detention.

5.3 CRC REQUIREMENTS REGARDING DETENTION

5.3.1 FOCUS ON SUBSTANTIAL REQUIREMENTS IN CRC ART. 37 AND 40

Articles 37 and 40 of the CRC concern rights for children that are being accused or recognized of having committed a crime. These provisions provide for specific rights and duties and involve many different requirements regarding detention. Our focus is on substantial requirements regarding the limitation of the use of detention and the conditions for detained children.

Article 37(a) provides the child with the fundamental and general rights, to be protected from torture or other cruel, inhuman or degrading treatment or punishment – rights which also are applicable to adults. Moreover, Article 37(a) provides the child with the right to be protected from capital punishment, life imprisonment without possibility of release and unlawful or arbitrary deprivation of liberty. This prohibition thus provides for limitations as regards imprisonment for lifetime, and provides absolute standards for the way detention is carried out.

Limitations regarding the use of detention are first and foremost stipulated in Art. 37(b). This rule states that 'detention shall be used only as a measure of last resort and for the shortest appropriate period of time'.²⁵ The requirement that

24. Gröning, Husabø and Jacobsen. (2016) pp. 42–55.

25. CRC Art. 37(b).

detention shall be ‘a last resort’ is a strict standard. Hence, detention must be the *final* option, in the event that less-intrusive alternatives are unsuitable.²⁶ It follows from the Beijing rules²⁷ that detention shall not be used unless the child is involved in serious criminality, and unless there is no other appropriate response.²⁸ Seen in conjunction with Article 40, this rule requires also that the state has *made sure that there are no alternatives to detention*. Although the use of detention is here related to a need for reacting on serious crimes, the concern for the child must in the end be understood as primary. The rules regarding detention are therefore not mandatory, but must permit individual assessment of the needs and effects of detention for the child.²⁹

The requirement that detention shall be for the ‘shortest appropriate time’³⁰ requires an individual assessment. Moreover, the period of detention must be kept to a minimum. In this respect, the CRC committee has been critical towards the possibility of sentencing children to 20 years of imprisonment.³¹ Moreover, while there is no exact time-limit for *pre-trial detention*, the CRC committee has been critical towards Japan for doubling the time-limit from four to eight weeks.³² The requirement also implies that children in police custody are brought as speedily as possible, i.e. within few days, before a judge or another judicial organ that can review the detention.

CRC art. 37(c) particularly provides standards concerning the conditions for and the treatment of detained children. It states the fundamental principle that every child must be treated with humanity and respect, and in a manner which takes into account the needs of persons of his or her age.³³ The reference to age implies that children should not be treated as a homogenous group, but that their

26. CRC/C/GC/10 para. 28 a. See further Schabas and Sax, (2006) pp. 84–85.

27. Beijing Rules (1985). The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) was adopted by General Assembly resolution 40/33 of 29 November 1987. The Beijing rules state that juvenile justice shall be conceived as an integral part of the national development process of each member state, and that the rules shall be implemented in the context of economic, social and cultural condition in all member states (Beijing Rules 1985).

28. Art. 17 (1) of the *Beijing Rules*.

29. Schabas and Sax (2006), p. 82.

30. Art. 37(b).

31. UN doc CRC/C/15/Add. 170, 2002, Consideration of reports submitted by States parties under Article 44 of the Convention. February 1, 2002. Concluding observations by the UN Committee on the Rights of the Child. para 79 (f).

32. UN doc CRC/C/15/Add. 231, 2004, *Consideration of reports submitted by States parties under article 44 of the Convention. February 26, 2004.* para 53.

33. CRC art. 37(c).

personal development must be taken into account.³⁴ As a particular aspect of respectful treatment, Art. 37(c) furthermore requires that detained children are separated from adults, unless it is considered in the child's best interest not to do so. The aim of this requirement is to prevent a negative impact on the child in adult settings.³⁵ Children that are placed together with adults, face, *inter alia*, a risk of being subject to violence and sexual abuse, and may come in contact with criminal networks.³⁶ The separation requirement does not necessarily presuppose separate buildings for children and adults. It is sufficient that children are detained in a separate part of an institution also holding adults.³⁷ Finally, Art. 37(c) provides detained children with the right to maintain contact with their family through correspondence and visits, save in exceptional circumstances. Due to children's early stage of development, this principle ensures that children may have contact with their family and network to a greater extent than adults.

Article 40 covers more broadly the rights of all children that are subject to investigation, arrest, charges, any pre-trial process, trial and sentence. It also concerns the institutional conditions for, and the treatment of, detained children. Art. 40(1) pertains to the right of the child to be treated in a manner consistent with the promotion of the child's sense of dignity and worth that reinforces the child's respect for human rights and fundamental freedoms of others. The child's age and the desirability of promoting its reintegration and the assumption of a constructive role in society, should also be taken into account in this regard.

Of special importance for this chapter is Art. 40(3) stating that the 'States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law'.³⁸ In other words, the States shall seek to promote a distinctive *juvenile criminal justice system*. Art. 40(4) requires in addition the availability of a variety of alternatives for dealing with children outside institutions. The presence of alternatives may also affect the extent to which children are detained in prisons.

These rights must be viewed dynamically in relation to the general principles of the CRC. In particular, the principles expressed in Art. 2 (non-discrimination), Art. 3 (best interests of the child), and art. 6 (the right to life, survival and development) relates to the subject of this chapter.

34. Schabas and Sax (2006) p. 89.

35. See further Schabas and Sax (2006), p. 92.

36. Gording Stang and Hydle (2015), p. 53.

37. See rule 13 (4) *Beijing Rules*. See further Schabas and Sax (2006), p. 92.

38. CRC Art. 40 (3).

5.3.2 PREVIOUS CRITIQUE AGAINST NORWAY

In concluding observations submitted to Norway in 2010, the CRC Committee expressed particular concern regarding Art. 37(b-c) and 40.³⁹ This concern was related both to the limitations of the use of detention and to the conditions for detained children. While the CRC Committee noted that the number of children under the age of 18 in prison in Norway was low, it nonetheless expressed concern regarding the increase in the number of imprisoned children. Hence, the CRC Committee recommended that Norway should ensure a limitation of detention so that children are detained only as a last resort, and for as short time as possible. Furthermore, the CRC Committee expressed particular concern regarding the physical conditions in Norwegian prisons, as they were considered unsuitable for children, given that children are not detained separately from adults and training of prison personnel for the treatment of juvenile offenders was not mandatory. The CRC Committee recommended that Norway comply with the requirement of keeping detained children separated from adults, ensure that persons working with children in the criminal justice system receive appropriate training, and ensure rehabilitation and education during time of imprisonment. Eight years later, in the concluding observations on the combined 5th and 6th periodic reports of Norway,⁴⁰ the CRC Committee urged Norway to bring its juvenile justice system fully in line with the CRC and other relevant standards. Furthermore, the CRC Committee recommended the discontinuance of preventive detention for children. Reiterating its concluding observations from 2010, in situations where detention is unavoidable, the CRC Committee urged Norway to ensure that children are not detained together with adults both in pre-trial detention and prison. It recommended further that solitary confinement be avoided to the greatest extent possible, and that the Norwegian state should make the necessary legislative amendments to extend the applications of alternative form of sanctions, i.e. juvenile sanctions.

Following this earlier critique by the CRC Committee, also the Norwegian Ombudsman for Children,⁴¹ the Ombudsman,⁴² and the Norwegian Bar Associa-

39. CRC/C/NOR/CO4 2010. Consideration of reports submitted by State parties under article 44 of the Convention. March 3, 2010 No. 4 Concluding Observations by the UN Committee on the Rights of the Child.

40. CRC/C/NOR/CO/5-6 2018. Advanced Unedited Version: Concluding observations on the combined 5th and 6th periodic reports of Norway. 14 May–1 June 2018 Adopted by the Committee as its seventy-eighth session.

41. Supplementary Report to the UN Committee on the Rights of the Child, 2009.

42. Sivilombudsmannen 2014 and 2016.

tion,⁴³ have raised the same or similar concerns. Against this background, we will now assess to what extent the current rules and practices of detention comply with the CRC standards.

5.4 NORWEGIAN RULES AND PRACTICES ON DETENTION: OVERVIEW

The rules regarding detention of children that have committed, or are suspected for having committed a crime, are found in the Criminal Procedure Act⁴⁴, the Penal Code⁴⁵, the Execution of Sentences Act⁴⁶, and Police Law.⁴⁷ *Pre-trial police custody* and *pre-trial court-ordered custody* are primarily regulated in the Criminal Procedure Act, yet certain rules are to be found in Police regulations. The Penal Code regulates the use of *imprisonment and preventive detention as punishment*.⁴⁸ Finally, the Execution of Sentences Act stipulates rules about the treatment of children in the execution of these sentences, and in court custody. Many of these rules are the result of law reforms in 2012 aiming to reduce the number of children in arrest and detention, in light of the the previous critique from the CRC committee.⁴⁹

In the following sections (5–7) we will take a closer look at these rules and their implementation in practice, and assess whether they conform to CRC standards. This assessment combines a legal analysis of relevant criteria with an empirical investigation into the actual situation for detained children in Norway. In the latter regard, we base our assessment on statistical data from the Police Directorate, the Directorate for Detention Services, the Youth Unit at the Bjørgvin Prison, the NOVA report series and Statistics Norway (SSB). Our evaluation of the conditions for detained children is based upon interviews with key personnel within the Police and the Correction services as well as visits to selected units. Previous

43. Advokatforeningens årstale 2010.

44. Straffeprosessloven (1981) *Lov om rettergangsmåten i straffesaker* (Criminal Procedure Act). Available in translated version: <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf>

45. Straffeloven (2005) (Penal Code).

46. Straffegjennomføringsloven (2002) *Lov om gjennomføring av straff mv.* (Execution of the Sentences Act).

47. FOR-1990-06-22-3963. Forskrift 26. juni 1990 om alminnelig tjenesteinstruks for politiet (Police Instructions).

48. Penal Code, Chapters 6 and 7.

49. Innst. 83 L (2011-2012). *Innstilling fra justiskomiteen om lov om endringer i straffeloven, straffeprosessloven, straffegjennomføringsloven, konfliktrådsloven m.fl. (barn og straff)*.

reports from the Ombudsman, the Children’s Ombudsman and the Norwegian Bar Association have also been a basis for this evaluation. Our examination relates only to data obtained until 2017.

In the search for a complete statistical overview, we have faced certain challenges. The difficulty in obtaining a full statistical overview in this area is in itself problematic and has also frequently been criticized by the Ombudsperson for Children.⁵⁰ The most challenging numbers to obtain have been from the *Politioperativ system* (PO), over arrests. First, the system does not allow us to distinguish between children arrested on a criminal basis and children arrested on other grounds. Secondly, certain sources of errors may occur when children are registered as being detained in a police custody cell, but in reality have been detained in an office or of the like. A final source of error has been that there may exist duplication of information in the PO. Despite having met obstacles in obtaining a full statistical overview, our requests have been thoroughly followed up by the Police Directorate and from local police districts, yet the lack of a complete overview of central statistics is a critical concern.

5.5 POLICE CUSTODY

5.5.1 LEGAL CRITERIA

Pre-trial police custody and pre-trial court-ordered custody are closely related to each other. Police custody is decided by the police prosecutor, and is generally enforced in cells located within police buildings. In many occasions, the police only keep a person arrested for interrogation and in order to secure evidence, before releasing the person in question. Court-ordered custody follows from police custody in those cases where the police prosecutor wishes to keep a person in custody. A person is then transferred from the police building to prison. However, in practice, it may take some time before such a transferral takes place. In other cases, a person may be transferred to a prison before the court decision after a special request from the police. With this in mind, we take a closer look at police custody, while court-ordered custody will be dealt with in Section 5.2.

The general conditions for the use of police custody follow from the Criminal Procedure Act §§ 171–183. These rules provide for a common legal basis for the different measures involved in police custody, i.e., arrest, transfer to a police station, initial detention (e.g. for interrogation), and eventually custody. Any person suspected of one or more acts punishable with more than six months’ imprison-

50. Supplementary Report to the UN Committee on the Rights of the Child, 2009.

ment can be detained for certain defined purposes. These are to hinder that a detainee evades prosecution or the execution of a sentence, interferes with the evidence or commits a criminal act punishable by six months' imprisonment.⁵¹ A person can also request detention.

Detention can also take place when the person has confessed or is suspected to a considerable degree to have committed certain criminal acts punishable by at least 10 years of imprisonment. In addition, any person who is caught in the act and does not desist from the criminal activity may be detained without regard to the penalty imposable.⁵² Hence, in these cases, police custody can be used for lesser criminal offences.

For detention to take place, however, it must not constitute a *disproportionate infringement* of liberty.⁵³ Detention of children under the age of 18 shall not take place unless it is considered *especially necessary*. This is a strict standard, which was introduced in the legislation in 2000, requiring that detention is limited to an *absolute minimum*.⁵⁴ Such delimitation is in conformity with the principle of detention as a last resort following from CRC Art. 37 (b).⁵⁵ Of importance for this limitation of detention is that the prosecutor may decide on different kinds of control measures, such as requiring a detainee to stay within a certain area or withholding their passport.⁵⁶ The police prosecutor, however, lacks the formal authority to place a child in a childcare institution. Such a placement requires a court order. Informally, police may on agreement with the childcare service, require that the child spend the night in a childcare institution instead of police custody.⁵⁷

Police custody must be *limited in time*. If the prosecution authorities wish to keep a child in custody, the child must be brought before the court *as soon as possible and not later than the day after the arrest*.⁵⁸ The aim of this time-limit is to reduce the time the child spends in custody awaiting judicial decision, and to sig-

51. Ibid, Section 171.

52. Ibid, sections 172, 173.

53. Ibid. Section 170 a and Grunnloven, article 94.

54. Ibid., para. 174, see NOU 2006:15 *Barn og straff – utviklingsstøtte og kontroll*, p. 68, and Prop. 135 L (2010–2011). *Endringer i straffeloven, straffeprosessloven, straffegjennomføringsloven, konfliktrådsloven m.fl. (barn og straff)*. p. 50.

55. Prop.135 L (2010–2011), p. 50. See also Rt. 2004 Decision by Norges Høyesterett of 03.11.2004. p. 1655 para. 13.

56. See Criminal Procedure Act, section 181. See further Bjerke, Keiserud and Sæther (2011), pp. 642–643.

57. See below in Section 6.2.

58. See Criminal Procedure Act, section. 183. For adults, the time-limit is three days.

nal that the prosecution and the courts must prioritize cases involving children.⁵⁹ The rules on this matter are clearly in conformity with the CRC.⁶⁰

In contrast to the strict limitations of the use of police custody, the conditions for detained children are surprisingly poor and fragmentally regulated. There is a general police regulation about ‘defensible supervision’ of persons in custody, which is interpreted as requiring more when the detained person is under the age of 18.⁶¹ In addition, there are local police directives regarding police custody in the different police districts that stipulate specific routines and procedures for children.⁶² The precise content of these directives differ between districts, opening the door to different practices – which may compromise the principle of equal treatment. It is, however, a general requirement that the police immediately contact the child’s guardian and the childcare services when a child is arrested.⁶³ The police directives also dictate that certain measures are to be taken when children are kept in police custody, in order to reduce the negative effects of detention. These may include, *inter alia*, more frequent supervision and contact between police personnel and the child, offering the child walks in close by yet confined area, and offering contact with psychologists or other health personnel. The extent of such measures is, however, open for discretion, and depends on available resources and the facilities of the arrest buildings.

5.5.2 CHILDREN IN POLICE CUSTODY

The imposition of strict standards concerning the use of police custody for children seem to have had the intended result. While around 1 000 children were held in police custody in 2010 (before current standards were implemented),⁶⁴ 298 children were held in 2015, 238 in 2016, and finally, 70 children were held in police custody as of the first four months of 2017. These numbers demonstrate a

59. Prop.135 L (2010–2011), pp. 169–170.

60. See Section 2.3 of the chapter.

61. See FOR-2006-06-30-749 Forskrift 1. juli 2006 om bruk av politiarrest, paras. 2–5. See also Auglend and Mæland (2016), pp. 815 ff.

62. These local directives also build upon different directives and document from the Norwegian Police Directorate and the Higher Prosecution Authorities. At present, there is no overall Central Police directive regarding police custody, but such directive is under development.

63. That the police shall inform the Child Care Services also follows from Straffeprosessloven § 183, and the duty of the Police to inform the Guardians of the child is regulated in FOR-2006-06-30-749 § 2-4, cf. FOR-1990-06-22-3963 § 9-2. For a critique of the lack of available and operative services past opening hours see Rotihaug, Vengen and Osland (2014).

64. Prop. 135 L (2010–2011).

prominent decrease over the course of seven years.⁶⁵ The numbers also show that only a small amount of the children that are prosecuted in Norway are held in police custody.⁶⁶

According to the Police Directorate, children are only detained when there are no other practical measures available.⁶⁷ There are, as we have seen, different grounds for police custody, and some open for custody also for less serious crimes. In cases of less serious offences the police may informally agree with the childcare services that the child spends the night in a childcare institution, provided that the control of the child is secured. The cooperation between the police and the local childcare institution is here of certain importance, and differences between different police districts will result in different practices when it comes to children in detention. The police may also in cases of less serious criminality agree that the child spends the night at home with his/her guardians. Most children that were held in custody during 2016 had however, committed relatively serious crimes.

There has also been a positive change with regard to the time children spend in custody. In 2012, 113 children were held in custody for more than 24 hours. In 2013, after the introduction of stricter standards, 47 children were held for more than 24 hours.

However, the institutional conditions for detained children are still a problematic matter. Children subject to police custody are most commonly detained in a cell or a security cell in police buildings. In many police districts, the conditions of these cells do not comply with the specific needs of the child. A particular problem is also the variation between different police districts.⁶⁸ In Bergen, the cells are for instance located in outdated cellar buildings without daylight or clocks on the wall. Nevertheless, certain police districts, such as Tønsberg Central Arrest have cells made specifically for children.⁶⁹ These often include certain facilities, such as TVs and sinks, which are considered to be perceived as less stressful. These regional variations are problematic with regard to equal treatment of children in police custody in Norway. Generally, the lack of institutional facilities is highly problematic as it limits the possibilities for the police to secure the needs of the child.

65. Politidirektoratet (3/2015), Politidirektoratet (3/2016) and Politidirektoratet (1/2017).

66. The following is based upon interviews with staff members of the Police Directorate, and the Police District of Bergen and Oslo.

67. See also Prop. 135 L (2010–2011), p. 17 that supports this.

68. See Juristkontakt (5/2016).

69. Sivilombudsmannen (2014a).

5.6 COURT-ORDERED CUSTODY

5.6.1 LEGAL CRITERIA

Should a person detained by the police remain in custody, it must be decided by a court. The conditions for court-ordered custody are primarily regulated in by the Criminal Procedure Act, section 184, and are essentially the same as for police custody. The threshold for the court to decide on (continued) custody is, however, by its wording here even stricter.⁷⁰ Children cannot be held in custody unless it is *strictly necessary*, which implies that there should be *no other alternatives*.⁷¹ A court may in this regard decide on alternative measures, such as placement in an institution or a municipal residential unit.⁷² Placement in childcare institutions may here be an alternative to detention for children.⁷³ The use of such alternative measures is however conditioned by the consent of the municipality or relevant institutions.⁷⁴

Court practice shows that the courts generally take into account the rights of the child. In accordance with the CRC emphasis on differentiation, the best interest for the child weighs more heavily for young children.⁷⁵ The availability of alternatives to custody also seems to play a vital role for the courts' decisions. On some occasions, however, courts are of the view that alternatives *should have been* available.⁷⁶ The Norwegian Directorate for Children, Youth and Family Affairs has in this regard expressed clear reservations towards custody in childcare institutions, and emphasized that it can only secure criminal justice aims as long as they are in conformity with childcare regulations.⁷⁷ This shows that the clash between childcare and criminal justice perspectives may be an obstacle to an adequate limitation of detention of children. It also shows that there is a need for a clarification of the role of the municipality and relevant institutions as actors within the criminal justice system.

The rules on the time-limits for court-ordered custody are generally in accordance with the CRC.⁷⁸ When the defendant is under the age of 18, the court shall

70. According to the preparatory works, the conditions for police arrest and court detention should however be understood to stipulate a similar threshold. See Prop.135 L (2010–2011), pp. 58–59.

71. *Ibid* pp. 58–59.

72. See Straffeprosessloven § 188.

73. See Larsen (2016) pp. 119–120.

74. See Criminal Procedure Act, section 188.

75. See *inter alia* LF 2008-102133 Decision of Frostating lagmannsrett of 04.07.2008, p. 2.

76. See *inter alia* Rt.2005.358 Decision by the Supreme Court of Norway of 23.03.2005 and Rt.2012.274. Decision by Supreme Court of Norway of 15.02.2012.

77. See letter from The Norwegian Directorate for Children, Youth and Family Affairs (2012).

78. There may still be individual cases that are problematic with regard to the CRC requirement, and this must be evaluated in each case. For a discussion on this matter see Fornes (2006) and Havre (2014).

set a fixed a time-limit that shall be as short as possible and that shall not exceed two weeks (for adults the maximum period is 12 weeks). On request from the prosecutor, it can be prolonged for two weeks at a time.⁷⁹ Also the judicial control of the continuous need for detention is, in this regard, comforting.

The institutional conditions for children in court-ordered custody are, in contrast to police custody, regulated by the Criminal Procedure Act. There is for instance an absolute prohibition against excluding the child from company with other prisoners, in accordance with the CRC Art. 37 (1).⁸⁰ The child must also, in accordance with CRC Art. 37(c), be able to receive visits and have correspondence with close family members, save in *specific circumstances*, such as in cases of honor violence.⁸¹ In addition, the Execution of the Sentences Act contains several rules for the treatment of children in custody and in the administration of punishment.⁸² Of particular importance is Section 10(a) that requires that the conditions for detention should be adjusted to the needs of the child. In accordance with recommendations from the CRC Committee about the need for rehabilitation and education, this rule also requires the establishment of specific Youth Units with an interdisciplinary team to assist the needs of the child during the entire time in prison.⁸³ Against this background two Youth Units with an interdisciplinary team as part of the staff have been established, namely Bjørgvin in Bergen and Eidsvoll in Oslo.⁸⁴

A prevailing issue experienced by the police is that persons charged for committing a crime sometimes provide false identity in order to ensure a milder sentence. Most often this concerns their age. If the police are uncertain as to whether the stated age is false or not, the person charged for committing a crime must undergo a procedure for determining the person's (or child's) age. However, until the opposite is proven, the person is treated legally as a child, with all their attendant rights.

5.6.2 CHILDREN IN COURT-ORDERED CUSTODY

In the years prior to the incorporation of the CRC, just over a hundred children were registered in court-ordered custody. The number was, however, significantly

79. See Criminal Procedure Act, section 184, the time-limit for adults is 4 weeks.

80. See *Ibid.*, section 186 a.

81. See *Ibid.* section 186. See further Prop. L. (2010–2011), p. 171.

82. See Execution of the Sentences Act, see also further below in 7.1.

83. CRC/C/NOR/CO4, 2010, para 58.

84. See further Gording Stang and Hydle (2015), pp. 54–60.

reduced to 76 in 2003 and 47 in 2004.⁸⁵ Figure 5.1 below demonstrates how the number of children in court-ordered custody has evolved from 2005 to 2016. There is a prominent reduction of children in court-ordered custody from 2012, which can be explained from the amendments in the Criminal Procedural Act that followed from the critique of the CRC Committee.⁸⁶ The numbers from the latter years also indicate that court-ordered custody is only used when strictly necessary.

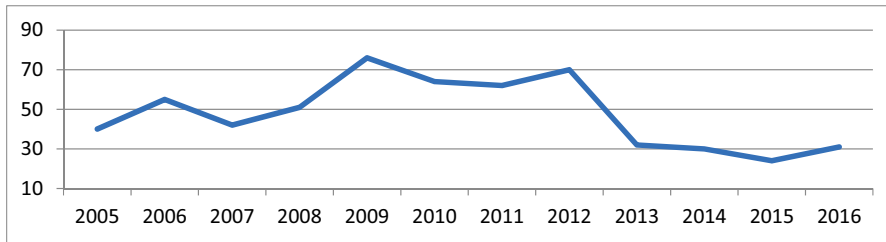


FIGURE 5.1 Number of children under 18 having completed court custody from 2005–2016.

Source: Kriminalomsorgens årsstatistikk 2005–2015.

However, the development of the time children spend in custody is then more complex. Figure 5.2, demonstrates time spent in court-ordered custody from 2008 to 2015 (measured in average days). From 2011 to 2014, 16-year-olds spent more time in custody than the other age groups. Moreover, for 2015, 15-year-olds exceed the time of both 16- and 17-year-olds. These numbers indicate that the child's age is not sufficiently considered when it comes to time spent in custody. We find this unlikely to be in accordance with the CRC's emphasis on the fact that the best interest of the child shall be more heavily weighted the younger the child is. At the same time, it is hard to draw any solid conclusions as the total number of detained children is low and the indicators are not controlled for other factors. Further statistics and research is needed.

For the period 2011 to 2016, the children who were held in court-ordered custody had committed different kinds of crimes such as rape, robbery, theft, drug-related crimes, and assault and battery. These types of crimes have a sentencing framework ranging from up to one year until 15 years of imprisonment.⁸⁷ A question is, in this regard, whether there should be alternatives to custody at least for the crimes in the lower end of the spectrum.

85. Mæhle (2014) p. 7.

86. Prop. 135 L (2010–2011).

87. Penal Code, sections 231, 271, 273, 291, 321 and 327.

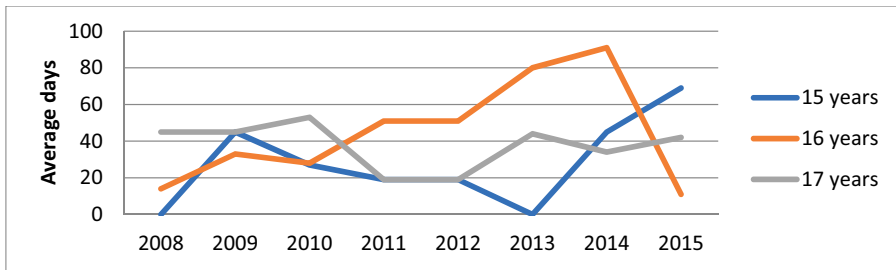


FIGURE 5.2 Average days spent in court custody distributed by age.

Source: Kriminalomsorgen årsstatistikk 2011, 2012, 2013, 2014 and 2015.

A specific aspect to note in this context is that there has been a decrease of children with foreign citizenship in court-ordered custody. In 2010, 52 per cent of all detained children were of foreign descent, compared with 32 per cent in 2016.⁸⁸

Furthermore, after the establishment of the Youth Units, there have also been major improvements concerning the conditions for children in custody. Before the establishment of these units, children were placed in cells in ordinary prisons together with adults, and the separation requirement was a main challenge for the Correction Services. Now, children who should be kept in court-ordered custody (or who have been sentenced to imprisonment) should be placed in a Youth Unit unless another placement is in the child's best interest.⁸⁹ Therefore children are now incarcerated directly in Youth Units, or transferred to a Youth Unit. Nevertheless, there are still certain challenges concerning children in court-ordered custody.⁹⁰ There have been a couple of instances where the police have found a place for court-ordered custody for a child in a regular prison unit, without informing the Youth Unit. When such instances are revealed, the procedure that follows is that the child is transferred to a Youth Unit as soon as possible, provided that there is capacity. In periods the Eidsvoll Youth Unit has in this regard been reduced to half capacity due to lack of approval of sufficient fire security. This may be an explanation as to why 10 out of 31 children in 2016 were in court-ordered custody in a regular prison. As of June 15, 2017, all detained children have been placed in Youth Units.

A specific practical challenge is the use of security cells at the Bjørgvin Youth Unit. The prison personnel expressed a need for such cells at the Youth Units, but

88. Prop. 135 L (2010–2011) p. 19.

89. FOR-2002-02-22-183 *Forskrift 1. mars 2002 nr. 183 om forskrift for straffegjennomføring*, sections 3–4.

90. The following is based on an interview with central staff members of the Bjørgvin Youth Unit.

these security cells have been constructed and built with a special concern for children. The Ombudsman has also assessed the design of these cells and considers them as ‘adequate’.⁹¹ However, after an incident in the security cell at the Youth Unit at Bjørgvin, the security cell was found to be in need of renovation. Therefore, there is currently a lack of security cells available for children at this unit; hence, children are temporarily being transferred to Bergen prison for that purpose. In practice, such transfers take place before the security cell is considered necessary, so that the security cell can be used when needed. While in the Bergen prison, children are isolated from other inmates – often alone.⁹² If the child is kept in solitary confinement, the Bergen prison’s staff members, (e.g. the guidance counselor, psychologists and other health personnel) care for the child; and the interdisciplinary team from the Youth Unit works only as a secondary resource. In addition, isolation of a child consequently results in the child spending most of the time in a cell in effective solitary confinement, which is a major concern in relation to CRC Art. 37 (1).

Furthermore, while there are only two Youth Units in Norway, another major challenge is that children are often detained far away from their families and social networks. The geographic and/or demographic conditions of Norway are in this regard an obstacle to the full compliance of the CRC. The fact that there are only two Youth Units, located in Bergen and Oslo, suggests that children from other parts of Norway will be placed far from their networks’ immediate geographical proximity. This may complicate or challenge the principle of Article 37 (3) providing children with the right to maintain contact with their family through visits.

5.7 IMPRISONMENT

5.7.1 LEGAL CRITERIA

Long-lasting and highly restrictive imprisonment is the most intrusive form of detention for children within the criminal justice system. It has also a clearer retributive justification than other forms of detention, as it is imposed as punishment.

Imprisonment of children is limited according to the Penal Code. An unconditional prison sentence can only be imposed on persons under the age of 18 when *especially necessary*, which is the same threshold as for police custody, and cannot

91. Hydle, I. M. and Stang, E. G. (2016), p. 126.

92. For further discussion on the problem of isolation of children in prison, see Eknes (2014) pp. 415–435.

exceed 15 years.⁹³ The Supreme Court appears more lenient now than in previous cases, possibly due to parliamentary signals,⁹⁴ and the courts as a whole generally seems to have followed suit. If other types of reactions are viewed as sufficient and adequate, these must be chosen by the judicial authorities.⁹⁵ Whether other reactions shall be used is evaluated in light of the character of the offence and the circumstances of the case more generally. For the most serious crimes, imprisonment is generally imposed.⁹⁶ Such delimitation of imprisonment is understood as in accordance with the CRC.⁹⁷

Of certain importance for the limitation of imprisonment of children is the youth penalty that can be used as a punishment also for more serious, but not the most serious, crimes.⁹⁸ This penal sanction was introduced in 2014, and its objective is to help children back on 'the right track' after committing crimes.⁹⁹ Moreover, the youth penalty builds on ideals of restorative justice, where children are offered meetings with relevant stakeholders, such as school representatives and the Child Protective Services, as well as the police and the Correctional Services.¹⁰⁰ For practical reasons, however, the use of youth penalty requires that the offender has a residence in Norway.¹⁰¹ This requirement may result in a child that has no residence in Norway is being imprisoned while children with residence avoid this option. In case this happens, which is difficult to validate, it will clearly be in tension with the principle of non-discrimination in CRC Art. 2.¹⁰²

Regarding institutional conditions in prison, the Execution of the Sentences Act stipulates several requirements aimed at securing the needs of the child, where the new Youth Units represent a major leap forward.¹⁰³ There are, however, judg-

93. See *Straffeloven* § 33 and § 79.

94. See the decision of Rt. 2012–274. Decision by Norges Høyesterett of 15.02.2012, p. 1313.

95. Ot.prp. nr. 90 (2003–2004) *Om lov og straff (straffeloven)* p. 435.

96. According to the Norwegian department of justice the concern for the best of the child must be outweighed when the child has committed very serious criminality, prop. 135 L 2010–2011 p. 100.

97. Ot.prp. nr. 90 (2003–2004) p. 435.

98. See Prop. 135 L (2010–2011) on the youth penalty.

99. *Ibid* on the youth penalty; Regjeringen (2014).

100. Regjeringen (2014).

101. See Prop 135 L (2010–2011), p. 164 on this condition. See also LA-2011-187926 Judgement by Agder lagmannsrett of 23.01.2012 for a judgment where the lack of residence in Norway prevented the court from using the youth penalty.

102. See Hansen (2015), pp. 41–43. See also Spangen Iversen (2013), pp. 377–395 and Holmboe (2014), pp. 397–414.

103. See *Særregler for mindreårige innsatte fra Kriminalomsorgsdirektoratet* 2016. See also above in 6.1.

ments where the court seems to argue that it is for the best for the child to receive a prison sentence, because of the favourable conditions in the Youth Units.¹⁰⁴ This is problematic. Improved prison conditions for children cannot legitimize sentencing a child to imprisonment, instead of alternative sanctions.

There are also several rules aimed at reducing the time in prison. The Correction Services must always consider placing inmates under 18 years in a lower security prison or in a halfway house, and allow them serve the sentence at home with electronic control.¹⁰⁵ It must also consider transferring the child for the completion of their sentence outside prison under certain supervision and control measures when half the term of the sentence has been served.¹⁰⁶

In accordance with the CRC Art. 37 (1), there are many exceptions for inmates under the age of 18 in relation to exclusion from company with other inmates, and on the use of coercive measures.¹⁰⁷ Generally such measures must be strictly necessary and less intrusive means must have been tried and proved useless, or obviously be insufficient. The right to visits from close family is also specifically regulated.

Finally, it should be mentioned that the Correction Services have the opportunity to transfer an inmate under the age of 18 for execution of a prison sentence in a childcare institution.¹⁰⁸ This opportunity seems to have certain relevance for the courts when deciding on an unconditional prison sentence for a child.¹⁰⁹ In some cases, courts are even clear that an ordinary execution of a prison sentence will be clearly undesirable and almost instruct the Correction Services to decide upon transfer to an institution.¹¹⁰ The realization of a transfer from prison to a childcare institution depends, however, on the availability of suitable institutions, indicating that clear alternatives to prison sentence are absent.

5.7.2 CHILDREN SERVING A PRISON SENTENCE

Few children serve a prison sentence in Norway. In 2016, there were six new imprisonments of children, while in 2015 and 2014 there was only one.¹¹¹ The

104. See LH-2016-72863 Judgement by Hålogaland lagmannsrett of 23.05.2016, pp. 6–7.

105. See Straffegjennomføringsloven § 11, § 16.

106. Ibid § 16.

107. See Straffeprosessloven §§37–39.

108. See Straffegjennomføringsloven § 12.

109. See inter alia LB-2003-3089 Judgement by Borgarting lagmannsrett of 06.10.2016 p. 6, LA-2009-77169 Judgement by Agder lagmannsrett of 04.09.2009, p. 4 and TOSLO-2012-6212, p. 6.

110. See LB-2011-204503 p. 4 for a clear example.

111. Kriminalomsorgens årsstatistikk 2014, 2015 and 2016.

numbers of children serving a prison sentence at each time differ from these numbers, but are similarly low. On 15 December 2016, there were for instance four children serving a prison sentence in Norway.¹¹² The years 2014–2016 represent a clear decline from previous years, and indicate the success of legal amendments done to reduce the number of children in prison. As demonstrated below, the number of children in prison has been reduced greatly in the last eight years. These numbers are consistent with the CRC emphasis that the younger the child, the more heavily weighted their best interest.

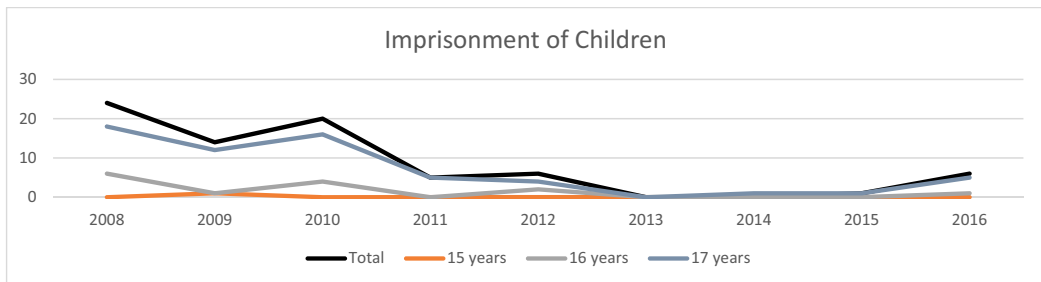


FIGURE 5.3 Imprisonment of children 2008–2016 by age and in total.

However, it must be noted that the number of children that are sentenced to imprisonment by the courts is significantly higher than the number of children that are in prison at each time – although also these numbers show a clear reduction. In 2014, 43 children were sentenced to prison, compared with 212 in 2002.¹¹³ The reason for this might be that several children that are sentenced to prison have spent a long time in custody, and the sentence is by this time.¹¹⁴ As a result, these children are released after the main trial. In addition, some children turn 18 before they start to serve their sentence, and are therefore placed in a regular prison unit. From a CRC perspective, it is important that also children *sentenced* to imprisonment are taken into account. It should here be noted that Norway has not included the number of children sentenced to prison in its most recent State report to the CRC Committee, but only those that are in prison.¹¹⁵

112. Kriminalomsorgens årsstatistikk 2015 p. 39. These numbers have also been supplemented by the Norwegian Correctional Service from our inquiry.

113. SSB 2014. See further Fornes (2017), Chap. 4.

114. Straffeloven § 83.

115. Rapport om Norges gjennomføring av FNs barnekonvensjon (2016), p. 75. It should also be noted that the numbers of children in prison reported seem to include also children in court custody, and also seem inconsistent with the officially reported numbers from the Norwegian Correctional Service.

As regard the length of the prison sentence, the six children imprisoned in 2016 were convicted on rape and robbery charges. They were convicted to sentences lasting from 92 days to two and a half years. All had Norwegian citizenship.

When it comes to the conditions for imprisoned children, these have as explained above been improved after the establishment of the Youth Units.¹¹⁶ Children sentenced to a prison sentence shall as a main rule be placed here, and this was also the case with all but one of the six children imprisoned in 2016.¹¹⁷ As of 15 June 2017 all children serving a prison sentence were placed in a Youth Unit.

The problematic issues regarding the conditions for children in court custody that has been explained above are the same in relation to children serving a prison sentence.¹¹⁸ Also children serving a prison sentence may be temporarily transferred to a regular prison unit. The fact that the child may be detained in a Youth Unit far away from family and social networks is also even more troublesome when the child must serve a longer sentence.

5.8 PREVENTIVE DETENTION

5.8.1 LEGAL CRITERIA

A specific form of imprisonment in Norway is *preventive detention*.¹¹⁹ This reaction is a hybrid construction, as punishment based upon considerations of the future risk that the perpetrator commits new crimes. As such, it deviates from backward-looking proportionality considerations that normally steers the choice of punishment. Preventive detention can be prolonged as long as the perpetrator is still considered dangerous, if needed for lifetime.

Preventive detention can only be imposed in specific circumstances: when a prison sentence for a specific term is insufficient to protect the life, freedom and health of the members of society. Furthermore, the perpetrator must have committed a serious crime and there must be a certain risk that he or she will commit new serious crimes. If the perpetrator is a person under the age of 18, preventive detention requires, in addition, *completely extraordinary circumstances*. According to the preparatory works, it should *almost never* be used against children.¹²⁰ It is at the same time acknowledged that there may be extraordinary cases where preven-

116. The following is based on interviews with a central staff member at the Bjørgvin Youth Unit.

117. See above in Section 6.2.

118. See above in Section 6.2.

119. Straffeloven §§ 40–47. See further Grønning, Husabø, & Jacobsen (2016), pp. 617–623.

120. Prop.135 L (2010–2011), p. 105.

tive detention is the correct reaction.¹²¹ The more precise meaning of *completely extraordinary circumstances* is, in this regard, quite unclear. The preparatory works do not concretize this requirement in relation to CRC requirements, although it is generally clarified that the CRC should be taken into account.¹²²

When passing a sentence of preventive detention for persons under the age of 18, the court shall fix a term that should not usually exceed 10 years and must not exceed 15 years. If the prosecution services do not make a request for prolongation, the person shall be released at the end of this term. If such a request is made, the detention can be continuously prolonged as long as the person is deemed to be dangerous.

In our view, preventive detention for children raises problematic issues. CRC Art. 37 a. prohibits life imprisonment without possibility of release. Since the detained person must be released when the condition of risk is no longer present, preventive detention is not formally a violation of this rule. However, preventive detention is a highly intrusive form of punishment and stands in clear tension with the principle of the best for the child. Given the requirement that imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time it is troublesome that this reaction is time-unlimited. Already to use regular imprisonment against children is problematic, in particular longer sentences. For preventive detention there is a significant additional burden of the insecurity for the child about the length of the reaction.¹²³ Furthermore, preventive detention not only stigmatizes the child as being criminal, but also of being *dangerous*, which may be in tension with Art. 40 and the 'desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.¹²⁴ It is also important to consider that the evaluation of the risk for new crimes is in itself insecure, and is generally considered to be more difficult the younger the child is.¹²⁵

5.8.2 CHILDREN IN PREVENTIVE DETENTION

There is to date only one person under the age of 18 that has been sentenced to preventive detention, a decision made by the Supreme Court.¹²⁶ This child had

121. Ibid, p. 167.

122. Ibid section 2.3.

123. See also Prop.135 L (2010–2011) p. 105.

124. CRC Art. 40

125. See Rt.2006.641, para 12.

126. See HR-2016-290-A. Judgement by Norges Høyesterett of 09.02.2017, p. 10. See also for comparison, Judgment by Agder Lagmansrett of 15.09.2017 (LA-2017-112563) where a boy that was 15 years old at the time of committing the offence (a murder) was sentenced to regular imprisonment.

committed a murder, and had a history of many serious acts of violence including attempted murder. At the time of the murder, she was 15 years and 1 month, and just above the age of criminal capacity in Norway. The preventive detention will be carried out in a Youth Unit, where institutional conditions are arguably satisfactory. After the girl has turned 18, however, she will be transferred to a regular prison unit for preventive detention.

Clearly this was a case in which criminal justice considerations were significant. The girl had committed a severely serious crime, and it was difficult to consider any other punishment than imprisonment. Still, it is highly controversial to make use of *time-unlimited* preventive detention, not least because of the young age of the child. Even though preventive detention may be accepted in extreme cases, it is in our view problematic that it has now been imposed on a child at such a young age as 15. The lower court even indicated that a preventive detention would be *best* for the child.¹²⁷ The Supreme Court, however, rejected this kind of reasoning.¹²⁸ This case begs the question of whether there are no other available means in the Norwegian criminal justice system to use against such a young perpetrator, in order to prevent re-offending. The creation of a preventive detention regime is highly problematic in Norwegian criminal law, and it becomes even more troublesome when used against children.

5.9 CONCLUSION: ASSESSMENT AND POSSIBLE IMPROVEMENTS

To a significant extent, Norway has followed up on the previous critique from the CRC Committee, especially concerning the use of police custody, court-ordered custody and in prison. The introduction of law reforms to ensure implementation of the CRC in this area can be regarded as very positive.

Generally, the legal criteria for the limitation of detention of children is now in accordance with the CRC requirements of detention as last resort and for shortest appropriate time. Norway has, however, challenges in regard to a fully satisfying implementation of the CRC. To begin with, one may discuss whether there should be even more concrete and absolute requirements. The criteria for the use of detention are often value-laden and open for discretion, and the preparatory works are not always clear about the more specific requirements following from the CRC.¹²⁹

127. See LB-2015-119615 Judgement by Borgarting lagmannsrett of 06.10.2016, p. 14 and TAHER-2015-13241 Judgement by Asker og Bærum tingrett of 26.06.2015, p. 20.

128. See HR-2017-290-A, p. 10.

129. The proposal for a new criminal procedure act only has very few matches on the words relating to the CRC, see NOU 2016 *Ny straffeprosesslov* p. 24.

A further step forward could be to limit the possibility of pre-trial custody to certain serious crimes. This has also been suggested in the preparatory works as a potential future change.¹³⁰ Another option could be to articulate clearer criteria for the proportionality and necessity evaluation in order to emphasize that detention of children is highly intrusive and requires stronger reasons than detention of adults. It should here be mentioned that the proposal for a new Criminal Procedure Act seeks to limit the general use of custody, by articulating the principle of the least possible infringement and by requiring more serious criminality before custody can be used.¹³¹

It seems clear that the Police, Prosecutors, Courts and Correction Services seek to limit and carry out detention of children in accordance with the CRC. The Supreme Court has in this regard been an important factor in the development towards fewer children in court-ordered custody and prison. To a certain extent, however, court practice – in line with the most recent recommendations from the CRC Committee – indicates that there is a need for a further development of rules concerning *alternatives* to detention. In this regard, one may argue for a further development of suitable institutions in the municipalities that could be used instead of holding children in custody in cells in police buildings and prisons. An important matter for further research is how the criminal justice system and child care institutions can interact in order to secure the best for the child.

However, the willingness to regulate and use alternatives to detention seems to have some limitations – also in Norway as an advanced welfare state. When it comes to very serious crimes the criminal justice rationality seems to outweigh the CRC perspective. When such criminality is at stake, the courts regularly decide on custody and imprisonment. Thus, when it comes to serious criminality, the tension between the criminal justice and the CRC perspective is obviously present, although the CRC acknowledge that certain serious crimes committed by children could be met with long prison sentences. This is not least seen in the possibility of time unlimited preventive detention of children, which in our view should be abolished.

Therefore, the conditions for detained children become an important matter. The fact that the number of detained children in Norway is low can and should never compensate for a deficient treatment of these children. In this regard, Norway has still a way to go when it comes to the conditions for children in police custody. These conditions are far from satisfying, and there is also a problematic variation between police districts. This indicates a need for the articulation of clear

130. Prop.135 L (2010–2011), p. 59.

131. See further NOU 2016:24 p. 315 ff.

and absolute legal requirements regarding the conditions for children in police custody. Above all, however, to provide satisfying conditions for children requires resources. If there is a serious political will in implementing the CRC, there must also be resources invested in adequate buildings.

The development and establishment of prison Youth Units should, in this regard, be underlined as a major improvement of the conditions for detained children. There should, however, be paid attention to the risk of a ‘net-widening’ effect, where the existence of satisfactory prison institutions justify that children are imprisoned. In addition, it is important to invest in the long-term rehabilitation and reintegration of those that commit crimes as children. There should be an adequate rehabilitation process within the prison system for those children that serve longer sentences, also with regard to their transfer from Youth Units to regular prisons when they turn 18. It should here be remembered that the strict limitations of the use of imprisonment alters the prison population. Those children that are in prison today typically have diverse and complex problems, and are often at a low level of maturity compared to children of the same age.

More generally, Norway is far from having a separate and specialized criminal justice system for children, as is desirable in light of CRC Art. 40. Norway has no specific courts, or specialized judges. It has neither a specific criminal process for dealing with children. In addition, the available measures that may serve as alternatives to the use of prison are as described still limited. It is time that Norway invests in a higher level of specialization and education in the criminal justice system in order to meet the specific needs for the child. The question that must also be raised is whether Norway should seek to realize a separate criminal justice system for children, which in case will require significant resources. Compared to many countries, also similarly small countries, Norway lies behind in this regard.¹³² This can to a certain extent be explained by the specific topography of Norway, with many small local communities separated by mountains, and by the specific Norwegian pragmatic legal culture that has not favored specialisation.¹³³

In the end, we must think beyond the criminal justice system. Taking children’s rights seriously is difficult to reconcile with the inherent brutality of this system. Ideally, children committing crime should be taken care of long before a crime is committed, thus reducing the chances of its commission. It is well documented that many children that end up in criminality have a troublesome childhood, often

132. See Pruin (2010), pp. 1513–1556 and Dünkel et. al. (2010), pp. 1623–1690.

133. See Jørn Øyrehagen Sunde, *Managing the unmanageable – An essay concerning legal culture as an analytical tool*, in Søren Koch, Knut Einar Skodvin & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2017, Bergen: Fagbokforlaget, s. 15–16.

with early signs of problems.¹³⁴ In order to reduce the number of detained children, there must be sufficient focus on understanding these problems. An important way forward is engagement in kindergartens, schools and other institutions that can ensure mature child development without the need to consider crime and punishment.

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134. See inter alia Moffitt et al. (2002).

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ANNEX: INDICATORS FOR BETTER MEASUREMENT OF IMPLEMENTATION

We were asked by the editors to consider whether existing indicators assist in measuring implementation. Several indicators show that Norway as an advanced welfare state lives up to several of its children's rights commitments: first place in the KidsRights Index¹³⁵ and eleventh in the Realization of Children's Rights Index (RCRI)¹³⁶ However, our evaluation of the implementation of the CRC in the area of criminal justice and detention of children reveals the need for further improvement in Norway in realizing children's rights. This includes development of more specific indicators. While CRC indicators often have a broader focus, we here argue that it is important to develop more targeted indicators for the area of detention of children within the criminal justice system.

Within this area, it is important to differentiate between different institutional contexts and types of detention, i.e., police custody, court custody and imprisonment as punishment, because they raise somewhat different needs and ask for different evaluation criteria. It is within each of these types also important to formulate indicators that concern different structural, procedural and outcome measures, such as the existence of appropriate laws (structural), the level of training and expertise (procedural) and how the children in this context have actually benefited from the realization of their rights (outcome). We here base our argument in line with the tripartite model of indicators developed by for instance the European

135. KidsRights Index (2018).

136. Realization of Children's Rights Index (2018). Norway has a score of 9.15. Liechtenstein ranked as number one has a score of 9.42.

Union Agency for Fundamental Rights (FRA)¹³⁷ and the work laid down in the Manual for the Measurement of juvenile justice indicators by The United Nations Office on Drugs and Crime.¹³⁸ We therefore suggest the following structure, with indicators that should be developed (not an exhaustive list). Our suggested indicator area is *detention of children within the criminal justice system*. The number that we propose may be considered high (22) although much of this data should be relatively easy for the criminal justice sector to collect.

Looking at the first context or type of deprivation of liberty treated in this chapter, namely *police custody*, we argue that there is a need for indicators both at a structural, procedural and an outcome level. See summary in Table 1. The structural indicators must provide useful information of the extent of child involvement in crime, and the extent to which arrest powers are used in an appropriate manner by law enforcement authority with respect to children's rights. Against this background, we therefore suggest that there should be enforced structural indicators on firstly, the existence of time-limits for children to be held in police arrest in existing legislation. Although there has been a positive trend with regard to the time children spend in police arrest after the introduction of stricter standards,¹³⁹ it is nonetheless important to enable the measurement of the time children spend in police arrest on average in order to ensure that children spend the least amount of time as possible in this type of detention.

Secondly, we suggest that there is a need for the existence of legal obligation of supervision and monitoring of children in police arrest. As our evaluation has demonstrated, the supervision of children in police arrest may sometimes be done in a haphazard way, and is often based on discretion which in turn results in different practices between police districts. See also discussion on the next chapter on racial profiling. As the local police directives may vary from district to district, we hence argue that clear indicators capturing the existence (or lack thereof) of such supervision is needed. Such an indicator may enable a comparison across the different Norwegian police districts.

Thirdly, we propose that there should be developed indicators regarding the architectural conditions of the holding cells at the police stations. There is a striking difference between the conditions of the holding cells between the Norwegian police districts, which shows that a lack of adequate facilities for children. By developing indicators for architectural conditions, one may call attention to and evaluate the minimum standards for such conditions between the different police

137. European Union Agency for Fundamental Rights (2010).

138. The United Nations Office on Drugs and Crime (2006).

139. See subchapter 5.2. Children in police custody.

districts. Moreover, at the procedural level for police arrest, we argue that there is a need for indicators that capture the degrees of efforts made at state and regional level to implement training initiatives on how to handle children that are or are suspected of being in conflict with the law. Such efforts could be the existence and training of specialist counselling and support services for children in police arrest.

Finally, at the outcome level, we suggest that there is a need to formulate indicators that measure child-sensitive procedures for identifying age. Furthermore, we also argue that there is a dire need for developing clear, unambiguous and easily accessible data on the number of children in police custody and where they are placed (i.e. in an office or a security cell). Finally, we push for the development of indicators showing the number of alternative care placements available for each child held in police arrest.

TABLE 5.1 Indicators for children in police arrest

Level of measurement	What it measures
Structural indicators	<ul style="list-style-type: none"> • Time-limits in legislation • Existence of legal obligation of supervision of the child • Architectural conditions
Procedural indicators	<ul style="list-style-type: none"> • Training of police personnel • Specialist counselling and support services
Outcome indicators	<ul style="list-style-type: none"> • Child-sensitive procedures for identifying age • Data on the children in police arrest • Data on alternative care placements available

Looking at the second type, *court-ordered custody*, we also here suggest that at the structural level of measurement there should be developed indicators for the existence of time-limits for children held in custody and during a prison sentence. While the rules on time-limits for court-ordered custody and imprisonment that exist in Norway to date generally are in accordance with the CRC, we nevertheless suggest that this should be made more easily measurable in order to ensure that no children exceed the time-limit set by the CRC. Furthermore, as with police arrest, we also here suggest indicators of existence of legal obligation of supervision of the child in court-ordered custody. As the timeframe of court-ordered custody in Norway to a large extent reflects good practice of the CRC, it is nevertheless our opinion that continuous supervision may avoid unnecessary trauma for the children placed in court-ordered custody. At the procedural level of measurement, we also here suggest that there should be formulated indicators on training initiatives of personnel and programs for specialist counselling and support services. While

we have witnessed that today there exist robust regulations in the two Youth Units in Norway, we nonetheless see that children in court-ordered custody sometimes are transferred to regular prisons with the interdisciplinary team only as a secondary resource. Hence, we suggest that there should be developed an indicator indicating that all prison personnel should be trained to deal with children – even in regular prisons. For the outcome indicators, we propose the development of indicators on alternative care placements available (such as being placed in a childcare institution). Finally, we also suggest that there should be developed indicators on the number of *all* children in court-ordered custody, and it should be made clear whether the child is put in a Youth Unit or a regular prison. We also suggest that there should be developed data on the number of children in security cells.

TABLE 5.2 Indicators for children in court-ordered custody

Level of measurement	What it measures
Structural indicators	<ul style="list-style-type: none"> • Time-limits in legislation • Existence of legal obligation of supervision of the child
Procedural indicators	<ul style="list-style-type: none"> • Training of prison personnel • Specialist counselling and support services
Outcome indicators	<ul style="list-style-type: none"> • Data on alternative care placements available • Data on children in court-ordered custody and prison: a) Youth Unit/regular prison, and b) number of children in security cells

Finally, it is in our view that the third type of deprivation of liberty, namely *imprisonment*, should have many of the same indicators as court-ordered custody. See summary in Table 5.3. As with court-ordered custody, we also propose that the same indicators at the structural and procedural level of measurement should exist for children serving a prison sentence. However, in addition to the same indicators listed above, one has to take into account that imprisonment as a type of punishment can last for several years. Therefore, the children's development over time must weigh more heavily when it comes to children serving a prison sentence than for children in court-ordered custody. Hence, it is imperative to attend to the children's psychological, physical and social development, and ensure that *all* requirements of article 40 of the CRC – the promotion of the child's integration – are met. We thus emphasize the importance of the following outcome indicators: First, and in order to reflect whether the child's rights have been realized in a given context and have benefitted from the interventions and programs of actions, we suggest that there should be formulated indicators for education programs and vis-

its that are in line with the CRC art. 37 (3). It is of our opinion that there must exist stable and effective rehabilitation programs for all imprisoned children. This is particularly important for children in preventive detention.

Secondly, there should exist indicators on school and education programs available for all imprisoned children in order to secure that imprisoned children receive educational stimuli. While the imprisonment of a child is the strictest form for punishment, imprisoned children should *not* be deprived of an education or programs of action that may lead to, or be part of the process of reintegration back into society.

Thirdly, we suggest that there should be indicators that take into account the possibility of network and community development. Here, we emphasize the importance to the child of staying in contact with close and relevant network and/or family (save in special cases concerning e.g. honor violence). Such contact should include visits and correspondence with relevant network. The child should also be able to be part of a community with other children meaning that the child should serve prison sentences together with other youths and *not* with adults (unless this is deemed as the child's best interest).

Fourthly, we suggest that there is a need to develop specific indicators in relation to preventive detention. These indicators should measure the risk assessment of placing a child in preventive detention. Furthermore, they should assess the legal conditions for preventive detention and the justification of the reaction. Last but not least, we argue – as above – that there should be clear indicators on the number of children serving a prison sentence. Furthermore, this indicator should also provide information on whether the child serves its sentence in a Youth Unit or a regular prison, and include the number of children and time spent in security cells in order to provide a comprehensive overall picture of the reality for children in conflict with the law in Norway.

TABLE 5.3 Indicators for children in prison

Level of measurement	What it measures
Structural indicators	<ul style="list-style-type: none"> ▶ Time-limits in legislation ▶ Existence of legal obligation of supervision of the child
Procedural indicators	<ul style="list-style-type: none"> ▶ Training of prison personnel ▶ Specialist counselling and support services
Outcome indicators	<ul style="list-style-type: none"> ▶ Rehabilitation and education programs and visits with network ▶ Risk assessment of preventive detention ▶ Data on alternative care placements available ▶ Data on children in court-ordered custody and prison: a) Youth Unit/regular prison, and b) number of children in security cells

6

Policing

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ABSTRACT Policing is critical for children’s security but police are also responsible for preventing and addressing crime *by* children and younger persons. This can raise risks from a human rights perspective, especially as children are more likely to come in contact with police due to their greater presence in public places. The UN Convention on the Rights of the Child (CRC) sets out various protections concerning arrest and detention, and this chapter examines their implementation in Norway in law but especially in practice. The number of children arrested has been steadily falling but significant concerns remain about specific police practices. Three stand out and are the focus of the chapter: racial profiling, use of solitary confinement, and detention for immigration. The chapter is cautiously optimistic on progress on some other areas but especially critical as to the lack of measurement and denialism in other areas.

KEYWORDS policing | criminal justice | children’s rights | racial profiling | detention | immigration

6.1 INTRODUCTION

Police play an important role in protecting children *from* harm and form an integral part of child protection services. In Norway, police are tasked with receiving and investigating reports of abuse, violence and sexual assault against children (see Chapter 4, Sections 2 & 5). At the same time, police also are responsible for preventing and addressing crime *by* children and younger persons, which raises risks from a human rights perspective. In this respect, the Convention on the Rights of the Child (CRC) is relatively clear. Article 37(b) provides that children shall not be deprived of their liberty ‘unlawfully or arbitrarily’ and that detention

shall only be a measure of ‘last resort’ and for the ‘shortest appropriate period of time’. Children who are arrested or detained shall be ‘treated with humanity’ (Article 37(c)) and have the right to prompt access to legal aid and the right to challenge the decision (Article 37(d)).

The previous chapter dealt with the extent by which children are covered by criminal law and the implications of being found guilty of offences, especially the penalty of imprisonment. This chapter examines the relationship between children and police, partly in law but especially in practice. As criminological research indicates, children are more likely to come into contact with police than adults. In the USA, it has been observed that ‘young people have more frequent contacts with the police than adults due to their disproportionate involvement in law breaking and their greater presence on the streets (amplifying accessibility to the police)’ (Brunson and Weitzer, 2009: 858). In Norway, the number of children arrested has been steadily falling but significant concerns remain about specific police practices. Three stand out: racial profiling, use of solitary confinement, and detention for immigration. Each of these will be considered in turn in this chapter.

6.2 RACIAL PROFILING

Racial profiling has been the subject of extensive research and political debate in the United States and various European states (Open Society Justice Initiative, 2009b). In Norway, the situation is otherwise. Thus far, there has only been one study of the phenomenon: a qualitative investigation with participant observation and interviews with police and youth from ethnic minorities (Sollund, 2007a; 2007b).¹ Otherwise, the topic has been only addressed in media coverage of specific alleged incidents. In December 2017, the national statistics agency (SSB) admitted that it could not estimate the number of arrests and prosecutions that were affected by racial profiling (Andersen, Holtmark and Mohn 2017: 23). This dire shortage of quantitative as well as qualitative research on racial/ethnic profiling of both adults or children has persisted despite the issue constituting a regular concern of the Committee on the Rights of the Child and the European Commission against Racism and Intolerance.

1. Recently, interviews with a selection of young people with minority backgrounds in the five Nordic countries have also been published (Solhjell et. al., 2018). See discussion below in section 2.2.

6.2.1 CONCEPTS AND OBLIGATIONS

The term 'racial profiling' does not possess a coherent definition. Nonetheless, the UN Human Rights Council describe it as:

a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations, or for determining whether an individual is engaged in criminal activity.²

The concept of racial profiling has arguably acquired new momentum with the counterterrorism paradigm of the 21st century and the accompanying focus on prevention of radicalization and terrorism. Additionally, many criminologists argue that it has accompanied the shift from a post- to a pre-crime society, where the objective is to identify potential suspects and prevent future criminal acts (Janus 2004; Zedner 2007; Lomell 2012). In this paradigm, predictive profiling of certain groups or areas can become a natural part of police work. Research in the USA indicates that ethnic minorities are particularly vulnerable to profiling because of a range of structural and psychological factors. '*Street crime*' is often higher in economically distressed communities, which can result in increased police presence as well as easier crime solving, together with corruption and other forms of malfeasance (e.g. planting evidence). Studies also show that 'white' individuals can enjoy a 'halo effect' (Weitzer, 1999) and that discrimination may be embedded in police forces – with racially derogatory language remaining part of the everyday discourse of police officers (White, Cox, and Basehart 1991) and evidence of implicit racial bias amongst many police officers (Spencer et al., 2016).

While the use of ethnicity may be legitimate and apposite when used as descriptive terms, it becomes morally problematic when used to detect criminal behaviour. Legally, if the police behave differently towards a child based on his or her race or ethnicity, in the absence of an objective and reasonable justification, international and domestic obligations concerning discrimination may be violated.³ In this respect, it is noteworthy that the Koblenz Administrative Court in Germany ruled in 2012 that skin color cannot be the decisive factor leading to an identity check; and use of such a criterion is a clear violation of the constitutional ban on

2. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/080/01/PDF/G1508001.pdf?OpenElement>

3. *Kennedy v. Trinidad & Tobago* Communication No 845/1999, UN Doc. CCPR/C/67/D/845/1999 (UN Human Rights Committee).

discrimination.⁴ Furthermore, questions of indirect discrimination may arise as the effects of certain police behaviour may affect children of a certain race or ethnicity disproportionately.⁵

The right to non-discrimination is enshrined in Article 2 of the CRC. States' Parties shall respect and ensure the rights 'without discrimination of any kind', and the grounds of discrimination that would be most relevant for racial profiling in Norway would be a child's or his or her parents' or legal guardian's 'race', 'colour', 'language', 'religion', and 'national, ethnic or social origin'. In its general comments, the CRC Committee has not explicitly dealt with racial profiling. However, in General Comment No. 6, it stated that policing of foreign nationals relating to the public order

are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis (para 18).⁶

Furthermore, in General Comment No. 10, the Committee stated that 'particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children' such as children belonging to racial, ethnic, religious or linguistic minorities.⁷

6.2.2 INTERNATIONAL CRITIQUE OF NORWAY

International attention has been drawn to the deficit in research on racial profiling in Norway. As early as 2008, the European Commission against Racism and Intolerance (ECRI) wrote in its report on Norway that addressing racial profiling practices and advancing the confidence of the population of immigrant background was a 'key challenge' for the Norwegian police.⁸ While not specifically concerned with children, the report stated that ECRI had 'continued to receive information indicating that racial profiling, notably in stop and search operations carried out

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4. 'Court bans police racial profiling', *DW*, 31 October 2012. Available at: <https://www.dw.com/en/court-bans-police-racial-profiling/a-16347425>
 5. *D.H. v. Czech Republic*, Application no. 57325/00, Judgment 7 February 2006 (ECtHR).
 6. CRC Committee, General comment No. 6 on Treatment of unaccompanied and separated children outside their country of origin, Thirty-ninth session, 17 May–3 June 2005.
 7. CRC Committee, *General Comment No. 10 on Children's rights in juvenile justice*, U.N. Doc CRC/C/GC/10 (2007).

by the police' was common in Norway.⁹ It was highlighted as an issue that Norwegian authorities should address particularly. The Commission emphasized that Norway should prioritize the implementation of in-depth research on racial profiling, including observation of police activities in order to identify racial profiling practices (ECRI 2008: 10).

According to the 2012 ECRI report, Norwegian authorities had informed the Commission that racial profiling 'does not exist in the police's modus operandi' (p. 7). The Police Directorate reiterated the statement in 2016, asserting that the police do not conduct racial profiling and that there is zero tolerance for racism within the police force.¹⁰ Moreover, former minister of Justice and Public Security, Anders Anundsen, told the Parliament in 2016 that the police receive few complaints on discrimination. In 2014, the police received 736 complaints, whereby 25 of these concerned ethnic or racial discrimination.¹¹

The ECRI report did, however, note that other sources indicated that there had been complaints that public security officials had used 'racial profiling techniques to stop and search members of vulnerable groups' (ECRI 2012: 7). In the two reports following the fourth monitoring cycle in 2008, the Commission concluded that the recommendation of both monitoring and researching racial profiling practices by the police in Norway had not been implemented. However, ECRI did highlight the advantageous outreach activities conducted by the Oslo police towards minority groups and training of police officers in cooperation with NGOs.

6.2.3 EXISTING RESEARCH IN NORWAY

Turning to the existing research, the only authoritative study on the topic is by Sollund (2007a). She formally interviewed 18 persons with minority background and 20 police officers, participated in 38 police patrol shifts and informally interviewed 88 police officers while on patrol, and spent some days within a police station. Her results are mixed. She observed that police engaged in 'few unjustified stop and

8. Fourth Report on Norway (2008), p. 8. <https://rm.coe.int/fourth-report-on-norway/16808b597a>. FAFO researchers Anne Britt Djuve og Jon Horgen Friberg report that only 57% of first-generation migrant youths from Africa and Asia report confidence in the police. The figure for second-generation migrants from these regions is 68% and 'ethnic Norwegian' youth 78%. See: FAFO, *Elevers tillit til politiet*, <https://www.faf.no/index.php/om-fafo/nyheter/item/tilliten-til-politiet-hos-elever-i-videregaende-skole>

9. *Ibid.*, para. 8.

10. Utrop (2016).

11. <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=65790>

search incidents involving ethnic minorities, and if so, only soft approaches' (p. 80). She acknowledged that it was likely that the police were aware of her presence although felt that 'what is revealed of police conduct during field-work is what usually takes place amongst them' (ibid). Yet, most ethnic minority informants found reported 'the experience of being unjustly targeted', which they attributed to racism; and Sollund concludes that ethnicity does seem to play some role in who is targeted. This results in a form of 'typological guilt', an 'assumption that these persons may have committed or intended to commit crime, based on their appearance' (p. 90). Sollund also expresses concerns that the discourse on ethnicity in private police spaces may also have an effect on police practices.

In a more recent study of all Nordic countries, 121 young people with minority background between the age of 15 and 25 were interviewed on their experiences with the police (Solhjell et. al., 2018). These recollections repeat the same patterns as reported by Sollund, although more report incidents of police violence in Norway. The authors of this study conclude that ethnicity is one of five factors that appears to trigger greater police attention. The others were clothing, congregating or walking in groups, living in specific neighbourhoods, and gender (i.e., male).

Sarah Abraham, senior advisor at the Norwegian Police University College, has recently confirmed the apparent scarcity in research on racial profiling in Norway. In August 2016, she told *Politiforum* (Mortvedt and Trædal, 2016), that racial profiling has not been systematically examined in the Norwegian police and remarked that there is a lack of research into the routines of the police, thereby preventing a quantitative analysis to ascertain whether the police stops persons on basis of their skin colour. The lack of research is remarkable considering the considerable literature in countries such as USA and United Kingdom (see overview in Brunson and Weitzer, 2009) but also Sweden and Denmark (Hydén, 2006; Uhnö, 2015). Abraham called for an increased focus on racial profiling in the curriculum of police students; and she referred to the report *Politiet mot 2020* (Politidirektoratet, 2008), concerning the staffing and competency requirements of the police, which discovered that the police suffered from a lack of expertise in their work with minorities.

The use of racial profiling by the police in Norway is also commonly discussed in relation to immigration control. Police conduct such control practices with the intent to determine whether persons have a valid residence permit in Norway, pursuant to the Immigration Act § 21. Immigration control is further regulated in the Police Directorate's circular letter RS2010/009.¹² The police may stop a person

12. *Politiets utøvelse av utlendingskontroll på territoriet, herunder i grenseområdene*, Politidirektoratet, 2001, RS 2001/021 Available at <https://www.nidsenter.no/fag/juss/rundskriv/>

and request proof of identity when there is reason to assume that the person in question is a foreign national and the time, place and situation give grounds for such check. Akhenaton de Leon, leader of the Norwegian NGO OMOD (*Organisasjon mot offentlig diskriminering*) has argued that despite the legitimate objective underpinning this rule, the police should be aware of the consequences such checks may give rise to, arguing that such practices generate a loss of trust of the police, particularly amongst people that are stopped repeatedly (Mortvedt and Trædal, 2016).

6.2.4 REFLECTIONS AND EVALUATION

The deficiency in statistics and in-depth analysis on racial profiling on children by the police prevents any definitive remarks about the existence of such practices in Norway. Moreover, accusations can be difficult to validate, and the sources should be reviewed carefully. Nonetheless, while it is imperative to recognize that investigations into racial profiling are inherently complex, four points can be made.

The first is that the UN Working Group of Experts on People of African Descent has stated that consistent denial by authorities without evidence can worsen the problem. In their words, in the case of one state, 'The repeated denial that racial profiling does not exist in Germany by police authorities and the lack of an independent complaint mechanism at federal and state level fosters impunity' (Feb. 2017).

The second is that several non-academic sources provide details of racial profiling by the Norwegian police. When the Committee on the Elimination of Racial Discrimination in 2015 reviewed Norway in 2015, several NGOs raised concerns about the police authorities' deficient competence in relation to diversity and discrimination in Norway, accentuating that male minority youth experience discrimination from the police when stopped and questioned, furthermore, arguing that 'there are indications of racial profiling taking place on a regular basis, especially in regards to minority youth' (The Norwegian Centre Against Racism, 2015: 48–49). Media accounts of racial profiling of children have seemingly increased in recent times or gained more attention. A recent high-profile incident in February 2018, in which two youths in a McDonalds restaurant were subject to a full body search and photographing by police led to a protest outside parliament and complaints to the special police unit on the basis that this was too common an occurrence.¹³

13. Arnsten Linstadog and Christian Boger, 'Organisasjoner mener politiet spesielt går etter Oslo-ungdom med mørk hud. Lørdag demonstrerer de', *Vårt Oslo*, 2018.

The third is that academic research reveals two tendencies, which suggest a number of legal conclusions. One is that there may be a very small group of police officers that actively engage in ethnic profiling of youth and adults, and occasionally with violence. This accords with the interviews in NCHR (2016) and Solhjell et. al. (2018) and is possibly reflected in the statement by one police officer to Sollund (2007a: 84) as to the variation of political views amongst police officers. The other is that ethnicity may have been institutionalised or socialised in police's patrolling and interviewing practices. This conclusion is certainly drawn by all three above-mentioned studies although to slightly different degrees. To the extent that ethnicity is an indicator used by police (consciously or unconsciously), it raises questions as to whether there is discrimination. Such use of ethnicity, including skin colour, can be only justified if there are reasonable and objective criteria. Certainly, if ethnicity is the *dominant* reason for police intervention, the defence to discrimination would not be met. As the Committee on Child Rights has stated that in the policing of foreign nationals, there must be an 'individual rather than collective assessment'.¹⁴ Moreover, even if ethnicity is only *a* reason for police intervention, current police practices may fall foul of the proportionality test.¹⁵ We can ask: Are police practices structured in such a way that youths with minority backgrounds must needlessly suffer discrimination in effect? If there are alternatives as to how and what manner youths are targeted, have these been investigated and implemented? Moreover, if police resources are disproportionately targeted in areas in which there are many youth with minority background, there are questions of indirect discrimination. For example, research indicates that most marijuana use among young people in Oslo occurs on the west side but police resources are predominantly used in the east side, in which there are disproportionately more children with a minority background (Acharki, 2018). Given that marijuana use is a very common reason for stop and search by police, the geographic allocation of resources may suggest indirect discrimination in practice.

Finally, the burden is arguably with the authorities to prove, with research, that racial profiling does not exist. After a decade of critique from international mechanisms and domestic organisations, the ball is in the court of the authorities to demonstrate that racial profiling is not present and/or that there are effective mechanisms in place to prevent its occurrence. Organizations in Norway have recommended, without success, a number of practices that could be introduced including 'receipts' for every police stop; and Open Society Justice Initiative (2009a; 2009b) have recommended a range of best practices based on research

14. See section 2.1 above.

15. See section 2.1 above.

and police experiences in Europe. This lack of responsiveness and evidence suggests that Norway sits with the burden of proof in demonstrating that police do not engage in racial profiling and that it has taken sufficient action to prevent such abuses of power.

6.3 ARRESTS AND SOLITARY CONFINEMENT

A decade ago, the number of children arrested and detained attracted significant attention. In 2010, as Figure 1 demonstrates, 2076 children were detained by the police according to official police records. Domestic organisations, the law associations and international supervisory bodies were highly critical.¹⁶ Since then, levels of police detention have declined considerably. The three-fold reduction in overall arrests is also matched in the reduction of detention of children under the age of 15, who are not subject to criminal law and who cannot be lawfully detained. In 2010, there were 49 in this category but only 10 in 2015.

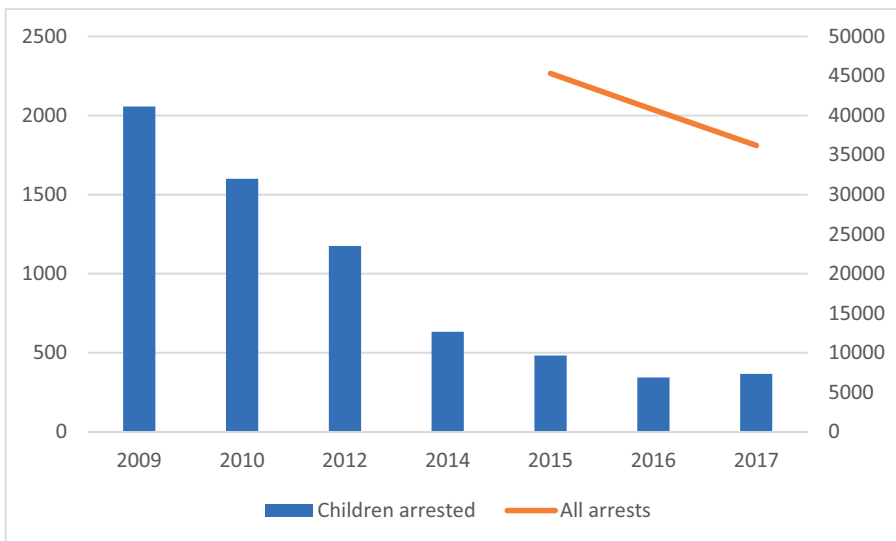


FIGURE 6.1 Arrest and Detention of Children 2009–2016.

16. See, e.g., *Advokatforeningens årstale 2010*; *Letter from Children's Ombudsmen to Police*, 28 February 2011; Rolv topdahl, 'Det er bare spørsmål om tid før et barn tar livet sitt i politiarresten', *NRK*, 18 February 2013; UN Children Rights Committee, *Concluding Observations on Norway*, 29 January 2010, para. 58.

The government claimed that this was a conscious response to concerns and criticisms although the same period has also seen a reduction in the overall number of arrests (see Figure 6.1). However, the decline in the arrests of children may be the result of other factors, such as the police reform which some claim has taken time away from frontline policing. Moreover, there was a slight increase in the number of children arrested in 2017, although it is noted by the police that in East Norway there has been many cases of grave and violent criminality (Politiet, 2017: Annex 1, s. 8). It is also important to note that the number of penalties imposed on children has increased. In 2017, prosecuting authorities imposed 15221 criminal penalties on children (Politiet, 2017: 12) This represents an increase of 15 percent since 2016 and the highest since 2012, and is regarded by police as a positive development since it demonstrates their concern with ‘minor criminality’ (Politiet, 2017: *ibid*).

The positive downward trend in police detention rates is not been necessarily matched by a commitment to remove one of the most problematic aspects of Norwegian and Scandinavian policing: the use of solitary confinement. In many or most cases of arrests of children, solitary confinement is used. In most instances, the confinement lasts a period of 1–24 hours while in a small number of cases it can be for many weeks. However, as we shall see below, Norway has received considerable critique for the use of solitary confinement. This is particularly because there is significant evidence that prolonged solitary confinement has deeply harmful psychological and physical effects (Smith, 2006).

Already in 1989, the UN Human Rights Committee (1989, para. 68–69) expressed a wish to receive more information on, *inter alia*, time-limits governing resort by prison authorities to solitary confinement or the use of security cells; clarification as regards detention in mental health institutions; time-limits for preventative detention, and the placing under special observation. In 2006, it expressed ‘concern’ about ‘solitary confinement and the possibility of unlimited prolongation of such pre-trial confinement, which might be combined with far-reaching restrictions on the possibility to receive visits and other contact with the outside world... [and] the continued use of pre-trial detention for excessive periods of time’ (Human Rights Committee, 2006, para. 13–14, see also 16). Five years later, the same concerns were reiterated (Human Rights Committee, 2011, para. 10, 12, 13).

Equally, the Committee against Torture (2002c, para. 84–86) has expressed continued concern about pre-trial solitary confinement (see overview and analysis in Langford et. al 2017). In 2008, it noted satisfaction regarding an amendment to the Criminal Procedure Act to reduce the ‘overall use of solitary confinement and to strengthen... judicial supervision,’ and guidelines on family notification, law-

yers and healthcare access. However, the committee expressed concern about the 'lack of adequate statistics validating the effectiveness of these measures.'

In practice, the use of solitary confinement has remained the most common form of detention. In 2013, almost all of the approximately 1000 children detained were subjected to solitary confinement. This was partly ameliorated by law reforms which reduced the amount of time to 24 hours, but the practice continues, and most cells are not child-friendly in any respect. Norway, like Sweden and Denmark, has consistently opposed demands for reforms on solitary confinement, whether for adults or children. However, the government's loss in an appeal, in which a court ruled solitary confinement of an adult unlawful in 2017,¹⁷ and official acknowledgements that police cells are not suitable for children – and raise psychological risks and the potential for suicide – is at least one sign of progress. It is also notable that in the Police in their 2017 report notes that a number of general measures are used to try and dampen the effect of solitary confinement (Politiet, 2017: Annex 1, p. 8). This includes use of arrest as a last resort, placing of a child with an adult in an office rather than a cell, an open door to a cell with an adult person nearby, regular inspection and offers of food and a walk, offer on conversation and contact with guardians. It is also reported that in some police districts there is an offer of cells with a TV and a bathroom. These ameliorative measures seem positive but there is no indication as how much they are used or when alternatives to solitary confinement will become standard practice.

Overall, the reduction of the number of arrests is positive as it also means in practice a lower usage of solitary confinement. While police have sought to ameliorate the effects of solitary confinement, it continues for many children in practice. It is also noteworthy that the number of criminal penalties imposed on children has increased significantly in the past year.

6.4 IMMIGRATION DETENTION

The discourse on immigration detention has acquired considerable momentum in Norway over the last years, alongside an increasingly restrictive immigration law and an intensified political focus on the importance of forced returns.¹⁸ A particularly vexed issue is the arrest and detention of children and whether such practices are in conformity with Norway's obligations under the CRC. Increased

17. 13-103468TVI-OTIR/01, District Court, 2 June 2014.

18. Puntervold Bø (2013) p. 135. See also <https://www.aftenposten.no/norge/i/eK6O/Politiet-har-fatt-instruks-om-a-tvangsreturnere-9000-migranter-i-ar>

attention was given to the issue in the spring of 2017, when the Borgarting Court of Appeal found that the State had violated *inter alia* the CRC, after having detained an Afghan family, including four children aged 7–14 years old, for 20 days at Trandum Detention Centre. The Court relied considerably on the ECtHR’s decisions of July 2016, which found that France had violated Articles 3, 5 and 8 of the ECHR when detaining families with children that were to be forcibly returned.¹⁹ The rulings have additionally prompted legislative amendments in relation to the detention of children pursuant to the Immigration Act, however, primarily consisting of clarifications of the existing legal framework.²⁰

6.4.1 APPROPRIATENESS OF DETENTION

Research on the wider impact of immigration detention indicates that children are negatively affected by detention, both physically and mentally. The UNHCR has unequivocally called for an end to its usage, with experts stating that detention is never in the best interest of the child, moreover, emphasizing that even short periods of detention can have an *‘adverse and long-lasting effect on a child’s development’*.²¹ A recent study into the international academic literature on immigration detention found consistent confirmation of how children that have been detained often experience impairments such as anxiety, depression, sleep deprivation and post-traumatic stress (Bosworth 2016: 4).

Recognition over the potentially grave consequences that immigration detention of children can give rise to has also been brought to the fore in Norway. Criticism has been directed against Trandum Detention Centre by the Committee on the Prevention of Torture,²² moreover, the Parliamentary Ombudsman published a report in 2015 which acknowledged that while a considerable effort had been done to adjust the physical surroundings appropriate to the well-being of the detainees, Trandum Detention Centre *‘does not appear to be a suitable place for children’*,²³ highlighting instances of riots, self-harm, suicide attempts and the use of coercive measures. The Norwegian Psychological Association reached the same conclusion after its visit the same year.²⁴

19. LB-2016-8370; A.B. and others v. France (11593/12), R.M. and others v. France (33201/11), A.M. and others v. France (24587/12), R.K. and others v. France (68264/14) og R.C. and V.C. v. France (76491/14).

20. LOV-2018-04-20-9, see Section 106 c.

21. UN experts’ statement on International Migrants’ Day 2016; see also UNHCR statement 2017

22. Committee on the Prevention of Torture (CoE) report on Norway 2011, p. 20.

23. The Parliamentary Ombudsman report (2015), p. 3.

24. Norwegian Psychological Association report (2015), p. 10.

Furthermore, investigations into children's perceptions of being detained at Trandum Detention Centre show that children consider themselves to be imprisoned, with a clear recognition of being deprived of their liberty.²⁵ These perceptions are reinforced by the element of control that permeates the mental and physical reality of being detained, exemplified by body searches; surrounding barbed wire fences; surveillance monitoring; doors that are locked and the inability to move around freely. In addition, children who are detained typically experience feelings of being unsafe due to loss of daily routines and may be subjected to further uncertainty on basis of parents' distress.²⁶

Statistics demonstrate that there has been a decline in detention of children in the period of 2013–2016. Various government sources on the use of arrest and detention of families with children pursuant to the Immigration Act, highlight that families are almost exclusively arrested where deportation can be carried out quickly.²⁷ However, the statistics show that a significant number of children have been detained for more than 24 hours, despite repeated warnings about the harmful effects detention of children brings about.

TABLE 6.1 Children at Trandum Detention Centre 2013–2016²⁸

Duration	2013	2014	2015	2016	Total
< 24 hours	180	230	48	86	544
1–3 days	27	90	34	44	195
4–7 days	12	3	2	5	22
7–21 days	9	6	4	5	24
21–60 days	4			3	7
More than 60 days		1	1		2
Total	232	330	89	143	794

Examination of ten judgments from Oslo District Court in 2016, where immigrant families with children were detained, reveals that the Court recognized that Trandum Detention Centre is not suitable for children.²⁹ Nonetheless, the decisions demonstrate that the Court rarely considered alternatives to detention specifically

25. NOAS report (2017), p. 57.

26. Norwegian Psychological Association report (2015), p. 10.

27. See e.g. Innst. 78 L (2011–2012) s. 14; Prop 126 L (2016–2017) p. 48.

28. Prop 126 L (2016–2017) Table 7.1 p. 48.

and, moreover, often bypassed any specific consideration of whether it is absolutely necessary to detain the child in question. Instead, the Court accentuates how it is in the best interest of the child not to be separated from its parents, which thus renders detention of the child proportionate.

6.4.2 LIMITATIONS ON THE ARREST AND DETENTION OF IMMIGRANT CHILDREN

An imperative distinction between detention pursuant to the Immigration Act and the Criminal Procedure Act is that the objective of the former is to secure the implementation of an administrative decision, typically to ensure that the foreign national does not evade the implementation of a decision entailing that he or she must leave the country.³⁰ While detention pursuant to the Immigration Act is not punishment as such, there is arguably an apparent punitive element associated with immigration detention, as it deprives the persons involved of their liberty. This is evident both in terms of how detention is involuntary and particularly in relation to how detainees are confined to facilities that to a considerable extent have similarities with prisons and often are perceived as such, especially by children.³¹

The Criminal Procedure Act prohibits detention of children below the minimum age of 15 years. The Immigration Act, however, does not contain such a limitation. Section 106 of the Act provides that a foreign national may be arrested and detained, provided that certain defined conditions are met, regardless of age.³² It is established in several preparatory works that immigrant children below the age of 15 may be arrested and detained.³³ It was further established in the above-cited judgment from Borgarting Court of Appeals in May 2017 that the Immigration Act gives sufficient legal basis for detaining immigrant children accompanied by their parents who are under the age of 15.³⁴

However, the absence of a *clear* basis in the Immigration Act for detaining children accompanied by their parents is arguably a distinctive and considerable

29. The ten judgments are: 16-126413ENE-OTIR/01; 16-099607ENE-OTIR/01; 16-136285ENE-OTIR/03; 16-136302ENE-OTIR/03; 16-042565ENE-OTIR/04; 16-042590ENE-OTIR/04; 16-081212ENE-OTIR/05; 16-081212ENE-OTIR/05; 16-118305ENE-OTIR/06; and 16-090811ENE-OTIR/07.

30. Immigration Act § 99 (2).

31. Norwegian Psychological Association report (2015), p. 2.

32. Immigration Act § 106 a-h.

33. See e.g. Ot.prp.no. 75 (2006–2007); Prop. 138 L (2010–2011).

34. LB-2016-8370 p. 21

weakness and has repeatedly been emphasized by scholars and various NGOs.³⁵ Attention has further been drawn to the fact that the Immigration Act, until legislative amendments in April 2018, did not provide specific limitations on when children may be arrested and detained, as it only referred to the Criminal Procedure Act and that Sections 174 to 191 of the Act shall apply 'insofar as appropriate'.³⁶ Critics emphasized that the legal framework could be viewed as unpredictable and that the mere reference to the provisions in the Criminal Procedure Act was arbitrary and could cause unequal and differential treatment.³⁷ The amended section, however, emphasizes that children shall not be arrested unless it is especially necessary and that detention shall not take place unless it is considered absolutely necessary, thus reflecting the wording of Sections 174 and 184 of the Criminal Procedure Act.

The preparatory works of the Immigration Act specified that the necessity requirement shall be understood as an absolute requirement – to permit detention only when there are no other alternative measures available. Furthermore, in the recent decision, the Borgarting Court of Appeal has stated that the condition that arrest and detention must be absolutely necessary is not only contingent on a common linguistic understanding of the term, but also requires consideration of alternatives to detention.³⁸

Section 106 (1) (a-h) of the Immigration Act stipulates various grounds for when a foreign national may be arrested and detained. The potential grounds do not distinguish between children and adults, as the wording of Section 106 applies to 'a foreign national', the exception being Section 106 (1)(g) and (h). The newly added Section 106(c) additionally stipulates certain conditions that must be met in order to detain pursuant to Section 106 (1)(a)-(h), furthermore, that children should normally not be arrested for more than 24 hours and that the child must be presented before a court if the arrest shall be extended. Moreover, a child may be detained for 72 hours at a time, which shall not be exceeded, unless particularly strong reasons warrant it. The child may be detained for nine days at a maximum.

Examination of the 2016 court decisions shows that the requirement of absolute necessity for detaining a child is only explicitly mentioned in half of the decisions, even though detention of the child or children in question is granted. This is arguably problematic, as it prevents recognition of which elements the Court has considered when determining that detention is unavoidable, including less intrusive alternatives such as those stipulated in Section 106 (2), which provides that the

35. See e.g. Husabø and Suominen (2012) p. 40.

36. Immigration Act § 106 (3).

37. See e.g. NOAS report (2017) p. 10; LB-2016-8370, pp. 10; 12

38. LB-2016-8370 p. 40.

arrested person can be placed under an obligation of notification to the police; or to stay in a specific place, typically at an asylum reception centre.³⁹ Only one of the 2016 district court rulings considers such alternatives specifically.⁴⁰ In addition, measures according to the Child Welfare Act Chapter 4 may be considered, on basis of statements from the Child Protection Service, which is notified when a child is detained at Trandum.⁴¹ The latter alternative would, however, typically entail that the child would be placed in an emergency home, and thus separated from its parents, which is not considered to be in the best interest of the child in the court decisions that considers this alternative specifically.

A recurrent aspect of the 2016 court decisions is that the risk of evasion is accentuated as the primary explanation to why detention is both necessary *and* the reason as to why alternatives to detention are not applicable. This could be seen as problematic, given that the threshold for establishing risk of evasion is low. While the objective conditions for detention thus easily can be fulfilled, it is arguably pertinent to question whether the risk of evasion is given excessive weight, to the extent that it automatically exceeds other considerations such as the best interest of the child.

Furthermore, as only half of the 2016 decisions considered explicitly refer to the condition that detention of children can only occur if absolutely necessary, it is essential to question whether the safeguards against unlawful detention of children are applied too leniently. Irrespective of the absence of any direct reference to the provision, there is nonetheless limited consideration of why the child is to be detained in all of the assessed rulings. The Court typically finds that there is risk of evasion on basis of the parents' actions, which as a result renders it absolutely necessary to detain the child, regardless of whether the requirement of absolute necessity is considered specifically. Rather than providing a comprehensive consideration of the legal requirement, the Court rather assesses whether it is the best interest of the child to be detained together with its parents. The threshold for establishing absolute necessity is thus bypassed which cannot be seen as anything but a considerable deficiency, regardless of whether it is done deliberately or not.

The Borgarting Court of Appeal recognized this limitation in its May 2017 judgment. The Court maintained that it is not sufficient to establish that the conditions for detaining the respective parents are fulfilled, with an ensuing deliberation over whether it is in the best interest of the child to be detained with its parents. Such interpretation renders the special conditions that exist for detaining

39. Immigration Act § 106 (2), cf. § 105.

40. 16-042590ENE-OTIR/04

41. Criminal Procedure Act § 183 (3).

children void of any legal force and the condition that detention of children must be absolutely necessary thus loses its material content.⁴²

The Ministry of Justice has stated that it is very rare that it will be considered sufficient to detain only one of the parents, as it will not provide sufficient protection against risk of evasion.⁴³ The 2016 decisions attest to this understanding, as none of the rulings finds it sufficient to detain only one parent where both are present, and because of practical considerations such as deporting the family at the same time, renders detention of only one parent insufficient. As noted in the Borgarting judgment from May 2017, children below the age of 15 will rarely be willing or able to go other places than where their parents are. In the judgment, the Court states that the condition concerning the risk of evasion in the Immigration Act coheres poorly with the need to avoid the detention of children, and raises the question of whether children that are not at risk of evading a decision can *ever* be arrested and detained.⁴⁴ Moreover, it could be argued that if the risk of evasion occurs as a result of the arrest, detention may occur on basis of practical matters, such as facilitating deportation, rather than because it is absolutely necessary to detain.

All of the examined court decisions from 2016 illustrate how immigrant children are detained due to a consideration of their parents' likely actions and with varying consideration of the special conditions that regulates detention of children, as this is substituted by a best interest of the child assessment that limits a comprehensive deliberation over potential alternatives to detention. Accordingly, there are arguably sufficient grounds to question whether the application of the Immigration Act is in compliance with Article 37 (b) of the CRC and the requirement that detention shall only occur as a measure of last resort.

In December 2017, the Government announced that it would no longer be sending families and their children to Trandum. On 30 December 2017, a new interim family centre was opened in Hurdal, and a new permanent centre is, at the time of writing, due to open at Eidsvoll. Families will have two rooms in addition to collective space but cannot leave the building without police escort. While the new solution carries less characteristics of detention, the actual implementation will deserve close consideration. Moreover, question marks remain over the legislation and the policy and practice could shift again.

42. LB-2016-8370 p. 33–34.

43. Prop 126 L (2016-2017), p. 87.

44. LB-2016-8370 p. 32.

6.5 CONCLUSIONS

Policing is critical for children's security but also raises risks from the perspective of the Convention on the Rights of the Child (CRC). This risk is heightened by the regular contact between children and police due to the greater presence of children in public places. This chapter has argued that there have been some significant improvements by Norway after sustained criticism on the use of police detention for children and Trandum detention centre for families under deportation orders. However, the state has refused to take steps to determine to what extent policing decisions are being guided by racial profiling and ensure that solitary confinement is the rare exception during detention of children.

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7

Poor, but Included?

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ABSTRACT This chapter examines the relationship between monetary poverty and the social wellbeing of children in Norway. Poverty not only has immediate material consequences for children but increases the risk of social marginalization and hampers future life chances. This chapter asks whether Norwegian policies are adequate in order to secure children decent living conditions; economically or materially as well as socially. Examining laws and conventions concerning the rights of poor children and empirical evidence of children's living conditions, it provides a partly mixed picture of progress and presents some of the dilemmas policy makers face when children's rights are implemented. Finally, measures to improve children's living conditions in Norway are presented.

KEYWORDS poverty | living conditions | participation | social inclusion | children's rights | CRC

7.1 INTRODUCTION

An important aspect of children's rights is the possibility of growing up in non-poor households. Poverty limits access to basic necessities, it affects the likelihood of taking part in social activities and it affects the dignity and self-worth of individuals. In this chapter, poverty among children in Norway is discussed, by focusing on indicators of children's economic and social well-being and the measures implemented to deal with children's rights.

For decades, Norway has had great success in protecting most families with children from poverty. Compared to most other countries the 'at-risk-of-poverty' rate¹ has been low. Norway still enjoys a favourable position, comparatively spea-

1. The at-risk-of-poverty term is used by Eurostat. The at-risk-of-poverty-threshold is set at 60% of the national **median** equivalized disposable income after **social transfers**. The income is equivalized to take differences in household composition into account.

king, however since the 1990s, an increasing number of children are experiencing poverty during their childhood. The share of children below the age of 18 living in a household experiencing risk of long-term poverty² was four percent in the period 1997–1999, while the share increased to more than 10 percent in the period 2014–2016. Previously the adult population had the highest at-risk-of-poverty rate, but now the risk of poverty among children slightly exceeds that of adults (StatBank, SSB).

An important explanation for this development is the demographic change of Norway, with an increase of immigrant families. On average, some of the larger immigrant groups have larger family sizes than families of Norwegian origin and the work intensity is lower (Epland & Kirkeberg 2014). The wage level is also low among many of the immigrant workers. Hence, the likelihood of falling below the poverty line is higher for immigrant families than for families of Norwegian origin. It must, however, be noted that there has been a rise in the number of low-income families also among native Norwegians, especially among single parent families (Epland 2018). In addition to demographic changes, the increase of children in low income families is also related to the fact that some of the transfers often received by families with children have not been regulated according to the overall price- and wage-rise. This is amongst other things a case for the universal child benefit.

The increase in risk of poverty among children is worrisome for many reasons. In Norway, equal distribution is a pervasive ideal, and the mere existence of child poverty violates this ideal. Child poverty is also problematic because children are dependent upon their guardians and have no possibility to improve their situation on their own. Furthermore, child poverty affects children's conditions negatively here and now and poor children have an increased risk of social marginalization. In addition, poverty may not only affect the childhood living conditions, it may also hamper the future life chances of children. The family income affects children's likelihood of completing secondary education (Bratsberg 2010), and poor children have an increased risk of experiencing poverty themselves as adults (Lorentzen & Nielsen 2009). An overrepresentation of emotional problems among children from families of lower socioeconomic status as well as from low income families has also been shown (Bøe et al. 2012; Bøe et al. 2016; Bøe, et al. 2017a; Bøe et al. 2017b). The correlation between family income and children's living conditions speaks directly to the Convention on the Rights of Children (CRC). According to the CRC, children have the right to a standard of living that

2. Risk of long-term poverty is measured by income below 60 per cent of the average national median in a three-year period.

is good enough to meet their physical and mental needs (Article 27) and they should be able to engage in recreational activities and cultural life (Article 31). If children are at risk of being socially excluded this violates their rights, regardless of whether they are excluded because of poor economy or due to other reasons.

Last, but not the least, child poverty may have long-term negative effect on welfare state sustainability. High employment rates and low numbers of welfare state dependants are a prerequisite to preserve the generous and universal welfare state. If children are not provided the best opportunity to fulfil their potential so that the human capital of society is maximized, the prospects may be that in the future fewer young people will enter the labour market and more young people will be dependent on public allowances to make a living.

Since there are children in Norway living in families experiencing low incomes for a prolonged period of time, and since the problem is increasing, it is relevant to ask whether Norwegian policies are inadequate in order to secure children decent living conditions; economically or materially as well as socially. Moreover, when the problems of poverty and social exclusion are persistent or even increasing, is that a violation of children's rights?

In an international perspective, there is little doubt that poverty denies children their rights. Looking to the developing world, children living in absolute poverty³ are likely to suffer from hunger, malnutrition, ill health, lack of educational options and often impaired physical and/or mental development.

In developed welfare states, as the Norwegian, it is far less obvious whether poverty represents a violation of children's rights. Several Norwegian laws as well as international conventions establish the right of children to live their lives free of poverty and to enjoy living conditions ensuring, amongst others, a sound social development. The Norwegian welfare state provides educational services for all children, and the universal health system grants access to health services. The social security system is constructed to ensure that no individuals or families fall below a certain level of living, and the child welfare services shall make sure that all children – poor or not – do not experience failure of care, abuse or exploitation.

As will be shown, the majority of children living in low-income families have access to the most common consumer durables and take part in ordinary peer activities (Stefansen 2004a; Fløtten & Pedersen 2009; Fløtten & Kavli 2009; Kristoffersen 2010; Sletten 2010). Nevertheless, the mere existence of poverty, and the fact that more poor children than others do not have access to conventional con-

3. The concept of absolute poverty is used to denominate a condition where household income is below the level necessary to support the individual's physical needs, as a minimum standard of food and housing.

sumer durables and/or do not take part in organized or unorganized social activities, makes it relevant to ask whether their rights are indeed realized.

In this chapter, the following questions are asked:

1. What are the most important laws and conventions to take into account when discussing children's rights in relation to poverty in Norway?
2. How does Norway score on children's right to decent material living conditions and to social participation compared with other European nations, and how far are poor children lagging behind?
3. What dilemmas do policy makers face when children's rights are to be executed?
4. What do central and local authorities do to attend to poor children's rights (both material and social)?

7.2 LAWS AND CONVENTIONS

Unlike in many other countries, Norwegian policy has a long tradition of considering children's needs in law-making. When preparing the *Castbergske barnelover* in 1915 it was argued that the needs of children were to be taken into consideration (Skevik 2003). The needs of children were also central in the development of the modern Norwegian welfare state, and the government introduced allowances that were supposed to protect children in especially vulnerable situations, such as orphans, children without fathers and war babies (Grødem & Sandbæk 2009:186).

Today there are several Norwegian laws underlining the rights of children. For the scope of this chapter, laws that concern children's economic, material and social situation are of relevance and the question is how they correspond with the paragraphs of the UN convention on children's rights.

7.2.1 SOCIAL SECURITY

According to Article 26 of the CRC all children – either through their guardians or directly – have the right to help from the government if they are poor or in need. Every child has the right to benefit from social security, including social insurance, and the authorities shall take the necessary measures to achieve the full realization of this right in accordance with their national law. The benefits granted shall take into account the resources and the circumstances of the child.

Several Norwegian laws reflect Article 26:

- ▶ The Children's Act §§66 and 67 establish the duty of parents to rear their children and the practice of maintenance payment (fostringstilskottet).
- ▶ The Social Act contains several sections (§§1, 12, 15, 45) that can affect children's economic situation. The act underlines the duty of the municipality to make sure that it is aware of the living conditions of the inhabitants. The act does, however, not mention the need of children per se. §45 specifies that the NAV office has a duty to inform the child welfare services if there are reasons to believe that children the NAV office obtains information about could benefit from action from the child welfare services.
- ▶ The Child Welfare Act §1 establishes the purpose of the act, which is 'to ensure that children and youth who live in conditions that may be detrimental to their health and development receive the necessary assistance and care at the right time'. According to §3-1 'the municipality shall closely monitor the conditions in which children live, and is responsible for creating measures to prevent neglect and behavioural problems.' It is reasonable to interpret this as an obligation to ensure that children are experiencing economic security.

7.2.2 ADEQUATE STANDARD OF LIVING AND SOCIAL PARTICIPATION

It is difficult to draw a sharp demarcation line between legal provisions that concern economic security and legal provisions that concern material and social living conditions more generally. Article 27 of the CRC states that 'Children have the right to a standard of living that is good enough to meet their physical and mental needs. Governments should help families and guardians who cannot afford to provide this, particularly with regard to food, clothing and housing.' Article 31 concerns children's right to 'engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.

The sections of the Children's Act, the Social Act and the Child Welfare Act mentioned above all relate to these articles. In addition, §4-4 of the Child Welfare Act states that the child welfare service 'shall contribute to provide the individual child with sound living conditions and opportunities for development by providing advice, guidance and assistance'. The possibility of engaging in peer activities is an important part of children's living conditions, and such participation is important for children's development. Consequently, this section can be considered a parallel to Articles 27 and 31 of CRC.

7.2.3 REMARKS ON NORWEGIAN PRACTICES

Although Norwegian laws reflect Articles 27 and 31 of the CRC, the Committee on the Rights of the Child has observed some shortcomings in Norwegian practices. In the consideration of reports submitted by States parties under Article 44 of the Convention, the Committee notes that the level of coordination between government and municipalities, as well as among and within municipalities should be improved to assure that the services offered take the needs of children into consideration.⁴ This requires a more systematic training and raising of awareness of all professional groups working with families and children. The awareness of children's rights should also be raised at the policymaking and administrative level in municipalities.⁵

Furthermore, the Committee specifically mentions the situation of children living in poverty.⁶ It welcomes the increased attention paid to children living in families with incomes below the poverty line and measures targeted at these children, but it expresses concern about the geographical differences within Norway. The Committee recommends that Norwegian authorities undertake efforts to protect all children from the consequences of living in poverty, for instance by targeted programs in kindergarten and schools, measures for better nutrition and health and measures to make municipal housing more child-friendly.⁷

In its latest report on Norway in 2018, the Committee recommends that the State party 'increase resources allocated to combat child poverty, including by increasing child benefit rates and by adapting them to wage inflation'.⁸ Clearly, this would reduce the rate of children at risk of poverty, but this recommendation contradicts the recommendations by a recent commission looking into the public transfer to families with children (NOU 2017:6). The majority of the members of this commission suggests that the authorities prioritize benefits in kind over benefits in cash. Instead of increasing the child benefit rate, the commission suggests that the Norwegian authorities should grant universal access to kindergartens free of charge and convert the child benefit from a universal to a targeted measure.

In the 2018 report, the Committee also recommends that the State party 'Conduct a comprehensive assessment of the budget needs for children, with a particular emphasis on children in vulnerable and marginalized situations'.⁹ Consump-

4. UN Doc. CRC/C/Nor/CO/04, p. 2.

5. *Ibid.* p. 4.

6. *Ibid.* pp. 9–10.

7. *Ibid.* p. 10.

8. UN Doc. CRC/C/NOR/CO/5-6, p. 8.

9. *Ibid.* p. 2.

tion Research Norway has developed a Reference Budget for Consumer Expenditures that shows ordinary consumer expenditures for different types of households.¹⁰ This budget could, however, probably be used more actively to assess the situation of children and to set the levels of public allowances for families with children.

7.3 CHILDREN'S LIVING CONDITIONS

When measuring children's living conditions, a broad range of dimensions are relevant. Here we will concentrate on the risk of poverty, the degree to which children have access to fundamental consumer durables, and whether they are taking part in peer activities (formal or informal).

In Norway, as in most other western countries, poverty is defined as a relative phenomenon. To be poor, or at risk of poverty, is not characterized by severe material deprivation, but by a living standard markedly poorer than that of other members of the same community. The most common definition of poverty states that people are poor if 'they lack the resources to obtain the type of diet, participate in the activities and have the living conditions and amenities which are customary, or are at least widely encouraged or approved, in the societies to which they belong' (Townsend 1979:31). The definition recognizes the lack of ability to take part in activities as a fundamental dimension of poverty. How precisely to incorporate this social element in concrete measurements of poverty has been discussed since Townsend introduced his relative definition in the late 1970s (see Fløtten 2005). An important reason for this is the recognition that a person may very well experience economic poverty without simultaneously being materially deprived or socially excluded, and vice versa. Rather than presenting an aggregated measure taking economic shortcomings, material problems and social exclusion into account simultaneously, the following graphs therefore illustrates each of these social problems separately.

The relative definition of poverty, as well as the use of low income as an indicator of poverty, is regularly debated. Very few countries have official poverty lines and the poverty measures presented by national or supranational statistical offices are therefore often questioned. Especially in wealthy welfare states as the Norwegian, it can be hard to comprehend the relatively high share of children who are poor according to conventional measures as for instance 'income below 60 per cent of median income'. The discussion of the poverty measure tends to appear in

10. <http://www.hioa.no/Om-HiOA/Senter-for-velferds-og-arbeidslivsforskning/SIFO/Referanse-budsjettet>

election campaigns, such as during the Norwegian election campaign in 2017. Both journalists and politicians were questioning the relative poverty measure, and there were efforts in the media to find a definition of what some journalists and politicians labelled ‘the real poverty’.

The aim of this chapter is not to engage in a discussion of the relative poverty measure per se, but for clarification it should be kept in mind that the poverty measures employed are statistical measures *indicating* poor living conditions:

The relative income measure of poverty is meant to indicate the difference between the typical income level of a household and the income level of poorer households. The limit of 50 or 60 per cent of the median income is not meant to express any unquestionable divide between good living conditions and unacceptably poor living conditions. There is no point in the income distribution where the living conditions suddenly drop markedly; it is more a question of a continuum (Fløtten 2006). The poverty line must be seen as an indication of unacceptably poor living conditions. The line marks the level where a household has an income so low that the society cannot take it for granted that the household is able to uphold living conditions that are in accordance with the general level of living in this society. In practise, some households with income below the poverty line are able to uphold a relatively decent level of living. This could for instance be due to a situation where the household experiences just a short period of economic short-fall, because they receive help from family and friends or because they have savings or other resources to eat into. Correspondingly, some households with income above the poverty line may suffer from a severe material or social short-fall, for instance because the income has been relatively low for a long period of time, because the expenditure is high due to illness or disability, or because the household lacks the ability to balance budgets.

The idea that there is a non-normative ‘true’ measure of poverty is rejected by most poverty researchers. Poverty is considered a normative phenomenon, and there is no poverty measure independent of time and place. Where exactly to set the poverty line is in the end a normative question, and the role of scientists is to illuminate the consequences of setting the level at different points.

Despite the discussions surrounding the poverty concept and the poverty measures, most countries regularly report on measures of low income. Using the same measure over time and across countries makes it possible to monitor the development over time, to compare the situation of groups and to compare between regions within a country as well as between countries. It is also worth mentioning that regardless of the measure employed the same groups of the population tend to stand out as disadvantaged (Fløtten et al. 2011).

7.3.1 THE RISK OF POVERTY IN NORWAY

Compared to other European countries the share of children who are at risk of poverty in Norway is limited (Fig. 7.1). The rate is almost half of the EU average when risk of poverty is measured on a yearly basis. As mentioned earlier, this share has increased sharply over the past ten years (Fig. 7.2), but nevertheless, the Norwegian child poverty rate is far below the European average.

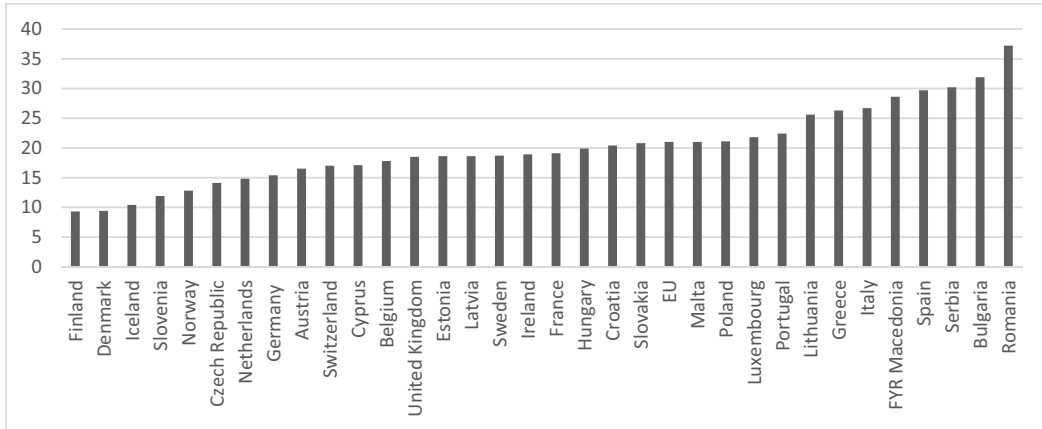


FIGURE 7.1 Share of persons below 18 years of age living in a household with disposable income less than 60 percent of the national median, 2016.

Source: Eurostat database, table ilc_li02, extracted 01.07.2018.

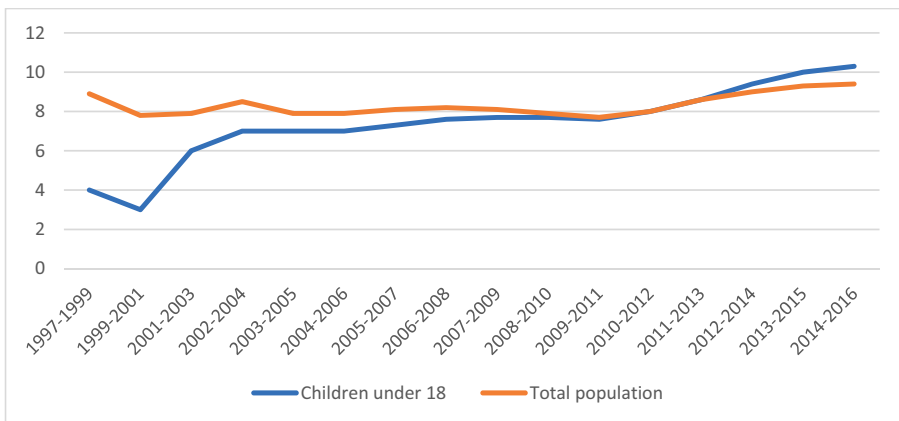


FIGURE 7.2 Share of persons below 18 years of age and the total population living in a household with disposable income less than on average 60 percent of the national median over a three-year period.

Source: Epland et al. (2011) for 1997/1999–2006/2008, Statbank SSB for the other periods.

When we look at the Norwegian numbers more closely, it is apparent that the risk of poverty is unevenly spread (Fig. 7.3). On average 10.3 per cent of children was experiencing long-term risk of poverty in the period 2014–2016. The risk was four times as high for children of immigrant background as for children in general, and for some immigrant groups the risk of long-term poverty is more than 50 per cent. The risk of poverty is also markedly higher among single parents than among couples with children. Furthermore, the higher the number of children in the household the higher the poverty rate is.

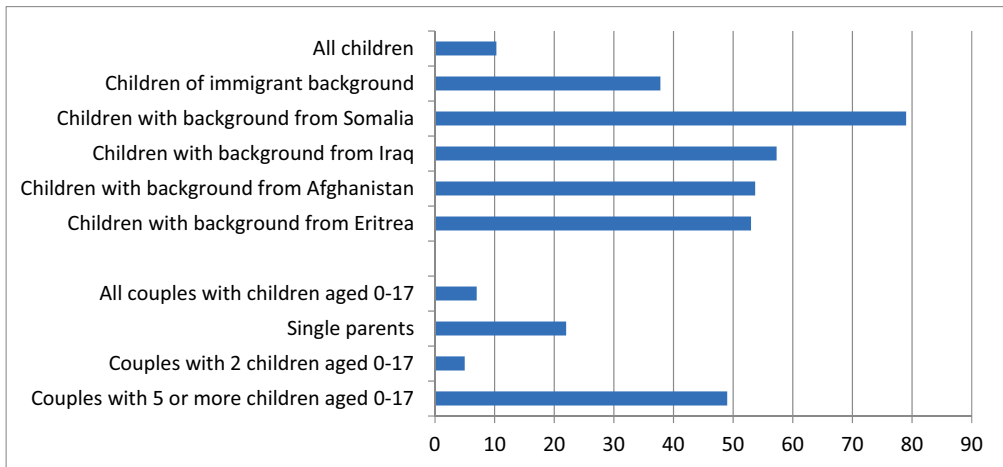


FIGURE 7.3 Share of children at risk of poverty by immigrant background and share of persons at risk of poverty by number of children in the household and relationship status of family provider. 2014–2016.

Source: StatBank (tables 09572, 09571 and 09008, extracted 20.06.2018).

7.3.2 MATERIAL LIVING CONDITIONS

The material living condition of Norwegian children is also comparatively good (Fig. 7.4). Less than three per cent of Norwegian children live in a household that suffers from severe material deprivation.¹¹ The corresponding share for all chil-

11. ‘The material deprivation rate is an indicator in EU-SILC that expresses the inability to afford some items considered by most people to be desirable or even necessary to lead an adequate life. The indicator distinguishes between individuals who cannot afford a certain good or service, and those who do not have this good or service for another reason, e.g. because they do not want or do not need it. Severe material deprivation rate is defined as the enforced inability to pay for at least four of the deprivation items’ (<http://ec.europa.eu/eurostat/web/products-datasets/-/tespm030>).

dren in the EU is 8.5 per cent and in four countries more than one in four children experiences such severe deprivation.

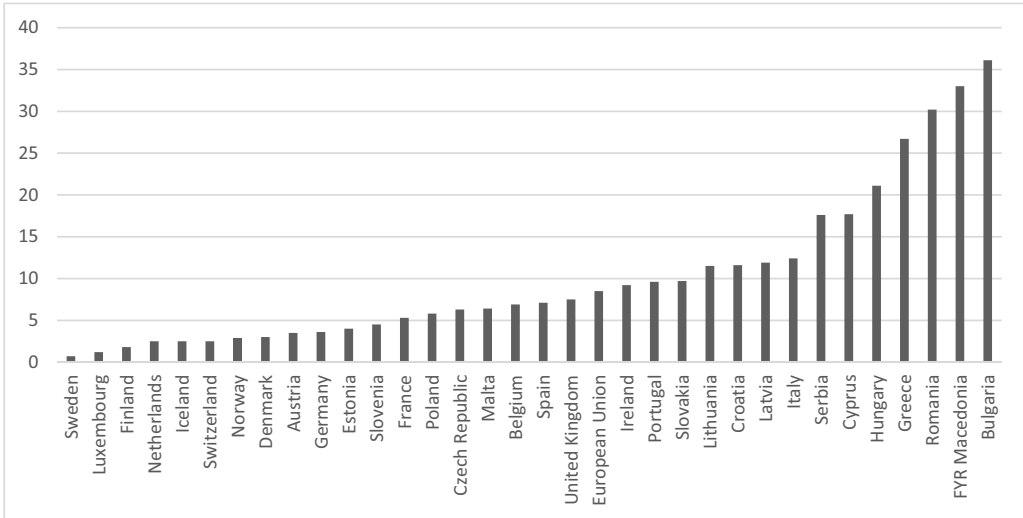


FIGURE 7.4 Share of persons below 18 years of age experiencing severe material deprivation. 2016.

Source: Eurostat database, table ilc_mddd11, extracted 26.06.2018.

Although there are few children experiencing severe material deprivation in Norway, it is worth noticing that children living in households with low income have a much higher risk of being in this situation than other children (Fig. 7.5). Ten percent of the households with dependent children in the lowest income quintile experiences severe material deprivation, while barely any families in the third quintile experience this. Compared to most other European countries, however, the share of severely deprived families is small even in the lowest income quintile.

When examining the material deprivation among those in the lowest income quintile, and separating families with dependent children from families without dependent children, Norway seems to be marginally less able to protect the families with children than families without (Fig. 7.6). The differences are generally small, but in some European countries, the material deprivation among those worst off economically is less in households with dependent children than in households without. This is the case in several east European countries as well as in Finland. Against this backdrop, it is not evident that Norway is succeeding more in protecting the most economically vulnerable children than other countries.

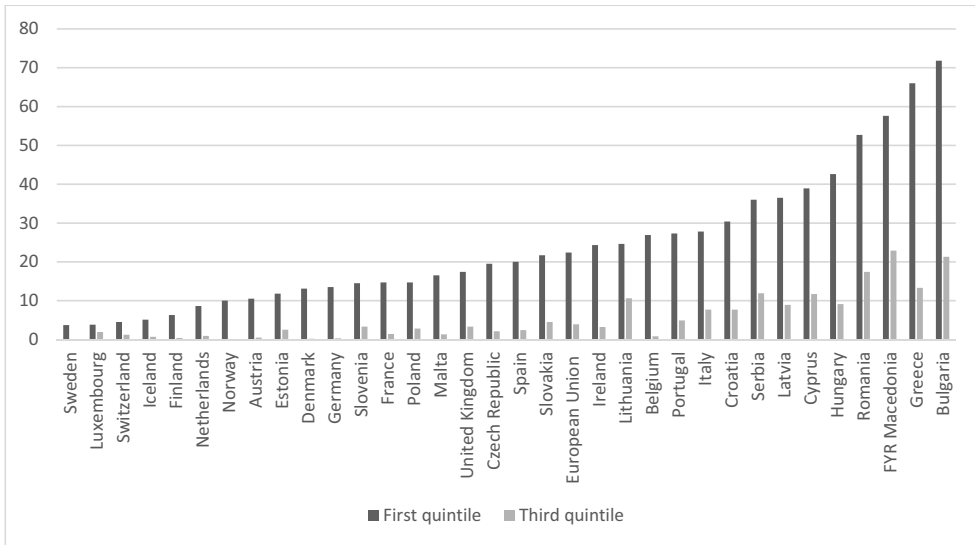


FIGURE 7.5 Share of families with dependent children with income in the first or third income quintile who are experiencing severe material deprivation. 2016.

Source: Eurostat database, table ilc_mddd13, extracted 26.06.2018.

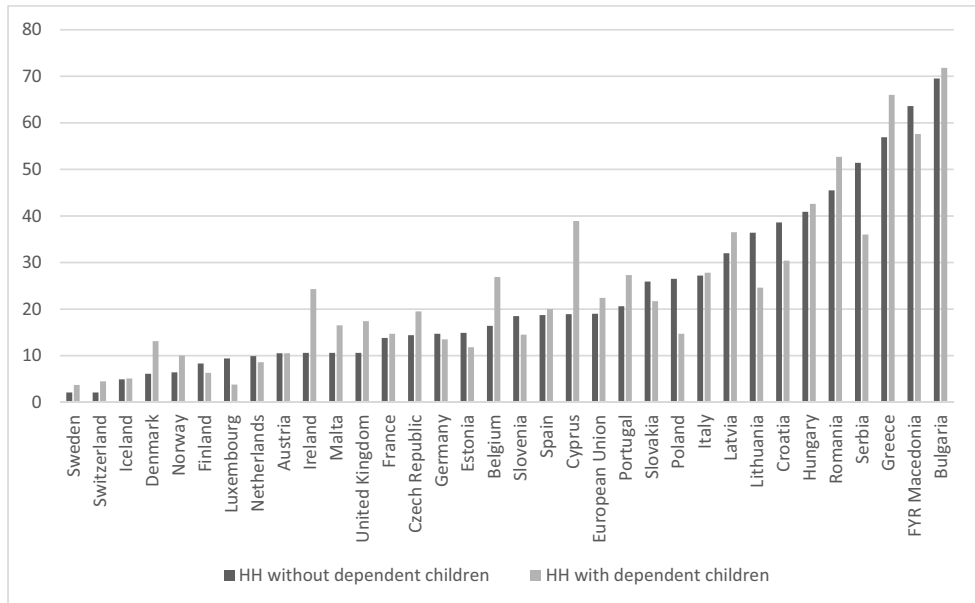


FIGURE 7.6 Share of families in the lowest income quintile experiencing severe material deprivation after presence of dependent children in the household. 2016.

Source: Eurostat database, table ilc_mddd13, extracted 26.06.2018.

In the figures above, the concept of material deprivation does not include indicators of the housing situation. In Norway, most families own their own dwelling and the housing quality is good. Approximately 150 000 persons are, however, considered to be disadvantaged in the housing market. Approximately 25 per cent of these are families with children (The strategy Bolig for velferd, page 30). Children in families with low income do more often than other children experience poor housing conditions (NOU 2011:15). According to the Eurostat database 6 per cent of Norwegians below the age of 18 are living in an overcrowded household, while the average for EU is 23 per cent. Twenty-two per cent of Norwegians (all ages) below the at-risk-of-poverty threshold are living in a crowded household, while the same is case for only 3 per cent of those above the threshold.

In recent years, several researchers have scrutinized the housing situation of families with children in general and poor families in particular (Hansen & Lescher-Nuland 2010; Grødem & Sandbæk 2013). These researchers conclude for instance that the housing situation of children from low income families is below the general housing standard in Norway, and that children at risk of poverty are far more likely to relocate frequently. Langford and Johnsen (2011) has discussed the Norwegian housing policy in a rights perspective and they find that a relatively large share of Norwegians spend a disproportionate large share of their income on housing and single parents are especially exposed in this regard.

7.3.3 SOCIAL PARTICIPATION

According to CRC article 31, children have the right to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. The ability to take part in leisure time activities is a cornerstone of childhood and all children should have this possibility. There are few databases allowing for comparisons of children's social participation, but de Neubourg et al. (2012) have calculated child deprivation based on EUSilc data from 2009. According to their calculations, the share of Norwegian children who are not taking part in specific social activities are far lower than the corresponding share for the average European child (Fig. 7.7).

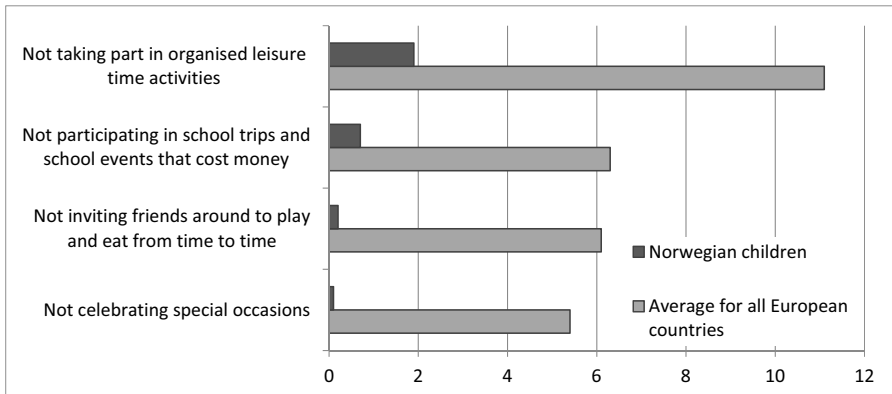


FIGURE 7.7 Share of children in Norway who do not engage in specific social activities compared to the average of children in European countries. 2009.

Source: de Neubourg et al. (2012: 9).

7.3.4 VIOLATION OF RIGHTS?

The review of material and social living conditions of children in Norway shows an overall advantageous situation. Not only does the state guarantee health services, education and other social benefits, compared to children from other European countries children in Norway are also less likely to be at risk of poverty, to lack vital consumer durables or to be excluded from social activities.

At the same time, the review shows that there are vulnerable children in Norway. Although an at-risk-of-poverty rate at 10 percent is low in an international comparison, it demonstrates that a considerable number of children are at risk of experiencing economic hardship. The hardship Norwegian poor children experience may in many instances be milder than the hardship experienced by poor children in poorer countries. Since poverty is defined as a relative phenomenon, the relevant comparison is, however, between Norwegian poor and non-poor children, not between poor children from Norway and elsewhere.

For many of the children experiencing risk of poverty during childhood the hardship will last only for a limited period, for instance because their guardians are in transition from education to work, because their guardians are between jobs or because the number of breadwinners in the household increases. For others the problems are longstanding.

Regardless of the longevity of poverty, it cannot be taken for granted that the fundamental rights of children are fulfilled when the family experiences economic hardship. Norwegian and international research have shown that children in poor

families are striving both to handle their own daily life and to help their parents handling theirs (Redmond 2008; Ridge 2009; Stefansen 2004b). Although many parents do their best to protect their children from the consequences of poverty (Thorød 2006), the children are often aware of the difficult situation their family is in (Stefansen 2004b).

As shown, the share of poor children is especially high in some immigrant groups. These children are also more at risk of not taking part in social activities (Fløtten & Kavli 2009) and therefore experience multiple disadvantages. For some poor children it is reasonable to assume that the consequences of poverty on their daily life are serious enough to assert that the child's wellbeing is negatively affected, hence that their rights according to the CRC are not fulfilled.

7.4 DILEMMAS IN PROTECTING CHILDREN'S RIGHTS

In Norwegian policymaking, the principle of equal distribution of income and resources has been dominant. In various policy areas, measures to promote distribution and to stimulate the development of human capital are present (NOU 2009:11, 284). This combination of redistribution and social investment policies is important to explain why the child poverty rate is comparatively low and why the living conditions of children are comparatively good. Free health care and education of high quality, inclusive labor market policies, universal welfare allowances and progressive taxes are important policy measures in this respect.

When the ambition is to reduce poverty further and to alleviate the consequences of poverty, policy makers will need to consider (partly) conflicting considerations.

First, one needs to decide whether to concentrate on measures directed toward the child or on measures directed toward the parents. Is the main ambition to eradicate or reduce poverty in itself, or is the main ambition to ensure good living conditions for the children, regardless of the family economy?

If the ambition is to reduce poverty, the income level of the family needs to be increased, and a second dilemma arises. When changing the situation of the parents is the first priority, this can be accomplished either by helping the parent to increase his/her earning ability or by increasing the income of the parents through the social security system. Helping people into paid employment is the favoured way to eradicate poverty and this choice implies few dilemmas, but increasing the parent's income through public allowances is far more challenging. This will put strain on public budgets and the incentive effects can be questioned.

The authorities must therefore carefully balance different considerations if parents cannot escape poverty by other means than by public allowances.

Third, even if the family income is successfully increased, there is no guarantee that an increase in income will actually benefit the child. It is common to expect that family members distribute income equally. Some studies indicate that this is not always the case (Sen 1983; Goode et al. 1998), but there are also studies concluding that poor parents go to the greatest possible length to make sure that their children's needs are satisfied even in situations of economic scarcity (Ghate & Hazel 2002; Thorød 2006; Stefanssen 2009). Research scrutinizing the distribution of income within families is scarce, but from the Norwegian research available, it is reasonable to assume that an increase in family income would most likely benefit the children.

At the same time, there is another strand of research suggesting that some of the problems affecting children from poor families are not caused by poverty in itself. Children from poor families are worse off than children from affluent families across a number of dimensions. However, the factors causing parents' low incomes, or other traits of the family, may influence children's living conditions (Mayer 1997). In her analyses, Mayer concludes that there is not necessarily a causal relationship between low income and the disadvantages a child experience. Fløtten and Kavli (2009) draw similar conclusions in an analysis of immigrant children's tendency to participate in organized leisure activities. They found that for boys with Pakistani or Somali background, low family income had a significant effect on participation in such activities, also when controlled for other factors. For girls of the same origin low income level did not have a significant effect on their participation rates.

If the observed correlations between family income and children's living conditions and life chances do not necessarily reflect a causal relationship, this complicates the policies introduced to fulfil children's rights, both with regards to the right to 'a standard of living that is good enough to meet their physical and mental needs' (CRC Article 27) and with regards to their right to 'engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts' (CRC Article 31). If it is obvious that increasing the family income improves the child's situation this might be a strong case for cash transfer programs. If not, other and more integrated measures are needed to ensure good living conditions for the children (Fløtten & Grødem 2014).

If we cannot automatically assume that an increase in family income eliminates the disadvantages the child encounters and/or if there are no short-term prospects for improving the income level of the family, measures can also be directed

towards the children. There are a number of such measures implemented in Norwegian municipalities (see below), and they may very well be introduced simultaneously with measures directed towards parents.

When the authorities decide to concentrate the efforts directly towards the children, a fifth dilemma is apparent: is it the parents or the authorities who are to decide what living conditions a child shall enjoy? What are the responsibilities of the parents and what are the responsibilities of the state?

In Norwegian welfare policy, benefits in cash are important measures to help alleviate poverty (as child allowance, cash grants to families with small children, unemployment benefit, disability benefit, social assistance, work assessment allowance etc). When the breadwinners receive one or more of these benefits, it is their decision how to allocate the money. If, however, the authorities have reason to question whether parents spend their money in the best interest of the child, more benefits must be earmarked, or benefits in kind must replace benefits in cash.

When the authorities decided to freeze the child allowance and instead accelerate the establishing of kindergartens, this is an example of such a shift in policy. This concrete shift was not initially made to prevent poverty, but in current policy debates many argue that kindergartens are a vital measure to prevent the transmission of poverty between generations. The equalizing effect of child care is the subject of Chapter 15 in this book. Here Drange concludes that child care may enhance child development, and that child care seems to be particularly important for children from disadvantaged families. Nevertheless, it is still a core principle within Norwegian policy that the parents have the main responsibility of creating a materially safe and a stimulating childhood for their children (NOU 1996:13 and NOU 2017:6).

7.5 MEASURES TO IMPROVE LIVING CONDITIONS

As mentioned above, the main measures to prevent poverty in Norway are parts of the general education, welfare and labour market policies, such as the unitary school system, the inclusive labour market policies, the coordinated system of wage setting, the progressive tax system, the universal welfare allowances and health services that are universal and free of cost. When a family, despite these measures, experiences poverty, both the state and the municipalities have introduced a variety of concrete measures to reduce poverty and to alleviate the consequences of growing up in poverty. Some of the measures are directed towards the parents, some towards the children. This dual approach is necessary if the ambition is both to help breadwinners out of poverty and to make sure children's rights

are realized. Not all the relevant measures can be described here, but by providing a brief overview of some of the measures and programs, one gets an impression of the scope and magnitude of the policy.

First, there are several measures of a universal character. These are not implemented primarily to reduce poverty, but as a part of the general family policy:

- ▶ The universal child benefit (barnetrygd)

A monthly allowance to all families with children below the age of 18.

- ▶ Cash grants to families with small children (kontantstøtte)

A monthly allowance paid to parents whose children between one and two years of age do not attend publicly financed kindergartens.

- ▶ Subsidized kindergartens

The municipalities allocate grants to all publicly approved kindergartens to assure that children can attend kindergartens regardless of the parents' economic situation.

Second, some measures are more specifically aimed at families with low income, as the following three examples:

- ▶ Free core time in kindergartens

Children aged 3, 4 or 5 years from low-income families have a right to 20 hours free kindergarten per week.

- ▶ Social assistance

According to the Social Act all adults, including parents have a means-tested right to monetary support if unable to support themselves through paid work or other means.

- ▶ Social housing

Families with children who have problems getting or upholding a stable dwelling have the right to several measures. In the national strategy 'Bolig for velferd' (2014–2020) the government promises to strengthen the efforts to ensure that all young people have a decent and stable housing situation. It is for instance a national aim that all rental accommodation for families with children shall be of good quality in a safe dwelling area.

Third, there is a range of measures specifically directed towards children living in low-income families, partly by helping the whole family, partly by ensuring that children are taking part in school and peer activities. Besides from Fritidserklæringen, the following measures are all included in Children Living in Poverty – The Government's Strategy (2015–2017) (Norwegian Ministry of Children, Equality and Social Inclusion 2015):

- National grant scheme to combat child poverty

The aim of this scheme is to combat poverty and lessen the consequences of poverty among children and young people. The municipalities and NGOs can apply for grants, and the funds can for instance be used to send children to holiday clubs, to offer low-cost leisure activities, to develop equipment resource pools etc. The grant scheme cannot be expected to reduce poverty as such, at least not in the short term, but it aims at alleviating possible negative social consequences of poverty.

- Measures for children and young people in large cities

This scheme aims at improving living conditions for children and young people in large cities by developing open meeting places, as youth cafes, youth clubs etc. All large cities can apply for grants from this scheme; many of the programs are a collaboration between the municipal authority and voluntary organizations.

- Grant scheme to prevent and reduce poverty among children and families who are in contact with the social services at NAV (the labour and welfare administration). The objective of this scheme is to reinforce and develop the social and preventive work in the municipalities. Low-income families, both children and parents, are followed up. Young people dropping out of, or at risk of dropping out of, upper secondary school are also a target group.

- Programme to follow up low-income families in NAV

This program is a trial, starting up in 2015, targeting families with children who have persistent low incomes. The municipalities shall closely follow up both parents and the children, and there is a systematic collaboration between different services to assure that the families are provided the best measures available. A group of researchers are monitoring and evaluating the pilot (Malmberg-Heimonen et al. 2016).

- ▮ Coordinated, interdisciplinary help for vulnerable children and young people under the age of 24 (the 0–24 Partnership)

Through early intervention and coordination of services, the 0–24 Partnership aims at ensuring that children and young people grow up healthy, that they complete basic education and that they are given the necessary basis for regular employment.

- ▮ Measures to combat child poverty from the voluntary field

The government recognizes the role of voluntary organizations in creating opportunities for children to make friends, and for having positive experiences. Many organizations are part of a network cooperating to combat poverty and social exclusion among children and young people (the NDFU, see <http://www.allemed.no>), and the government is supporting this initiative.

- ▮ Fritidserklæringen (The declaration of leisure time)

In 2016 the government (by the Prime Minister and several ministers), the confederation of Norwegian municipalities (KS), the Norwegian Sports association, Save the Children and a number of other NGOs signed Fritidserklæringen. This declaration is directly based on CRC Article 31 and by signing the state, municipalities and NGOs are obliged to assure concerted efforts to include all children in at least one leisure time activity, regardless of the economic and social situation of their parents. The declaration underlines the importance of cooperation between different actors who are working with children.

The list of examples illustrates that there are many specific measures implemented to improve the living conditions of poor children, as well as children who are vulnerable for other reasons. Both national and local authorities assign much weight to measures that help including children and young people in leisure time activities. It must be noted, however, that more than a fair share of the measures described above are designed to alleviate the consequences of poverty and not to increase the income level of families above the poverty threshold.

Despite political attention and many initiatives, the Office of the Auditor General of Norway has criticized the efforts of Norwegian municipalities to prevent child poverty and its consequences (Riksrevisjonen 2014). In the report from the Auditor General the CRC was, amongst others, used as a backdrop for the evaluation of the municipal efforts. The Auditor General criticizes the municipalities for not doing enough to ensure that poor children can take part in leisure time activities. All municipalities have introduced at least some measures to assure social

inclusion of poor children, but there is no linear relationship between the number of measures introduced and the child poverty rate at local level. In many municipalities, there are only a few measures and they are not sufficiently targeted towards the children from poor families. Furthermore, the Auditor General criticized the central government for inadequate coordination of the efforts to reduce the consequences of poverty for children. There are for instance several state grants that the municipalities may apply for, but these grant schemes are insufficiently coordinated (see also Fløtten & Hansen 2018). As mentioned above, also the Committee on Child Rights criticizes Norwegian authorities for not assuring sufficiently coordinated services. The report from the Auditor General also mentions that there is a need for more evaluation of how different measures work. Finally, NAV is criticized for not taking the situation of children sufficiently into account when parents are applying for social assistance (Riksrevisjonen 2014). The Auditor General based its conclusions on data mainly from 2013, and the municipalities are constantly working to improve their anti-poverty policies. At some points the critique may therefore be a bit outdated, but there is no reason to believe that there is a total change in the situation of poor children over the course of only four to five years.

So far, there are also few traces of a rights perspective in the public policy to prevent child poverty and to alleviate the consequences of poverty.¹² The Auditor General refers to the CRC in its report on the child poverty policies, but neither the CRC nor the concept of rights is mentioned in the government's strategy Children Living in Poverty. There are no traces of the CRC in the previous action plans against poverty, either.

7.6 CONCLUSION

According to the CRC all children have 'the right to a standard of living that is good enough to meet their physical and mental needs', as well as a right to 'engage in play and recreational activities'. In Norway, the access to data illuminating the living conditions of children is good, and the authorities are monitoring the development along a range of indicators on a yearly basis.¹³ Although the share of children in Norway who are at risk of poverty is low in a comparative perspe-

12. One program worth mentioning is the so-called Sjumilssteget (see sjumilssteget.no). This is a model introduced to help municipalities to concretize the articles of CRC in case management involving children.

13. See for instance the annual reports from Statistics Norway on economy and living conditions for low-income groups.

ctive, and although most children enjoy reasonably good living standards, there are children and young people in Norway who experience severe economic hardship and who do not take part in recreational activities on level with their peers. In the light of this, one could say that there is a breach of the Convention. At the same time, Norwegian children, both poor and non-poor, enjoy better living conditions than children in most other countries do, and there is a wide range of measures implemented to assure good living conditions of children. It therefore seems a bit steep to claim that Norway breaches the CRC, neither was the ambition of this chapter to form a definite conclusion in this regard. It is more important to underline that the fact that Norway is doing well, comparatively speaking, does not mean that there is no room for improvement.

It is first and foremost the parents who are responsible for taking care of children's needs, but securing the rights of children demands an effort also from the state and the municipalities. From the discussion above, it is obvious that the aim of ensuring that children enjoy good economic, material and social living conditions is not straightforward, not even in an affluent welfare state such as the Norwegian. The authorities will need to balance a set of different considerations when they propose and implement anti-poverty measures. The implementation of measures is further complicated by the fact that not all problems children may experience will be solved by improving the economic situation of the family only. The recent weigh put on so-called integrated and coordinated measures is positive in this respect.

The fact that there are few traces of a rights perspective in the anti poverty policies implies a potential for bringing children's rights higher up on the political agenda, also when it comes to combatting the negative consequences of child poverty. Such a shift towards a more rights-based policy might help the state in its efforts to develop effective measures to prevent poverty as well as the municipalities in their efforts to create good alleviating measures.

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8

Child Care, Education and Equal Opportunity

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ABSTRACT The child's right to an education should, according to the UN Convention on the Rights of the Child, enable the child to develop abilities on the basis of 'equal opportunity'. Moreover, States are already required to provide, at least, childcare for working parents (Article 18). This article presents empirical evidence on the importance of child care for child development, and goes on to discuss whether Norway succeeds in promoting a well-designed child care policy. The author explores how children from various socioeconomic backgrounds are affected by enrolment in child care, and further discusses how the child care center can work to fulfill the child's right to develop abilities on a basis of equal opportunity.

KEYWORDS child care | early learning | child development | equal opportunity | children's rights

8.1 INTRODUCTION

The child's right to an education should, according to the Convention on the Rights of the Child (CRC), enable the child to develop abilities on the basis of 'equal opportunity' (Article 29). Research in the field of neuroscience and psychology suggests that the first years of life are critical in shaping cognitive, social and language skills (Shonkoff and Phillips 2000). Thus, children's learning, or lack thereof, during early years, may determine their future academic success. States are already required to provide childcare for working parents (Article 18, CRC) but the Committee on the Rights of the Child has also increasingly recognized that the right to education is dependent on access to quality childcare.

Children from disadvantaged families face compromised environments and parenting that fail to support learning and child exploration. For example, already at age three, the language development of children of highly educated parents is substantially better than that of children of low-educated parents (Kalil 2014, Schølberg et al. 2008). Such early inequality can persist or widen through school years and later life. Indeed, recent data from the PISA study show that socioeconomic inequalities in education are of a similar magnitude in the generous welfare state of Norway as in the USA, and socioeconomic inequalities in education seem to have risen over the last decades (Kalil 2014).

On this background, it appears crucial to promote a solid foundation for child development early on to enable all children to develop abilities on a basis of equal opportunity. Several recent studies show that enrolment in institutional child care at an early age enhances early learning and promotes child development, particularly among children from disadvantaged families (Drange and Havnes 2019, Havnes and Mogstad 2011, Almond and Currie 2011). Hence evidence goes a long way in suggesting that participating in child care can help level the differences that arise from children growing up in different home environments.

If we want to assess whether Norway succeeds in promoting equality of opportunity, keeping in mind the important role of early learning, we must take a close look at policies governing early child development. While education in Norway is compulsory and free from age 6 to age 16, centre-based child care is not mandatory prior to in school at age 6. However, the government ensures that all children have a right to enrol in publicly certified child care. But while this right applies to some children from their first birthday, others will have to wait until they turn nearly two before they have the same right. Furthermore, child care is heavily subsidized, but may still be costly for a low-income family. Indeed, despite the extensive availability of child care, there is a large discrepancy in enrolment rates in Norway depending on immigrant status, family income and parental education. In 2014, about 85% of 1- and 2-year-old children with a native background were enrolled in child care, whereas the corresponding share of children from immigrant families was about 55%. A similar, if slightly less pronounced pattern, is also evident for other background characteristics such as parental education and family income (Drange and Telle 2018). Given that the first years are crucial for the formation of both social and cognitive skills, it is a challenge that many children who likely would benefit are not, in fact, enrolled.

This chapter aims to discuss whether Norway succeeds in promoting a well-designed child care policy that enhances early child development. Given the documented success of formal child care in enhancing such early development, the

focus will be on the importance and implementation of child care policies. I will carefully review the literature on child care, both for short- and long-term child development. I will further address the current state when it comes to policy implementation in the child care sector in Norway, such as the child care enrolment guarantee and regulations that apply to the child care center. I will also discuss the Cash-for-Care subsidy, as receiving this subsidy depends on the child not enrolling in child care. Next, I proceed to investigate whether the current policies are successful in securing enrolment of children in child care in Norway. I pay close attention to differences across children from various socioeconomic backgrounds. This latter part will focus on child care in Oslo as the data needed to do the analysis is only available for the capital. It turns out that there is a lower enrolment rate among children from disadvantaged families, and this pattern is particularly clear for children from immigrant families. To expand the understanding of how the child care center may be successful in promoting early child development, I also look at how the composition of children vary across centers and areas in Oslo. Lastly, I proceed to discuss the implications of these findings for the ability of the child care center to enhance social mobility and fulfill the child's right to develop abilities on a basis of equal opportunity.

8.2 CHILD CARE, CHILD DEVELOPMENT, AND CHILD RIGHTS

In 2002, the European Union's Presidency formulated a policy goal 'to provide child care by 2010 to at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years of age' (EU, 2002, p. 13), and in his State of the Union address in February 2013 President Obama called for making 'high-quality preschool available to every single child in America'. In Norway, a number of governmentally appointed committees and white papers list the benefits of providing high-quality and universal child care.¹

A key problem with many studies of how child care affects children, is that child care supply, child care enrolment and family characteristics are related in unobserved ways. For instance, if we compare children that enrol in child care with children that do not, we will probably find that children in child care do better, simply because parents with higher income and education are more likely to send their child to child care (Drange, Havnes and Sandsør 2016). Differences

1. E.g., *Offentlige overføringer til barnefamilier*, St.meld. nr. 43 2000–2001; *Tidlig innsats for livslang læring*, St.meld. nr. 16 2006–2007; *Med barnet i fokus*, NOU 2008:9; *Fordelingsutvalgets rapport*, NOU 2009: 10; *Kvalitet i barnehagen*, St.meld. nr. 41 2008–2009; NOU 2010:8 *Med forskertrang og lekelyst*.

between parents such as income and education can be observed, and we can take them into account when we compare the development of children enrolled and not enrolled. However, other differences may be unobserved. For instance, imagine that parents with a strong desire for their child to achieve higher education are more likely to send their child to child care than parents without such a desire. At the same time, these parents may also be more likely to read to their child, and in general to engage their child in activities that enhances child development. If this is the case, and we compare these children, we may find that the child in child care starts school more prepared than the child that has not been enrolled in child care. However, we cannot know whether the difference between the two children exists because of the child care experience or because the parents who sent their child to child care at the same time offered a home environment that to a greater degree encouraged early development. If we undertook this simple comparison, we would overestimate the importance of child care because other, unobservable factors were correlated with enrolment. In order to properly understand whether child care is beneficial for children, it is important that we rely on studies that take into account such unobserved factors.

Several recent studies that take unobserved factors into account, suggest that investment in early childhood is promising and important to improve intergenerational mobility (Almond and Currie 2011). Non-enrolment in preschool programs may, for example, delay the children's language development, especially when the parents' proficiency in the language spoken by the majority is poor (Bleakley and Chin 2008). Moreover, a number of studies that investigate effects of child care on subsequent outcomes of children find particularly beneficial effects for children from disadvantaged families (Havnes and Mogstad 2011; Cornelissen et al. 2018).

There are several well-designed Norwegian studies exploring how child care affects child development. Havnes and Mogstad (2011) study long-term results of a reform that expanded the availability of child care for 3–6-year-olds in the 1970s. Their study is based on the introduction of a law passed in 1975 which laid the responsibility for child care centers to the municipalities. This caused a large increase in child care availability with significant variation between different municipalities. The authors take advantage of this variation and compare outcomes of children residing in municipalities with a large expansion and children residing in municipalities that expanded little, before and after the law was passed. The authors find a strong, positive impact on children's later educational attainment and participation in the labor market. Some effects of increased child care availability are heterogeneous. The likelihood of earning a high income later in

life is, for instance, mainly linked to girls' improved performance. Findings from this study underline how child care may enhance social mobility and hence promote equality of opportunity.

A study by Drange and Telle from 2017 explores the introduction of free child care for five-year-olds in two city districts in Oslo (Gamle Oslo and Grünerløkka) in 1998. We find that access to free child care has a positive impact on the school performance of children from immigrant families at the end of primary school. While girls perform better, boys' results are unchanged.

Studies from other countries tend to discover similar findings. A study from Germany examines a more recent expansion of child care (Cornelissen et al. 2016). The German child care centre is similar to the Norwegian in that it is subsidized, follows consistent national policy in terms of quality, and has a focus on learning through play. The authors look at tests in both cognitive and non-cognitive skills done before children start school. The study concludes that children who would benefit most from attending child care, are the children that are less likely to be enrolled.

While we know quite a lot about how child care impacts older children (3–5-year olds), few studies have focused on the impact for the youngest. There are, however, some recent exemptions, such as a study from Oslo taking advantage of a lottery that randomly allocated child care to young applicants aged 1–2 years (Drange and Havnes 2019). The random assignment allows for a comparison of children that enrolled in child care at different times due to the outcome of the lottery. It turns out that children who started earlier in child care due to winning the lottery, perform better on language and mathematics tests in first grade. The results are particularly strong for children from disadvantaged families, again suggesting that starting early is important for social mobility.

A potential shortcoming of this study is that it only considers cognitive development. Non-cognitive skills have also been shown to be very important. Reassuringly, several articles from the psychology literature have recently looked at potential effects on non-cognitive skills such as aggression, using Norwegian data. When handling selection bias with an instrumental variable approach, Dearing et al. (2015) find that aggression levels at age four appeared very similar for children enrolled in child care prior to age 1 and those who had entered much later.

These findings in the research literature track an evolving understanding of the obligations of States in the Convention on the Rights of the Child. The Convention is already crystal clear that States must ensure child care is available and accessible for working parents: 'States parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services

and facilities for which they are eligible'.² Moreover, Article 18(2) indicates that child care is part of a broader platform of support to parents. State parties must assist parents and guardians in 'child-rearing' through the 'development of institutions, facilities and services for the care of children'. States are regularly reminded of these obligations by the Committee on the Rights of the Child, including in its General Comment No. 7 on Early Childhood (paras. 15 and 21, 30).

However, the child rights community has increasingly recognized the link between education and equal opportunity. As Carol Bellamy, UNICEF's previous Executive Director, stated, 'There is a growing consensus that child care and early childhood education are inseparable' (UNICEF, 2001: 71). The Committee on the Rights of the Child has equally emphasized importance of making available high-quality childcare, even noting that it must include human rights education.³ This evidence-based shift is most apparent in its General Comment No. 7. The Committee states:

Research evidence demonstrates the potential for quality education programmes to have a positive impact on young children's successful transition to primary school, their *educational progress* and their long-term social adjustment. Many countries and regions now provide comprehensive early education starting at 4 years old, which in some countries is integrated with childcare for working parents. Acknowledging that traditional divisions between 'care' and 'education' services have not always been in children's best interests, the concept of 'Educare' is sometimes used to signal a shift towards integrated services, and reinforces the recognition of the need for a coordinated, holistic, multisectoral approach to early childhood."⁴

Moreover, in its concluding observations, the Committee has placed importance on decreasing inequality of income through measures which are holistic and evidenced-based.⁵

2. Emphasis added.

3. General Comment No. 7, *Implementing Child Rights in Early Childhood*, 20 September, UN doc. CRC/C/GC/7/Rev.1 (2005), para. 33. See also the Committee's *Concluding Observations on Nigeria*, UN doc. CRC/C/15/Add.257, paras. 40 and 41.

4. *Ibid.* para. 30. Emphasis added.

5. The Committee urges the State party to intensify its efforts to address and eradicate poverty and inequality, especially of children, and: '(a) To consider systematic reform of current policies and programmes to effectively address child poverty in a sustainable manner, using a multidisciplinary approach that considers social, cultural, and geographic determinants of poverty reduction'. *Concluding Observations on Italy*, UN doc. CRC/C/ITA/CO/3-4, 31 (2011).

8.3 CURRENT CHILD CARE POLICIES

Due to a political settlement in Norway in 2003 (*Barnehageforliket*), child care has been massively expanded in recent years. Enrolment rates for the youngest children have doubled, from about 40% in 2002 to about 80% in 2015 (Statistikkbanken). Children are entitled to a child care place from August of the year they turn 1, if they are born prior to November 1st. The current legislation implies that a child born in November has to wait until 21–22 months before having the right to a slot, whereas a child born in August will have the right to a place at 12 months. That the birthdate of a child determines such an important right, may be perceived as unfair for the individual family. On a more general basis and given that recent research shows a positive effect on cognitive development from attending child care early, it is unfortunate that the right to a place is based on discrimination by age. If such age discrimination postpones child care start for children born late and early in the year, it might lead to larger gaps in development by socioeconomic background for these children.

Child care centers in Norway should meet strict regulations, with provisions on staff qualifications, number of children per teacher, size of play area, and educational orientation. Each center should be run by a head teacher (typically an educated pre-school teacher) who manages the center and is responsible for planning, observation, collaboration and evaluation of all activities. In terms of educational content, a social pedagogy tradition has dominated childcare practices in Norway since its inception in the 1970s. According to this tradition, children should develop social, language and physical skills mainly through play and informal learning. The social pedagogy tradition to early education has been especially influential in the Nordic countries and Central-Europe. In contrast, a so-called pre-primary pedagogic approach to early education has dominated many English and French-speaking countries, favoring formal learning processes to meet explicit standards for what children should know and be able to do before they start school.

The informal learning is typically carried out in the context of day-to-day social interaction between children and staff, in addition to specific activities for different age groups.

From 1st of August 2018, national child care regulations specify that there should be at least one educated pre-school teacher per seven children aged below three, and one per 14 children aged above three. The pre-school teacher education is a college degree, including supervised practice in a formal child care institution.⁶ Each

6. Note that the empirical work sited in this paper is based on child care centers where the former regulation was in place. According to this, there should be at least one educated pre-school teacher per ten children aged below three, and one per 18 children aged above.

teacher typically works with two assistants, but this has varied somewhat across municipalities. There are no formal educational requirements for the assistants, but many high schools offer vocational training as ‘child- and youth worker’ (*barne- og ungdomsarbeider*). This entails a two-year school program and two years of practice. In 2015, about 27% of the assistants held a certificate as a child- and youth worker.

The lack of regulations of the number of children per adult in the child care center imply that this ratio historically has varied across municipalities. This has been a much-debated issue (see, i.e. Nordrum [2012]), and in a 2012 report by a government appointed committee, new legal requirements to regulate child care centers were suggested. Importantly, it was suggested to regulate the adult-to-child ratio. This should be 1/3 for children below 3, and 1/6 for children above 3 (NOU 2012). Recently, a new regulation was sanctioned, and from 1 August 2018, a child care center should have an adult-to-child ratio of 1/3 children below 3, and 1/6 children above 3. The child care centers will have until 1st of August 2019 to meet this new regulation.

8.3.1 THE COST OF CHILD CARE

About 50% of child care institutions are public, while the remaining are privately operated. Both public and private institutions require municipal approval and supervision to be entitled to national subsidies that cover around 80% of costs. Since 2003, there has been a maximum parental copayment set by the government. This amounted to 2,730 NOK per month for a full-time slot in 2017. In addition, the childcare centers may charge a fee that covers food serving.

While the maximum price is affordable for most families, it is still a substantial amount for a low-income family. From 2015, 4- and 5-year-old children from low-income families⁷ became entitled to a free place in child care amounting to about 20 hours per week (half day). From August 2016, this was expanded to 3-year-old children as well. It is still not clear whether this policy has been successful in recruiting more children to the child care center. However, we do know that a policy providing 20 hours of child care to all children independent of their family income, that was introduced in certain city districts in Oslo with a high share of immigrants among its population, succeeded in increasing the enrolment rates of children with an immigrant background (Drange and Telle 2015).

7. Earning below 417 000 NOK.

8.3.2 THE CASH-FOR-CARE POLICY

In August 1998, the Cash-for-Care (CFC) subsidy was introduced. The CFC scheme gave families with one- or two-year-old children the right to a monthly cash transfer, and the condition for receiving the full subsidy was that the child could not enrol in child care. The government at the time stated that the main goals of the subsidy were to ensure that families had more time to take care of their children, to allow families themselves to choose what kind of care they wished for their children and to equalize public transfers to families, regardless of the kind of care the family wanted for their child. When introduced, the CFC constituted a significant part of family earnings, particularly for low-income families. The annual allowance was 36,000 Norwegian kroner (NOK),⁸ and the average annual fee for publicly subsidized childcare was about NOK 34,600 with some price subsidies for low-income families. Bettinger, Hægeland and Rege (2011) demonstrate that for a family in the bottom income quartile, the effective after-tax price of a full-time day care place for a one- or two-year-old child constituted about 40 per cent of average family earnings.

From 2012, the CFC subsidy is no longer available for 2-year-olds. Today only children 12–23 months are eligible. The current subsidy amounts to 7500 NOK. It is possible to receive 50% of the subsidy if the child attends child care less than 20 hours per week, although this depends on whether it is possible to obtain a part time childcare place.

The fact that there is a substantial subsidy available if you do not enrol your child in child care, may seem at odds with the general Norwegian child care policy. If we accept the premise that child care is beneficial for most children from an early age, keeping the child at home in order to receive a subsidy, might pose an obstacle to the child's individual development. At the same time, in families where one of the parents do not have an attachment to the labor market, the CFC subsidy may increase family income quite substantially. Hence, if there are other siblings in the family, the increased income from the CFC subsidy could be positive for their development. Several studies have showed that a higher household income can improve the child's cognitive development through the improved consumption opportunities of the family (Duncan et al. 2010, Dahl and Lochner 2012). However, the connection of these two policies is not a given. An alternative could be to have more extensive transfers to low income families with young children, that were not connected to child care enrolment. This is also what was suggested in an OECD report on migrant education from 2009. The report's authors

8. The transfer was and is tax-free.

advise that removing the financial support could hurt the children in question through a negative impact on their home environment, but that the negative incentives for participation in child care should be addressed (Taguma et al. 2009).

8.3.3 CHILD CARE ENROLMENT IN NORWAY

Examining the statistics on the overall share of child care enrolment of children in Norway, Figure 8.1 displays how enrolment rates change over the years 2008–2014 for 1–2 year olds and 3–5 year olds, respectively. The figure is based on annual reports from the child care centers, and should capture children enrolled as of 15th of December the relevant year. The childcare centers report the total number of children enrolled by age.

Turning to the figure below, we see that over the recent years, there has been an increase in child care enrolment. This increase is mainly driven by higher attendance rates among the younger children. Most children 3–5 are enrolled and have been throughout the period. In 2014, the enrolment for the oldest children is 97%. For the group of younger children there has been an increase over the years, from just below 75% in 2008 to about 80% in 2014. Hence, the vast majority of children between 1 and 5 are enrolled in child care in Norway.

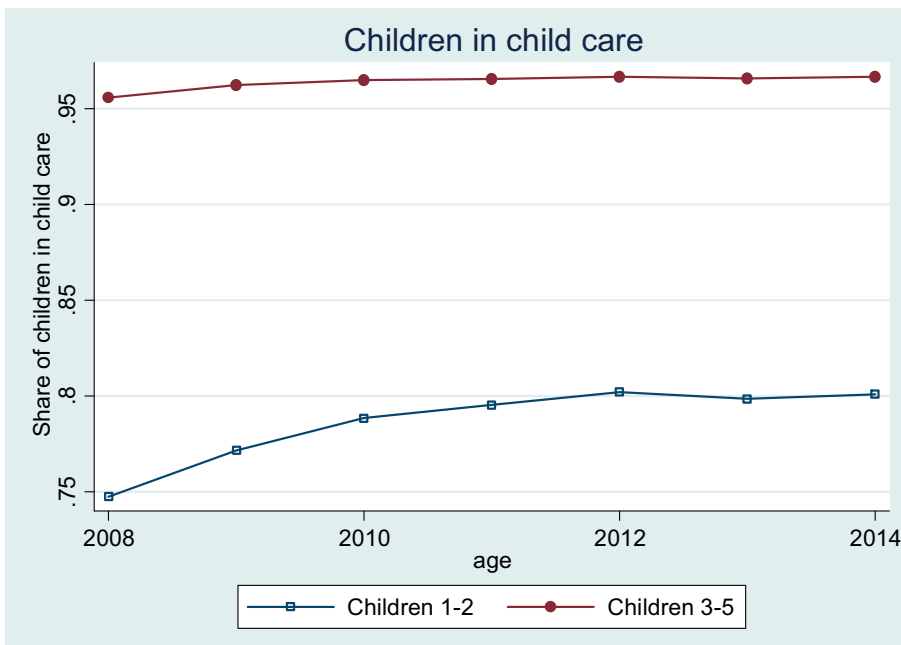


FIGURE 8.1 Children in child care 2008–2014.

The high enrolment rates mask that there still are large differences in enrolment between children from different backgrounds, particularly when it comes to the youngest children. We do not have registry information on individual childcare enrolment, but we do know the number of children with a minority language background attending. In Figure 8.2 below, share of children in child care by age and year is reported for children without and with immigrant background respectively. The shares are constructed by summing up all children in child care with a minority language background and dividing it by the number of children of the relevant age that have an immigrant background. We see that shares vary substantially for the two groups of children. Virtually all majority language children (upper panel) attend child care when they are between 3–5 years old throughout the period, whereas the corresponding share for the younger children aged 1–2 is about 80% in 2008, and increasing slightly to about 85% in 2014. For children with a minority language background, about 85% of the older children are enrolled in 2014, a small increase from the start of the period. For the younger children, enrolment is lower, but the increase is stronger for this group. In 2008 below 40% of children 1–2 years old were enrolled in child care, whereas the corresponding share in 2014 had risen to about 55%.

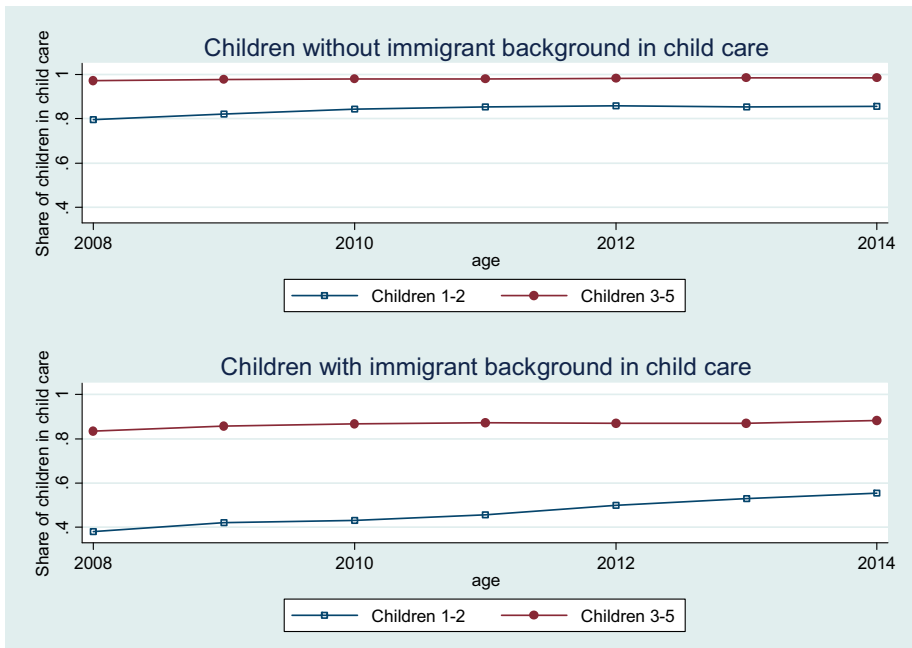


FIGURE 8.2 Children in child care 2008–2014, by immigrant background.

8.4 COMPARATIVE STATISTICS: CHILD CARE IN AN INTERNATIONAL PERSPECTIVE

Norway has a high enrolment of children aged 3–5 compared to most countries. For children 0–2, Norway ranks a little lower. The latter may be explained by the country’s extensive parental leave policy implying that few children below one year of age will enrol. For 2-year-olds the enrolment is above 90%. Key findings in a recent OECD report state that enrolment of 0-to-2-year-olds in formal childcare and preschool services differ considerably across the OECD (OECD 2016). Around 35% of children aged 0-to-2 participate in some form of childcare, but this varies substantially from as low as about 6% in the Czech Republic to as high as almost 66% in Denmark. Participation rates tend to be highest at around or above 50% in many of the Nordic (Denmark, Iceland, Norway and Sweden, but not Finland) and ‘Benelux’ OECD countries (Belgium, Luxembourg and the Netherlands), plus also France and Portugal.

For 3–5-year-olds, Norway is mentioned as one of ten countries where enrolment rates remain high across all three individual years of age, the others being Belgium, Denmark, France, Germany, Iceland, Israel, Italy, Spain, and Sweden (OECD 2016). In these countries enrolment rates for 3-, 4- and 5-year-olds are all above 90%. In others, however, participation rates for 3-year-olds are far lower than for the older children. In the US, less than 42% of 3-year-olds are enrolled in pre-primary education, compared to over 90% of 5-year-olds.

Enrolment by immigrant background is not available in the OECD data, but may be obtained by looking at specific countries. For the US, Park et al. (2015) report that the average enrolment rate is 47% for 3–4-year-olds with a native background, whereas it is 43% for this age group with an immigrant background. However, enrolment rates by immigrant background vary substantially across states.

8.5 CHILD CARE ENROLMENT AND CHILD BACKGROUND IN OSLO

We do not have registry information on child care enrolment in Norway. Such data are, however, available for Oslo, where we know when the individual child enrolls in child care. This allows for much more detailed analysis of childcare use. Using data from Oslo, we can study more thoroughly how child care enrolment varies by family background such as parental income and education. The available data cover children born 2004–2007.⁹ Turning first to attendance, we see from Figure 8.3 that about 95 percent of children had attended child care (in Oslo) before school start. However, the average participation rate hides the fact that it rose con-

siderably in this period, from 87 percent for the 2004 cohort to 95 percent for the 2006 cohort. From the figure, we observe that children from a more disadvantaged background have somewhat lower attendance rates, as measured along several dimensions. The attendance rates are particularly low for children from immigrant families (about 90%) and children of a parent receiving welfare benefits (about 87%).

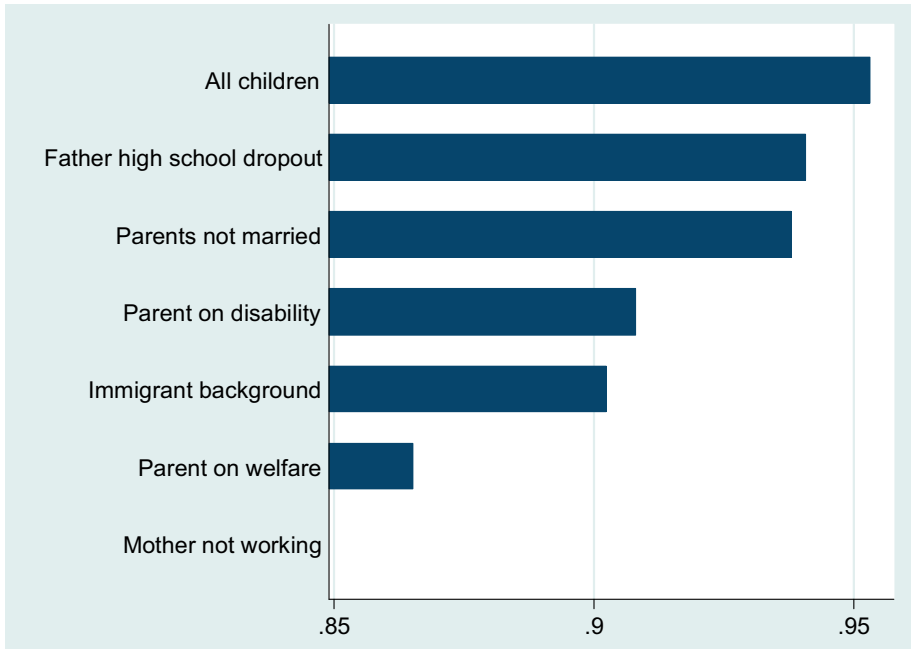


FIGURE 8.3 Participation rates in child care across family background.

Figure 8.4 displays the number of years a child has been enrolled in child care (in Oslo) before school start. On average, a child is enrolled close to four years in childcare. In line with what we would expect from observing Figure 8.3, children from more disadvantaged backgrounds tend to spend less time in child care than their more advantaged peers. In families where the mother is not working, the child spends less than three years in child care prior to school start, about the same as if one of the parents receive welfare benefits. Children with immigrant background also spend about a year less in child care before school start compared to

9. The children must reside in Oslo at the entry of the calendar year they turned six to be included in the sample. Note that we only observe if the child attended child care in Oslo. See Drange and Telle (2015) for details.

the average child. This clearly shows that there are differences in child care use across children from different backgrounds. Keeping in mind that child care has been shown to be particularly beneficial for children from disadvantaged families, as well as for children with an immigrant background, this may be of concern.

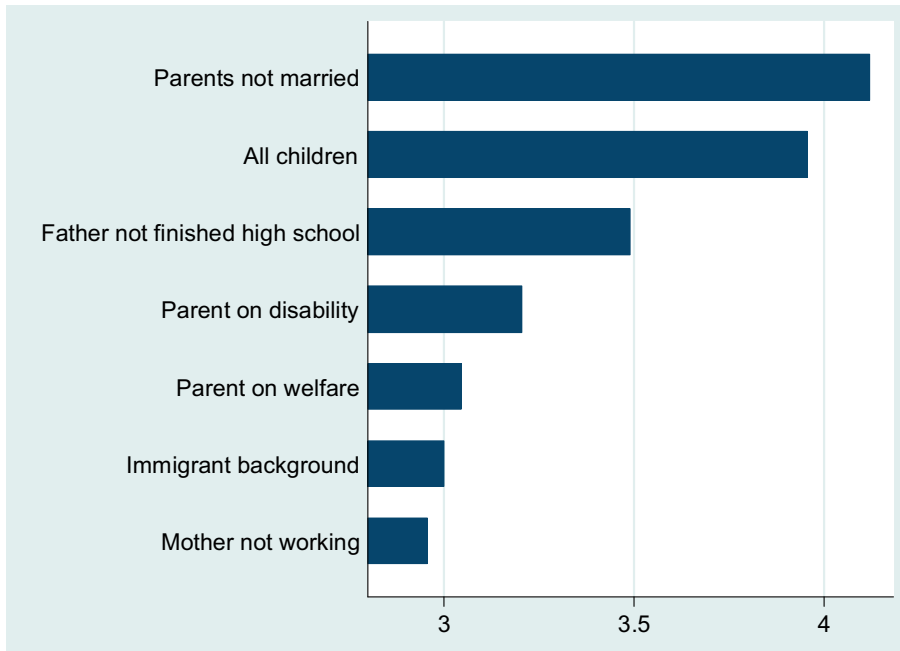


FIGURE 8.4 Years in child care before school start.

Given these socioeconomic differences in child care attendance, we would also expect a positive correlation between child care attendance and later school performance. For Oslo, we have data from language tests in first grade. These tests are meant to identify the weakest pupils to secure that the school allocates resources to children who are underperforming. In Figure 8.5, we see that among children with more child care experience, there is a lower share who scores poorly on the first-grade language test. For children with no child care experience, about 40% score poorly on the language test. Children who attend one to two years, do not really score much higher, whereas attending four to five years reduces the share who performs poorly sharply to about 15%. We should, however, keep in mind findings from Figure 8.4 that shows that children without immigrant background attend child care longer. Hence, the reason why children attending child care for a shorter period get a lower score on first grade language tests, is likely

due both to having spent less time in child care as well as having an immigrant background.

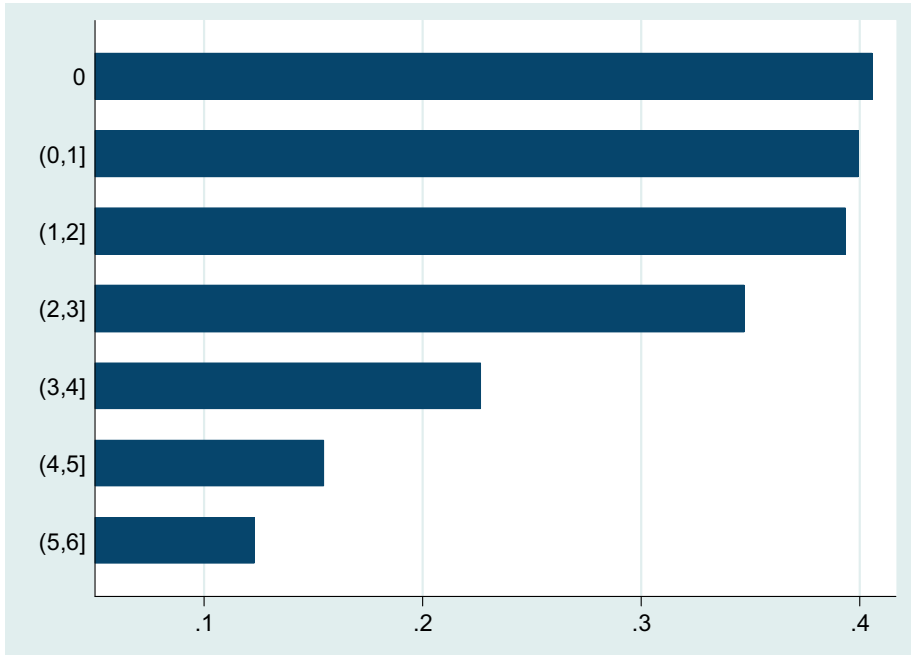


FIGURE 8.5 Share of children scoring poorly on 1st grade language test by years in child-care.

We would not only expect socioeconomic differences to exist between observable categories (e.g. between children from immigrant families and other children), but also within such categories. For example, among children from immigrant families, we would expect the most advantaged to attend childcare more and earlier than the disadvantaged. Though this could also reflect a causal effect of attending childcare, there are clearly important selection processes determining child care attendance.

8.6 CLUSTERING IN CHILD CARE CENTERS

While findings suggest that most children benefit from enrolment in child care, different factors may affect how successful centers are in promoting child development. One such factor is the composition of the children in a center. A center with a very high share of children speaking a minority language will clearly face

a bigger challenge securing that all children are able to speak Norwegian when they start school, compared to a center with only majority language-speaking children. To better understand the challenges faced by the centers in Oslo, we will now look at how the composition of children varies across child care centers. In the following plots, centers must have at least 10 children to be included, and the sample now includes all children enrolled in publicly subsidized child care in Oslo in 2011.

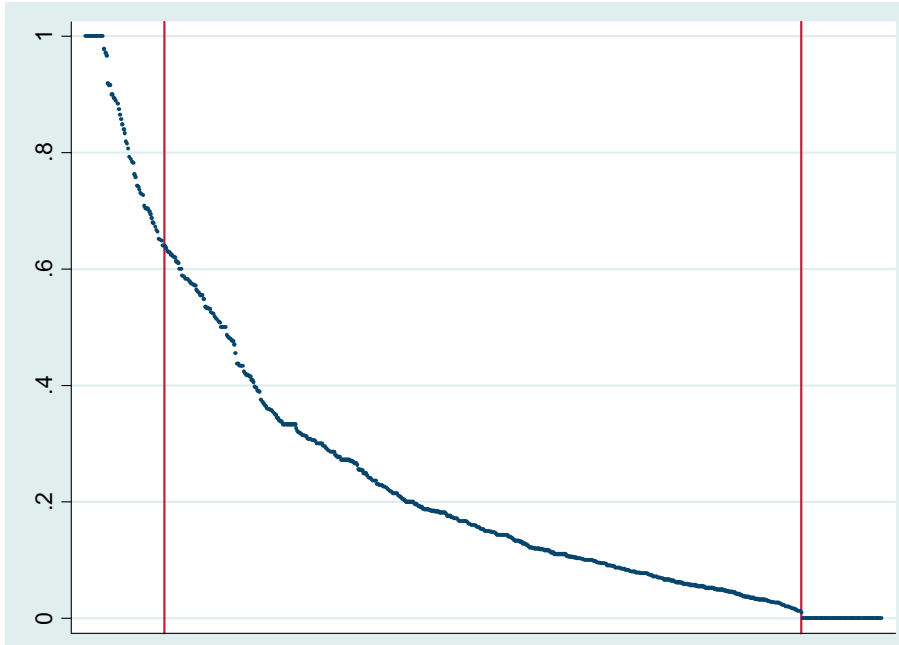


FIGURE 8.6 Distribution of child care centers after share of children with immigrant background.

In Figure 8.6, we see that children from immigrant families clearly are unevenly distributed across centers. In about 15 percent of the centers, there are no children from immigrant families, while in the 10 percent centers with the highest share of children from immigrant families, about 80 percent of the children have such background. This could reflect the fact that there is substantial clustering of immigrants across city districts in Oslo, and that children attend a childcare center in their own district. However, when taking a closer look at the data, the composition of families within city districts cannot alone explain the clustering. In Drange and Telle (2018) we show that while there are substantial differences in the mean share of children with immigrant background across city districts related to geographi-

cal residential segregation across the city, there are also substantial differences within districts (the districts are identical to the catchment areas of the centers). Moreover, the segregation is also very high within districts with a high share of children from immigrant families.

In Figure 8.7, we show the rate of the mean of the given background characteristic for the top and bottom decile of centers. The grey bars indicate the given share of children with the indicated background in the centers with the lowest 10% of children with such background, and the black bars similarly gives the share of children in the center with the highest 10%. Thus, when considering immigrant background, the figure reports that the centers with the lowest share of children with such background have 0%, whereas the centers with the highest share have a share of about 80%, in line with findings from Figure 8.5. Proceeding to the share of children with mothers not working, we see that in the highest decile of child care centers almost 60 percent of children are from families where the mother does not work. In the lowest decile, the corresponding figure is less than 10 percent. We see a similar clustering across all background characteristics, and note that while none of children come from families on welfare in the lowest decile, almost 30 percent have this background in the highest decile of child care centers. For all measures, it is evident that disadvantaged and advantaged children are clustered in different centers.

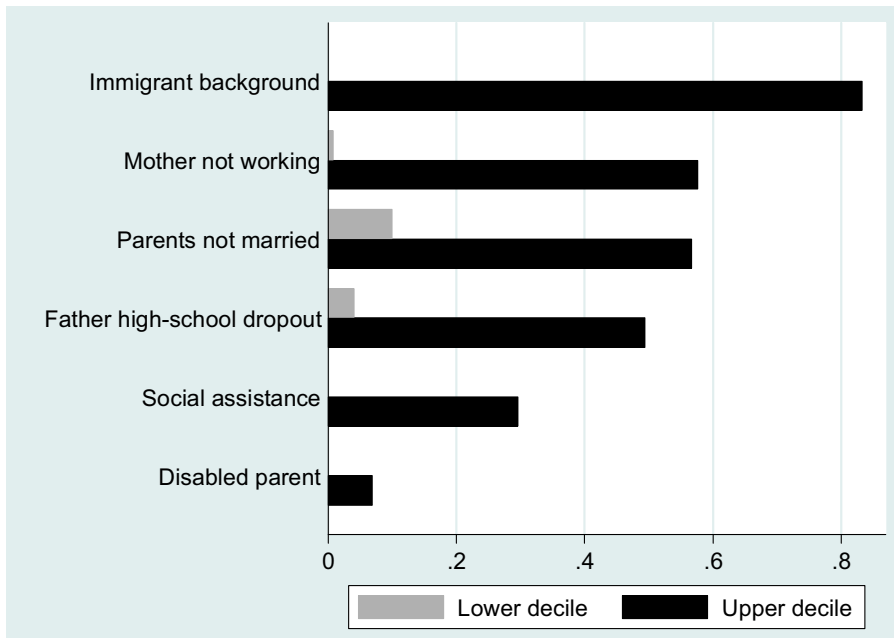


FIGURE 8.7 Family background inequality across childcare centers.

8.7 CONCLUDING REMARKS

Evidence from the Norwegian setting suggests that child care may enhance child development, both for the 3–5-year-olds and for toddlers (Havnes and Mogstad 2011, Drange and Havnes 2015). Both studies find that child care is particularly important for children from disadvantaged families, a finding that resonates well in the international literature (Almond and Currie 2011). This suggests that a well-designed child care policy is important to enable all children to develop abilities on a basis of equal opportunity, as Norway has committed to when ratifying the UN convention on the rights of the child. This understanding of the role of child-care is present in the jurisprudence of the Committee on the Rights of the Child and is reinforced by the broader express obligation in the CRC to support parents with child-rearing through ‘services for the care of children’ and all working parents with access to childcare.

Norway has an extensive child care program that covers the vast amount of 3–5-year-olds. Enrolment rates for younger children are lower, but whether this is due to a lack of supply or parental choice, is not clear. This distinction is obviously very important for policymakers. However, given that the child enrolment guarantee has not been extended to all children when they turn 1, the government and the municipalities should improve the legislation to secure that being born in June to October ceases to play an important role in determining when a child will enrol. This can matter for child development, as documented in Drange and Havnes (2019).

The Cash-for-Care subsidy is arguably an obstacle for child care enrolment in families with a low income and where the mother is already at home. For a low-income family, the transfer may be a substantial part of family earnings. Thus, if a family is on the margin of enrolling a child in child care, such a subsidy could easily tip their decision and lead to non-enrolment. This might also be better for other children in the family, because family income will increase. A policy that creates such incentives, is at odds with the fact that child care is beneficial for young children, particularly for children from low-income families. The current connection between the cash transfer and child care is unfortunate.

Overall, the current Norwegian child care policies are fairly successful in securing enrolment of children in child care in Norway. The country ranks high compared to most other countries, particularly for children over 3 years old. Child care is affordable, and with the latest policy changes where a half day in child care is free of charge for low income families, most families do have the opportunity to enrol their child. Still, for Oslo, where we can look more closely into how child care attendance varies across children from various socioeconomic backgrounds,

there is clear evidence that quite a few children do still not enrol, or enrol late. It turns out that there is a lower enrolment rate among children from disadvantaged families, and this pattern is particularly pronounced for children with an immigrant background. Moreover, the composition of children varies across centers and areas in Oslo, and this segregation may hamper the individual centers' ability to promote equality of opportunity.

We do not know whether the pattern of varying enrolment rates by background is representative for the entire country, but we know it is representative for children from immigrant families. We also do not know the reason why the pattern looks like this. It might be due to child care costs, it might be due to the cash-for-care subsidy and it might simply be due to parents preferring home care over formal care. The means to tackle the discrepancies in enrolment rates, are to make sure that child care is affordable to all, secure a quality that parents feel comfortable with and to remove the connection between the cash transfer and child care. There might also be gains from providing information to parents that are new in Norway, and less familiar with early child care. For the youngest children, it is hard to think of a system where other than parents decide whether to enrol the child. It is, however, important that parents can make an informed decision without having to consider costs or lost income, and that the decision can be taken independently of the child's birth date.

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Part III

CROSS-CUTTING THEMES

9

Incorporating the Convention in Norwegian Law

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ABSTRACT The UN Convention on the Rights of the Child 1989 (CRC) is incorporated in Norwegian law by the Human Rights Act. This chapter explores and analyse the legislative effect of this legal incorporation. It provides an overview of legislative amendments that the CRC has catalysed and cases in the Norwegian Supreme Court in which the CRC has been invoked. In several judgments, the CRC has been a central issue and the Court has divided over its interpretation. Drawing on the CRC committee's concluding observations, the chapter also reflects on contemporary challenges in the implementation of CRC in the Norwegian legal system.

KEYWORDS CRC | implementation | Human Rights Act | incorporation | judiciary | children's rights

9.1 INTRODUCTION

The UN Convention on the Rights of the Child 1989 (CRC) is incorporated in Norwegian law by a statutory provision giving the CRC the same status as other statutory regulation and with supremacy over concurring statutory provisions. The aim of this contribution is to explore and analyse the legislative effect of CRC in Norwegian law. Even though the legal position of the CRC may be considered to be strong, given that it is a valid source of domestic law with supremacy, this could be a rather formal position if the CRC is seldom invoked or subject to narrow interpretation. The two main bodies of this investigation are the legislator and the judiciary (the courts). It would of course also be beneficial to include the administrative branch to examine the implementation. However, doing justice to such an

examination would be challenging and the administrative implementation is also covered by many other contributions in this book.

This chapter will start with a short description of the history leading up to incorporation (Section 2) and the legal position prior to incorporation (Section 3). The main part (Section 4) will be an analysis of legislation and court decisions where the CRC has played a role (based on a review of 138 Supreme Court cases), and where the common question is which kind of impact that CRC has had, respectively on the legislator and the judiciary. The method will be a traditional legal approach – *de lege lata* – where the material will be analysed based on the relevant sources of law. Additionally, some reflections concerning current challenges will be made (Section 5) and a short conclusion will be offered (Section 6).

9.2 THE HISTORY TOWARDS INCORPORATION

Norway signed the 26 January 1990 and ratified the Convention 8 January 1991.¹ When the ratification passed the Parliament, the Government assumed that additional statutory amendments were unnecessary on the grounds that the current legislation was in conformity with the obligations under CRC (with the exception of the Norwegian reservation).²

Such a consideration is formally necessary as Norwegian law is based on a dualistic approach to public international law, including human rights treaties. International instruments as such are not automatically a part of domestic law, and have therefore to be integrated into the national legal order to be a relevant legal source (Rt. 1997 p. 580).³ There are two main ways of integration, either in form of *incorporation* (the international treaty is partly or as a whole made part of Norwegian law through a legislative act which refers to the relevant instruments) or through *transformation* (the content of the international treaty is made part of Norwegian law through a legislative act which converts the relevant legal instruments into

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1. St.prp. No. 104 (1989–90). The ratification was made with approval by the Parliament.
 2. Norway made a reservation regarding the right to appeal in criminal cases (CRC Art. 40, para 2, b(v)), but this was withdrawn after a major criminal procedure reform in 1995 (Norway made a similar reservation under the International Covenant on Civil and Political Rights 1966 (CCPR)).
 3. 'Rt.' is the yearbook of judgments and decisions from the Norwegian Supreme Court. From 2015 and onwards, judgments and decisions are not printed but are referred to by their case number ('A' indicates that it is delivered by a panel of five justices and 'P' indicates that it is delivered by the full Supreme Court (twenty justices)). The working language of the Court is Norwegian but a selection of rulings is translated into English and a summary in English is available of all recent judgments, cf. <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/> (last retrieved 1 July 2018).

domestic law, e.g. by translating the relevant provisions and taking them into domestic legislation). Normally, both incorporation and transformation are made by an act of Parliament.

Even though an international instrument is not made part of Norwegian law through incorporation or transformation, it can still be a valid legal argument in domestic law. The principle of presumption is well established in case law. The core content of the principle is that even if international law is not implemented through incorporation or transformation; it is binding upon Norway as a state within international law. Domestic legislation should therefore be applied in a manner that is consistent with the international obligation, unless there is no leeway of discretion under the interpretation of the statutory provision.

In the 1990s, however, academics and NGO's increasingly claimed that the principle of presumption and part incorporation of human instruments (either the incorporation of specific instruments or general incorporation of human rights in particular fields) was insufficient for the effective protection of human rights. A law commission prepared an expert report (NOU 1993:18) and suggested a Constitutional provision in addition to a Human Right Act. The Norwegian constitution was amended, and section 110c was inserted. Its successor now states that the authorities of the State shall 'respect and ensure human rights' as they are expressed in the Constitution and in 'the treaties concerning human rights that are binding for Norway' (Section 92).⁴

As a direct consequence of the constitutional reform of former Section 110c, the Parliament passed the Human Rights Act (HRA) in 1999.⁵ The Act originally incorporated three human rights instruments, The European Convention on Human Rights 1950 (ECHR), the UN Covenant on Civil and Political Rights 1966 (CCPR) and the UN Covenant on Economic Social and Cultural Rights 1966 (CESCR).⁶ In addition to the incorporation, HRA states that the incorporated instruments shall have precedence over concurring statutory legislation. Although the Parliament at a later state can pass statutory provisions deviating from the incorporated instruments, this is more a theoretical possibility than a practical opening. Additionally, the human rights laid down in the Constitution have established a boundary for the legislator. It is suggested that HRA takes the form of a 'semi-constitutional' norm, although this term is contested. When it comes to the

4. The provision as such does not incorporate all international human rights instruments, see HR-2016-2554-P paras 64–71.

5. Act 1999-05-21-30 on human rights (Human Rights Act).

6. The CRC committee expressed concern that CRC was not intended to be included in HRA, see CRC/C/15/Add.23 paras 13–14.

application of HRA, the preparatory work emphasized that the incorporation was not only attached to the wording of the incorporated instruments, but also to their application through the respective supervisions body (this issue will be returned to later).

When HRA was debated in the Parliament, a majority of the committee had encouraged the Government to incorporate also the CRC and the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW). The Ministry later submitted a proposition for the inclusion of CRC – including the first two protocols – in HRA, and the Parliament passed the amendment of HRA in 2003 (see Bårdsen 2015, Sandberg 2014). At the same time the Parliament made several statutory amendments, most of them with the intention of strengthening children's right to be heard. CEDAW was first incorporated in the Equal Treatment Act of 2013, but without supremacy over concurring statutory legislation.⁷ In 2009, CEDAW was included in HRA.

It would go beyond the scope of this chapter to give an introduction to the Norwegian legal system, but a few particularities can be mentioned (see Helland and Koch 2014). Despite the lack of a codified civil code, the Norwegian legal system is considered as a civil law system. The particularities of the judicial structures in the Nordic legal systems are so distinct and the Nordic legal systems may be regarded as a separate legal family. The point of departure when solving a legal matter will normally be the wording of the statutory provisions, where the preparatory works often will play a particularly important role in the interpretation. Norway has a general court system, with three instances with the Supreme Court as the superior body, deciding both civil and criminal cases, as well as all branches of administrative law. Rulings of the Supreme Court provide guidance to subsequent cases, and the case law concerning CRC will be analysed below.

After the incorporation some core principles of CRC were also made part of Norwegian constitutional law by the amendment of Section 104 into the constitution. The position of children's human rights was strengthened by a major revision in 2014 which is noted by appreciation by the CRC Committee.⁸ According to Section 104, first paragraph, children have the right to respect for their 'human dignity'. Children have the 'rights to be heard in questions that concern them', and 'due weight shall be attached to their views in accordance with their age and development' (cf. CRC Article 12). Furthermore, according to Section 104, second paragraph, for actions and decisions that affect children, the 'best interests of the child' shall be a fundamental consideration (cf. CRC Article 3). According to

7. Act 2013-06-21-59 on equal treatment (Equal Treatment Act), repealed.

8. CRC/C/NOR/CO/5-6 para 3.

Section 104, third paragraph, 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 rights guaranteed by Section 104 are inspired by CRC and the wording of CRC has been used as guidance when drafting several parts of the constitutional provision. Practice from the CRC Committee will therefore be of relevance also when interpreting Section 104 in the Constitution, cf. Rt. 2015 p. 93 para 64. Still, it is according to the Norwegian constitutional law up to the courts, and in particular the Supreme Court, to interpret, clarify and the develop the protection afforded by the constitutional provisions.

9.3 LEGAL EFFECTS OF CRC PRIOR TO INCORPORATION

Even before the inclusion in HRA, CRC had an impact on the Norwegian legal system. As stated before, the principle of presumption made CRC a valid argument in domestic law. An early example was the case in Rt. 2001 p. 1006 concerning the introduction of a new common curriculum on ‘Christianity, religion and philosophy’ in primary education. The Supreme Court found that the new curriculum was in conformity with the international human rights instruments, including the CRC. The CRC Committee commented on the curriculum in their concluding observations and held that it may be discriminatory. The Committee was ‘concerned notably by the process of providing for exemptions to those children and parents who do not wish to participate in parts of the teaching’.⁹ The Committee recommended that Norway review the implementation of the new curriculum and consider an alternative exemption process. The curriculum was also brought before the supervision bodies under ECHR and UN CCPR, which both came to the conclusion that the curriculum was not in conformity with the two instruments.¹⁰ Subsequently, the curriculum was reformed.

In some areas, international public law as such was partly incorporated through statutory provisions, stating that a particular law was limited by Norway’s international obligation. This can be found, for example, in the Immigration Act of 1988.¹¹ However, the impact of CRC was at first contested before it was accepted

9. CRC/C/15/Add.126 paras 26–27.

10. See ECtHR judgment 29 June 2007 *Folgerø and Others v Norway* (dissent nine to eight); United Nations Human Rights Committee’s views 3 November 2004 *Leirvåg and Others v Norway*.

11. Act 1988-06-24-64 on immigrants’ access to and residence in the country (Immigration Act), repealed.

that this instrument had the same supreme effect as other international obligations (Einarsen 1998).

The first example of the impact of CRC on the legislation was the Education Act of 1998.¹² Due to the recommendations made by the CRC Committee in Norway's first report,¹³ the Education Act introduced a right to primary education also for children not residing lawfully in Norway (Section 2-1).¹⁴ The wording establishes that the provision does not apply to secondary education. In this respect, there has been an interesting development after incorporation, which will be returned to later.

Another field where CRC has had significant impact, both before and after incorporation, is the provision of health services to irregular migrants and asylum seekers (Søvig 2011). The CRC Committee has expressed concern in the Concluding Observations to Norway,¹⁵ and domestic authorities have made several references to CRC in preparations of regulations and issuing of guidelines.¹⁶ Still, at some points irregular children are not entitled to the same level of health care as other children, which may not be in line with obligations under CRC (Jacobsen, Bendiksen and Søvig 2015).¹⁷ In light of the restrictive policy towards irregular children, it is a paradox that Norway during the drafting of CRC Article 2 proposed that 'irrespective of the legality of their parents' stay' should be inserted as a forbidden ground of discrimination.¹⁸

9.4 THE INCORPORATION OF CRC

As mentioned, through the HRA amendment in 2003, CRC was incorporated in Norwegian law. The potent effect of this incorporation is that supremacy is not only attached to the wording of the incorporated provisions, but also to their cur-

12. Act 1998-07-17-61 on primary and secondary education (Education Act).

13. See CRC/C/15/Add.23 para 12.

14. NOU 1995:18 p. 382; Ot.prp. No. 46 (1997–98) p. 26.

15. CRC/C/15/Add.23 para 12; CRC/C/15/Add.126 paras 20–21; CRC/C/15/Add.263 para 4; CRC/C/NOR/CO/5-6 para 24(c). See also recommendation from the ESCR Committee (E/C.12/1/Add.109) on the same issue.

16. See for example a circular (Q-11/2006 p. 16) where the Ministry after referring to CRC draws the conclusion that irregular children have the same access to health services as children legally residing in Norway. By contrast, see the opinion by the Ministry of Justice regarding some aspects of access to health care services for irregular children, opinion 17 July 2017, JDLOV-2015-4608.

17. See also the critique from the ESCR committee, E/C.12/NOR/CO/5 para 21.

18. HR/(XXXVII)/WG.1/WP.10; Legislative History (2007): Vol 1, p. 320.

rent interpretation through the relevant supervisory bodies. In the scholarly literature in the first years after incorporation the discussion principle of ‘self-execution’ was often focused on, but in recent years this aspect has hardly been addressed (although see the remarks from the minority in Rt. 2012 p. 2039, para 120).

When it comes to ECHR, the Norwegian Supreme Court has ruled that if practice from ECtHR is reasonable clear, then a domestic statutory provision must be set aside to achieve conformity with the rights enshrined in ECHR. There are numerous Supreme Court decisions in this field, and even the clarity formula has its limitation; the overall impression is that ECHR have had a significant impact on Norwegian jurisprudence.

Turning to CRC, the Ministry made a statement indicating that the courts should be reluctant to overrule the interpretations made by the legislator:

The Ministry presumes that Norwegian courts will be careful when overruling the legislator interpretations [of CRC], as long as the Norwegian statutory provisions builds on a cautious interpretation of the relevant provisions of the Convention. This will especially apply if it concerns provisions which are vague, if the statutory provision is built on value priorities, and the legislator has assessed the connotation to the Convention and has acknowledged that there is no conflict.¹⁹

This statement could be seen as an attempt to introduce a different standard compared with the approach made under ECHR. There are weighty reasons to be sceptical about dissimilar methods being adopted to the instruments incorporated under HRA, as this indicates that some conventions are more legally worthy and potent than others. Nevertheless, there are differences between ECHR and CRC, which may lead to nuances in the assessments, partly due to the lack of binding effect of practice from the CRC Committee. Analogies can be drawn here with the use of the ICCPR. The Norwegian Supreme Court has held that decisions under individual complaints under Protocol 1 of the ICCPR must be accorded significant weight (Rt. 2008 p. 1764).²⁰ There are similarities between ICCPR and the CRC. Both are incorporated through HRA and the decisions by the supervision bodies are not legally binding. There are also differences, since CRC until recently has not reviewed individual complaints and will not have this competence concerning

19. Ot.prp. No. 45 (2002–03) p. 16, and almost the exact same wording on p. 26. Translated by this author.

20. See also Ot.prp. No. 3 (1998–99) p. 69–70.

Norway (see below). Still, it should be accentuated that the parliamentary committee emphasized that an overall aim with HRA is to ensure that Norwegian court decisions, to the possible largest extent, reflect the practice of the international supervision bodies, indicating that the legal status of the CRC Committee's practice is not decisive.²¹

After incorporation, there have been several cases for the Norwegian Supreme Court where the practice from the CRC Committee has been addressed. Special attention was paid to this topic in a case concerning application of stay on humanitarian reasons for an unaccompanied minor (Rt. 2009 p. 1261). A core issue in the case was the legal relevance and weight of General Comments, particularly General Comment no. 6 (2005) para 86 and the 'best interest of the child'. The majority of the court noted that General Comments are not formally binding but were willing to consider their application. However, the crucial point in this case was that the particular General Comment lacked clarity (para 44). The majority indicated in essence that General Comments from the committee could have a significant impact but only if they were sufficiently clear. Moreover, in a concurring opinion, one justice stated that in order to establish common standards, and to safeguard that the ensured rights also are enforceable, it was necessary to establish common frames for interpretation (paras. 85–93). Although not stated explicitly, this minority position paid more attention to the guidance given by the CRC Committee in General Comments than did the majority.

This minority position appeared to have gained acceptance a few years later. In Rt. 2015 p. 93, the first of a number of plenary judgments concerning long-term asylum children, the majority referred to the majority in Rt. 2009 p. 1261 when it concerns the relevance and weight of General Comments (Rt. 2012 p. 1985 para 136). A unanimous court stated that the relevant General Comment represent a natural point of departure for the interpretation of CRC (para 64).

However, a more restricted approach is accentuated in the plenary judgment concerning internal placement as alternative to asylum (Rt. 2015 p. 1388). After citing General Comment No. 12 (2009) para 21, the majority stated that this passage was to be regarded as a viewpoint concerning in which direction the legal development should take place. It was then added that the viewpoint of the CRC Committee lacked support in the wording of the Convention (para 154). Nonetheless, the minority had a different approach. They began by reiterating the rationale for taking General Comments into account: that they are based on the Committee's accumulated experience and the special role that the Committee has as super-

21. *Innst. O. 51* (1998–99) p. 6.

vision body under CRC (para 272). The minority also referred to the judgment in Rt. 2009 p. 1261 (para 44), which was cited with approval by the majority in Rt. 2012 p. 1985 (para 136) and where it was emphasized that the relevance and weight of General Comments would vary, particularly depending on the clarity of the statement.

This examination of the case law of the Supreme Court regarding the role of General Comments from the CRC Committee in Norwegian law reveals that there are different viewpoints within the Supreme Court. Still, General Comments play a major role when the Court is interpreting the Convention. The most comprehensive decision on this matter is Rt. 2009 p. 1261. The shades between the two factions may be due to the wording of the relevant General Comment, in which the wording was rather far-reaching. In General Comments No. 6, para 86, the CRC Committee introduces a division between rights and interests, and in which the latter (as immigration considerations) were not considered relevant to the limitation of children's rights. The element of reluctance by the majority may be caused by an assessment of the content of the given part of the relevant General Comment, which was considered to be too expansive and without a firm grounding in the wording of the Convention, even though this is not explicitly stated in the judgment.

The previous case law all concerns General Comments of the CRC Committee. But the Committee also issues Concluding Observations amongst other documents. A common feature nevertheless is that all these resolutions are not formally binding upon the member states. Moreover, in contrast to ECHR and CCPR, the CRC Committee has until now only addressed CRC on a rather general level. The introduction of the third Optional Protocol regarding a communication procedure has added a new component in the legal reasoning. Norway has not ratified the protocol, partly because the Government were concerned that the political leeway would be diminished by a dynamic interpretation by the supervision bodies.²² However, Norway has been encouraged by the CRC Committee to ratify the optional protocol.²³ Still, cases concerning other states may be of interest, and they will be relevant even though the communications are not legally binding (in line with individual complaints under CCPR, cf. Rt. 2008 p. 1764).

To sum up the current legal situation in Norway, the impact of the CRC will depend on a number of factors, but the lack of formal binding of practice from the CRC Committee has only limited bearing. The crucial point is the clarity of the legal situation under CRC. An overall assessment must be made. The starting

22. Meld. St. 39 (2015–16), cf. Innst. 161 S (2016–17).

23. CRC/C/NOR/CO/5-6 para 38.

point is the wording of the relevant provisions of the Conventions, supplemented by relevant viewpoints expressed in General Comments, Concluding Observation and other opinions stated by the CRC Committee. However, there is interplay between the domestic and international level. If the legislator has introduced a statutory provision and in the preparatory work has thoroughly analysed the situation under CRC, then the statutory provision will normally be applied according to its wording, as long as there is some leeway under CRC. If there is no room for national discretion or application, the provision of CRC will have supremacy over domestic statutory legislation according to HRA. It should also be added that the CRC in this respect is a moving object. The Committee has committed itself to a dynamic approach, viewing the CRC as a living instrument. Consequently, despite being in compliance with CRC when the preparatory work to the provisions was made, Norway may at a later stage be considered to be in conflict with its CRC obligations – or face questions marks over certain aspects of compliance. The Supreme Court will have to take recent development under the CRC into account.

9.5 THE EFFECT OF THE INCORPORATION

9.5.1 LEGISLATION

The incorporation of the CRC has implications for all branches of the Government. For the *legislator*, it is still possible to introduce a statutory provision that deviates from the obligations under CRC, since the latter is not on a constitutional level. However, such a legislative approach is unlikely due to the political standing of the CRC.

One of the early examples of the impact of the CRC on the legislation was the provision concerning the protection of children in the planning process of buildings. The Planning and Buildings Act of 1985 contained from the beginning a clause on the object and purpose, stating that to secure safe upbringing for children was an aim of the planning process.²⁴ When the Act was amended in 1993, a referral was made to the CRC and the obligations under Article 3 were emphasized.²⁵ The new legislation states that ‘due regard’ should be made ‘for the environment in which children and youth grow up’ (Section 1-1, fifth paragraph).

Another example is education for irregular children. As mentioned above, the Education Act explicitly states that also irregular children are entitled to primary education, and this entitlement was introduced due to the recommendations made

24. Act 1985-06-17-77 on planning and buildings (Planning and Buildings Act), repealed.

25. Amendment 11 June 1993 No. 85, cf. Ot.prp. No. 59 (1992–93) pp. 85–86.

by the CRC Committee in Norway's first report. The question then arose as to whether irregular children also have a right to secondary education. With reference to the CRC, the Ministry of Justice expressed the opinion that also this group was entitled to secondary education.²⁶ The legislator recently clarified the legal situation and it is now explicitly stated in the legislation that legal stay is a condition for secondary education, cf. the Education Act Section 3-1, last paragraph (amendment 20 June 2015 No 54). Notably, in the preparatory works, the Ministry stated that the CRC does not contain a clear legal obligation to provide secondary education to irregular children,²⁷ although the ECSR committee has expressed concern about the restrictions on *asylum-seeking children* and their right to access secondary education.²⁸ This example indicates that the legislator may be willing to let other societal interests, namely a strict immigration policy, play a decisive role even if children's rights are at stake. In this particular case, the Government emphasized that the CRC does not contain an explicit provision concerning the right to secondary education and it was difficult to conclude with sufficient certainty the legal obligations under the CRC. However, the General Comment concerning treatment of unaccompanied and separated children outside their country of origin was not taken into account. This addresses a specific group but many of the statements would apply to all refugee children. According to the CRC Committee every unaccompanied and separated child, irrespective of status, shall have "full access to education in the country".²⁹ Interestingly, the issue was not addressed by the CRC Committee in their latest Concluding Observations to Norway,³⁰ despite the fact that the Government in their report stated that the right to education for children aged 16–18 lapses in the event of a final rejection of their application for a residence permit.³¹

A redundant issue in Norwegian immigration policy has been the care of unaccompanied asylum seekers. Such immigrants under the age of 15 years old are under the responsibility by the child protection service.³² They live in care centres until they are settled in a municipality or leave the country. Unaccompanied asylum seekers between the age of 15 and 18 are under the responsibility of the immigration authorities and live in reception centres. The King in Council also has the

26. Statement 24 November 2010, JDLOV-2010-8029.

27. Prop. 68 L (2013–14) p. 15.

28. E/C.12/1/Add.109 paras 22 and 43.

29. General Comment No. 6 (2005) para 41.

30. CRC/C/NOR/CO/5-6.

31. CRC/C/NOR/5-6 para 245.

32. Act 1992-07-17-100 on child welfare, Chapter 5A (Children's Welfare Act).

competence to decide whether children over 15 should be accommodated in care centres. This was originally not done due to the associated costs with such an amendment. In their Concluding Observations in 2010, the CRC Committee recommended to Norway that they expand the responsibility of the Child Welfare Services to include children aged 15, 16 and 17.³³ Since then the number of minor asylum seekers increased significantly in 2015, which the Government used as an explanation for still not extending the coverage.³⁴ In the latest Concluding Observations to Norway the CRC Committee recommended Norway to '[e]nsure that unaccompanied children in all municipalities, including those above 15, receive good quality care'.³⁵ The latest remark by the CRC Committee is clearly softer, permitted the state discretion as long as the care is of 'good quality'. It could be regarded as an example of a dialogue between the state party and the CRC Committee where the viewpoints of the committee are adjusted due to factual development.

An example of the interplay between the judiciary and the legislator is the subsequent statutory amendments in the aftermath of the judgment in Rt. 2005 p. 1567. A stepfather was convicted after having given the children physical punishment, but in a side remark the Supreme Court stated that light corporal punishment would not amount to a criminal offence. This remark was highly debated in scholarly literature, and afterwards the CRC Committee also issued their General Comment No. 8 (2006) stating that CRC requires the removal of any provisions that allow some degree of violence against children (paras 31 and 33). The legislator amended the Children's Act of 1981, clarifying that any use of violence was prohibited.³⁶ In the preparatory works CRC Article 19 is in particular emphasized.³⁷

9.5.2 COURTS

Selection of cases

For the judiciary, the CRC has been one of several sources of law coming from abroad, in line with ECHR and CCPR. All instruments incorporated through HRA are superior to statutory provisions. If the statutory provision is in conflict with the incorporated instruments the latter shall prevail. The core issue before the courts will be cases where the legal situation under the incorporated instruments is in

33. CRC/C/NOR/CO/4 para 52(e).

34. CRC/C/NOR/5-6 paras 290–7.

35. CRC/C/NOR/CO/5-6 para 32(g). See also CCPR/C/NOR/CO/7 para 31.

36. Act 1981-04-08-7 regarding children (Children's Act).

37. Ot.prp. No. 104 (2008–09) pp. 26–27.

some way uncertain and calls for an interpretation. As discussed earlier, the crux of the matter will be whether the legal obligation under the incorporated instruments is sufficiently clear to invoke the supremacy clause under the HRA.

In this section, a large selection of such cases regarding the CRC will be analysed. Since the CRC was a relevant legal source also prior to incorporation, some cases before 2003 will be included as well, even though the HRA and its supremacy clause was then not an issue. Since 1993 and up to 1 July 2018, there have been 132 cases before the Norwegian Supreme Court where the CRC either has been included in the parties' submissions or in the rulings by the Court. The cases are divided into sub-categories in order to avoid a chronological presentation. Such an approach and the different sub-categories will always be a subject of discussion but are inevitable to obtain an overview.

Before turning to the case analysis, one preliminary reflection is to be presented. Many of the cases where the CRC has been highlighted concern topics where traditional Norwegian law lacks a special provision parallel to what is included in the CRC. This should not be a surprise. Where Norwegian statutory provisions already regulate issues reflecting the same content as the CRC, the traditional legal material (wording of the provision, preparatory work, etc.) will be the starting point. Normally, the CRC will have been taken into account when drafting the legislation and is therefore already integrated. The CRC will normally only be called upon if there is a possibility of discrepancy between the statutory provisions and the CRC.

Best interest of the child (CRC Article 3)

The best interest of the child has been a recognized principle in Norwegian law since it was first introduced in the Children's Act 1981, and the principle is expressed in several statutory provisions (adoption, child care etc.). However, the best interest of the child was not a general rule in Norwegian law before the CRC was included in the HRA. As an example, before the new Immigration Act of 2008,³⁸ there was no specific provision stating that the best interest of the child should be a primary consideration in immigration cases. Most of the cases where references to Article 3 of the CRC are made are from the field of immigration. Historically, this could be explained by the lack of a provision in the Immigration Act stating that the 'best interest of the child' is a primary consideration. However, even after such a provision was included, there have been several cases within the

38. Act 2008-05-15-35 on immigrants' access and residency in the country (Immigrant Act).

field. This can be understood as the result of the rather strict immigration regime, where the interests of individual may receive less weight than in other fields.

An illustrative case is Rt. 2009 p. 534. The question was whether expulsion was a disproportionate measure towards the aliens' children (aged six and seven). Both factions within the Court referred to the CRC Article 3 but came to different conclusions. The majority (three judges) of the Court found that expulsion was in conformity with Norway's human rights obligations, while the minority (two judges) paid more attention to the practice of the CRC Committee. The case was brought before the European Court of Human Rights (ECtHR), which held that there had been a violation of ECHR Article 8.³⁹ In this decision, ECtHR took the CRC into consideration when applying ECHR Article 8, and the case illustrates how the CRC gains increased legal force when joined by other instruments in a form of interplay and interaction.

As already mentioned, the statement by the CRC Committee regarding unaccompanied minors that 'non-rights-based arguments such as, those relating to general migration control, cannot override best interests' considerations' (General Comment No. 6 (2005) para 85) has attracted attention, together with General Comment No. 14 (2013) concerning the 'right of the child to have his or her best interests taken as a primary consideration'.

Rt. 2012 p. 1985 concerned long term staying children who lived in Norway together with their family. After their asylum application was rejected, they applied for a stay on humanitarian grounds. The majority of the Supreme Court took as a departure point the relevant statutory provisions and the preparatory work attached to it, as well as subsequent development as evinced in documents from the Government and Parliament (para 134). According to the majority the overall assessment of the domestic legal material showed that the 'best interests of the child' should be of considerable weight in applying the Immigration Act. There should be taken into account the relationship to Norway developed while the child's stay was irregular (the time between after the rejection of the asylum application and the decision on stay on humanitarian grounds). However, the 'best interests of the child' had to be weighed against other interests, in particular immigration considerations. The latter could be so compelling that they were to be given priority over the 'best interests of the child' and such a viewpoint was seen to be expressed by the legislator in the preparatory work. The majority added that the weightier the 'best interests of the child' were, the less room was to be given to other considerations. The applicants in the case held that the CRC Article 3

39. ECtHR judgment 28 June 2011 *Nunez v Norway*.

required a more authoritative role for the ‘best interest of the child’ than what could be deducted from the national legislative material. The majority did not agree with this position. It held that the wording of the CRC Article 3 requires that the ‘best interests of the child’ should be a paramount consideration, but that it should not necessarily be the only and in not all cases the decisive consideration. In this respect, the majority both referred to earlier case law of the Supreme Court (inter alia Rt. 2009 p. 1261) as well as to the preparatory work of the CRC.⁴⁰ The applicants had in particular emphasized the role of General Comment No. 6 (2005) (and also invoked General Comment No. 5), which pays attention to the division between concerns of general interests and right-based arguments. The majority stressed that the actual case involved children living with their families, either in Norway or in their country of origin, which meant that we were outside the scope of General Comment No. 6 (2005). As a last point, the majority also paid attention to the latest CRC concluding observation concerning Norway. The Committee had expressed its concern that the principle of primary consideration of the best interests of the child is not yet applied in all areas affecting children, such as immigration cases.⁴¹ Furthermore, the Committee had recommended that Norway ensure that the best interest of the child and his/her affiliation to Norway is a primary consideration whenever decisions about the child’s future are under consideration. According to the majority the recommendations of the Committee could not be regarded as giving children a more preferable position than what was given in domestic legislation. It was not a reason to interpret the statements from the Committee that immigration considerations should always be outmanoeuvred by the ‘best interests of the child’.

The minority came to another conclusion. It took the same legal point of departure as the majority, but the order of appearance was different. The minority cited first CRC Article 3 before turning to the domestic provisions and stating that these were implementing CRC. This nuance may be a question of writing style, but it could also indicate that the minority was more willing to let Article 3 be the leading legal source. Referring to Rt. 2010 p. 1313 (a criminal case, cf. below), the minority held that the ‘best interests of the child’ should not be given absolute priority (para 187). However, the ‘best interests of the child’ should not merely be a consideration taken into account in an overall assessment. The balancing norm in CRC Article 3 requires that what all in all circumstances best serves the interests of the child should be particularly addressed and be in the foreground of the assessment; it should be ‘primary’. However, other legitimate and weighty rea-

40. Second reading (1988–89) para 121.

41. CRC/C/NOR/CO/4 paras 22 and 52.

sons could lead to other solutions than those that are in the 'best interests of the child'. The core content of the balancing norm was a requirement of relevance and proportionality when overriding the 'best interests' of the child. According to the minority, immigration considerations were undoubtedly relevant. However, the essential element of the CRC Article 3 requires that it should be difficult for immigration concerns to override the 'best interests of the child'. The 'best interests of the child' could not be disregarded by assessing that an expulsion would be justifiable in the sense that the child would not be exposed to unreasonable risk or deficiencies in the everyday care. Also, in such circumstances, to select a solution not in line with the child's interests must be anchored in sufficient overriding requirements. This is particularly important when the child is rooted in the country of stay by language, culture and social and personal ties. On this point, the minority also referred to the viewpoints of the ECtHR.⁴² Children will often be affected by their parents' unreasonable, unjustifiable or illegal choices. In immigration cases, it is an obvious risk that parents are using children in order to obtain a more preferable position for themselves. Still, the minority stressed that the CRC provides children with a separate and independent legal position. Children can therefore not be identified with the wrongdoings of their parents. The minority also cited an opinion made by a parliament committee, which in the views of the minority was in line with the balancing norm inherent in the CRC Article 3.

This judgment of the Supreme Court, Rt. 2012 p. 1985, is voluminous and in this short recapitulation it is difficult to offer a fair presentation of the viewpoints of the majority and minority. This task is particularly challenging since the two factions are writing opinions that are rather independent from each other and, to a lesser extent than usual, address the points where the viewpoints differ. It should also be emphasized that the factions have different viewpoints when it comes to the domestic legal material (cf. the minority's use of material from the Parliament committee), as well as regarding other international material (cf. the minority's use of the *Butt* judgment from the ECtHR). Still, the judgment clearly indicates divisions within the Court when it comes to the CRC and the balancing of the 'best interests of the child' and immigration considerations.

Rt. 2015 p. 93 (*Maria-judgment*) concerns the expulsion of a woman of Kenyan origin, who was living in Norway together with her daughter (four years old when the judgment of the Supreme Court was given). The daughter was a Norwegian citizen and could therefore not be expelled. Her father was not able to take care of her. The alternatives were either that she accompanied her mother to Kenya where

42. Cf. ECtHR judgment 4 December 2012 *Butt v Norway*.

she would live under poor conditions or to stay in Norway and be separated from her mother and placed under foster care. From an administrative law perspective, the judgment is interesting since the Supreme Court held that the decision affected the child to such an extent that she should be considered as a party in the immigration procedure. This illustrates that children to a larger extent than previously are considered as independent subjects. Turning to the immigration issue, the legal landscape had changed since the 2012 judgments. The Norwegian Constitution had been amended and now also guarantees the ‘best interests of the child’, cf. Section 104. The justice writing the judgment in Rt. 2015 p. 93 was the same judge as the justice writing the dissent for the minority in Rt. 2012 p. 1985. In the interpretation of Section 104, he also took into account General Comment No. 14 (2013) on ‘the right of the child to have his or her best interests taken as a primary consideration’. Section 104 was shaped with CRC as a pattern (para 64), and the preparatory work indicated that such an approach was made in order to make use of the practice of international supervision bodies. The judgment (para 65) refers to Rt. 2012 p. 1985 and the viewpoint of the majority that the ‘best interest of the child’ is not the only consideration, and not necessarily decisive. With referral to the CRC Committee the judgment then continues to emphasize that the ‘best interest of the child’ is of considerable weight and should not merely be a consideration taken into account in an overall assessment. The ‘best interests of the child’ should be the starting point, be addressed in particular and be in the foreground. This may very well be an extract of the CRC Committee’s approach, but the words are also rather similar to those used by the same judge when formulating the viewpoints of the minority in Rt. 2012 p. 1985.⁴³ The Supreme Court came to the conclusion that the decision to expel the mother was a disproportionate measure. She had given false information regarding her identity and birth date, but this was of minor character. An expulsion would be an unreasonable burden for her daughter who in this case was an innocent party.

Rt. 2015 p. 155 concerns extradition to Rwanda for war crimes. The person concerned had been living in Norway for twenty years and had three children who were all born in Norway. The Supreme Court paid particular attention to case law from the ECtHR which did not entitle the accused to be brought for trial in a particular jurisdiction and that extradition could only be denied in ‘exceptional circumstances’. Turning to the CRC, the Court held that the threshold for giving the interests of the child priority must be very high in cases involving serious crimes (para 67). In the proportionality assessment, it must be taken into account that the

43. Cf. also Rt. 2015 p. 155 para 61.

alleged crime was particularly grave and that the international cooperation on war crimes and a fair trial required that the criminal case was held in the country where the wrongdoings had taken place. The case in Rt. 2015 p. 155 is of particular interest read of light of Rt. 2015 p. 93. Both cases concern the balance between the 'best interests of the child' and other societal considerations, and a decisive element is the severity of the interests of the society.

Rt. 2015 p. 1388 is also a plenary case and concerns rejection of an asylum application and stay on humanitarian grounds due to the possibility of internal flight. According to the relevant provisions, an asylum application could be rejected if the person concerned would have effective protection in other parts of the country of origin than the area that he or she had fled from, if it is not unreasonable to seek protection in these parts of the country (which in the specific case was the Kabul region of Afghanistan). The family consisted of parents and two children, aged six and two years when the decision was taken by the Immigration Board. Several issues were at stake, and the aspects concerning the child's right to be heard will be addressed below. The majority took as a starting position that according to domestic sources there should not be made an assessment of the living conditions in Kabul compared with the situation in Norway, even if the case involved children (although if such a comparison was relevant under the assessment of stay on humanitarian grounds). Such an approach would lead to a situation where the right to asylum would be different for families with children, which would not be in conformity with the UN Refugee Convention. The CRC could not lead to another conclusion, and the majority emphasized that CRC Article 22 did not state that there should be a different assessment than under the UN Refugee Convention. The majority found that the family neither should be granted stay on humanitarian reasons. The minority came to the same conclusion regarding the question on asylum but had a different view regarding stay on humanitarian grounds. The core in this respect was that the reasoning given by the Immigration Board was insufficient, and in this assessment the CRC Article 3 played a vital role. The minority referred to General Comment No. 14 (2013) and the Committee's requirements concerning the rule of procedure. 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; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases (para 6). The minority held that even the practice from the Committee is not binding, they are of considerable weight and emphasized that the ECtHR often refers to the General Comments by the CRC Committee.

Deprivation of liberty (CRC Article 37)

Another important category of the cases before the Supreme Court has concerned deprivation of liberty of minors. CRC Article 37 contains provisions both regarding conditions for detention and regarding the procedure. Protection against deprivation of liberty can also be found in ECHR Article 5 and CCPR Article 9, which both applies to all persons, notwithstanding age. Article 37 of the CRC has explicit provisions for children and states that detention is to be used only as a measure of last resort and for the shortest appropriate period of time (litra b) and that child detainees should be separated from adults unless it is considered in the child's best interest not to do so (litra c). The Supreme Court has used the CRC Article 37 as an argument in favour of the child both in cases concerning selection means of sentencing (imprisonment or community sentence) and on custody. A case for illustration can be Rt. 2010 p. 1313. The person concerned had committed robbery and attempt at robbery at the age of 17 years and four months. For adults, such acts will normally attract a sentence of imprisonment for more than one year. Under considerable doubt, a unanimous Court ordered 430 hours of community services. The Supreme Court made references to both the CRC Article 37 and General Comment No. 10 (2007). Another illuminating case is Rt. 2013 p. 776 which concerned attempted rape. The convicted boy was 17 years and three months old when the crime took place. The majority gave a partly unconditional prison sentence, while one judge found that community service would be an appropriate punishment. Even though the offender was convicted to a prison sentence, the possibility for community service for such a crime would have been unlikely ten years ago.

In the field of sentencing for young offenders there has been an interplay between the legislator and the judiciary. The Parliament has referred to and indirectly encouraged the development of milder sentencing of convicted minors.⁴⁴

Protection of children as an argument for criminalization (of adults)

In some cases, CRC has been used as an argument to interpret the criminal responsibility to the largest possible extent (within the border of rule of law) in order to give children the best potential protection from acts committed by adults. One such case concerned the previous criminal responsibility for persons having a sexual relationship with children less than 14 years of age. The provision stated that the perpetrator could not be heard with the argument that he was in good faith of

44. See Prop. 135 L (2010–11) pp. 97 and 100, cf. references hereto in Rt. 2013 s. 67 paras 14–15.

the child's age. According to the Supreme Court (Rt. 2005 p. 833) this provision contradicted ECHR Article 6 and the presumption of innocence. The Court was not convinced by the prosecutor's argument that CRC Article 34 required objective criminal responsibility, and the Supreme Court stated that children would be offered sufficient protection even without the strict criminal liability. The CRC was also used as an argument in the case in Rt. 2005 p. 1567 concerning corporal punishment (referred above). The Court stated the CRC Committee found that even light corporal punishment was incompatible with CRC.

Deprivation of liberty of parents

Another sub-category within the field of criminal law has been criminal sanctions against adults with children that would be affected by imprisonment. These cases could also be located under the 'best interest of the child'. An illustrative case is Rt. 2011 p. 1744. A mother with sole care of a five-year-old child had been convicted of keeping 95 kilos of cannabis in her apartment. Normally, such an act would have resulted in five years of imprisonment, although the length in her case would be reduced to two years due to her immediate declaration of guilt. The majority (three judges) of the Supreme Court came, under doubt, to the conclusion that community service was a reasonable sentence due to the combination of the defendant's responsibility to care for her daughter and her confession and cooperation with the police. As a legal basis for this approach, reference to CRC Article 3 was made. It was stated that an implication of this provision was that care responsibility for children should have impact on the sentencing. The minority (two judges) held that it was not ruled out that family care could be made possible during imprisonment. Regarding the balancing of the best interest of the child and general deterrence, the minority emphasized that children under the age of 18 were significant consumers of cannabis, with its well-known harmful effects, such that children's rights also pointed to the need for a custodial sentence.

Child's right to participation

The child's right to be heard is one of the four main principles of CRC (see also Chapter 10 of this book).⁴⁵ One debated case in Norway concerned the involvement of children in custody disputes (Rt. 2004 p. 811). The core question was whether the courts could omit to hear the child (then aged 11) in a case concerning

45. First presented in General Comment No. 1 (2001) para 6. See also General Comment No. 5 (2003) para 12; General Comment No. 12 (2009) para 2.

access for the father, when this case was brought to the courts immediately after the custody dispute (where the child was heard). The High Court had not heard the child, and the Supreme Court found that this approach was in conformity with CRC Article 12, since the latter had to be interpreted in the light of Article 3. The decision was criticized (Smith 2004: 223–231). Although it is understandable that the Supreme Court wanted to protect the child from the disputes between her parents, the child will sooner or later be aware of the court case. It can therefore be claimed that participation through the courts, and with assistance of skilled personnel, will be a better option than the inevitable involvement that will take place through the parents.

Although the Supreme Court has held that the child's right to participation is an important principle, there may be some reluctance to include children in ongoing disputes.

In Rt. 2009 p. 1261, the main issue was whether CRC Article 3 should have consequences for minor unaccompanied asylum seekers that sought the right to stay in Norway, where a continued stay would be in the child's best interest. The Supreme Court examined the drafting history of the provision and the alteration from 'the paramount consideration' to 'a primary consideration' and paid also attention to General Comment No. 6 (2005), para. 86. The Supreme Court found that the best alternative would be to return the child to the country of origin and to live with his grandparents, but the child was not heard prior to the hearing in the Supreme Court.

Although this approach can be explained by the fact that the Supreme Court should only decide upon the validity of the decision of the Immigration Board, and not make a full assessment of the case, it's questionable whether it is possible to decide on the best interest of the child without an updated involvement of the child (Bendiksen and Haugli 2010: 60–80).⁴⁶

The case in Rt. 2015 p. 1388 concerning internal flight (referred above) also included a dispute regarding the child's right to be heard. When the Immigration Board tried the case, the oldest child was only a few days from being six years old. The Immigration Board turned down a motion to let the child express its views during the hearing. The majority of the Supreme Court referred to General Comment No. 12 (2009) para 21, that wherever possible the child should be heard directly in any proceedings. The majority found that this was merely a statement from the Committee on how the legal situation should be developed, which was not rooted in the wording of the Convention (Rt. 2015 p. 1388 para 154). The

46. The remark of the CRC Committee in the Concluding Observation to Norway must also be read in the light of the aforementioned decision (CRC/C/NOR/CO/4 paras 22–3).

majority also referred to General Comment. No. 12 (2009) and emphasized that the CRC Committee in this respect had stated that the concept of the child's best interest is flexible and adaptable. The minority came to the conclusion that it was a procedural error that the child had not been heard. Of particular interest in the actual case was the Committee's statement that there is not conflict between the best interests of the child (Article 3) and the child's right to be heard (Article 12) and that the two provisions are complementary to each other (General Comment No. 12 (2009) para 74). The minority emphasized that the CRC Committee has stressed that the right to be heard is without age limitations.⁴⁷ The minority further cited the CRC Committee's statement that state parties 'should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity'.⁴⁸ By not hearing the child, the Chair of the Immigration Board had anticipated the views of the child and deprived the child the possibility to enlighten the case and the child's possibility to enforce a fundamental procedural right. According to the minority such an approach was not in conformity with a core element of Article 12.

Rt. 2014 p. 530 concerns the appointment of a lawyer to represent the child in a child protection case where the child was entitled to its own lawyer. The High Court had appointed a lawyer according to the preferences expressed by the parents. The Supreme Court's appeals committee stated that it was a procedural error that the child's wishes to appoint a specific lawyer was not taken into account.

The case in Rt. 2012 p. 2039 could also be placed under this heading of participation, although it is a form of special right to participation. The case concerned *inter alia* whether the court could issue a declaratory judgment (in the conclusion) that there had been a violation of the CRC. The majority emphasized that there was not a complaint mechanism (at that time) under the CRC and found that it should not be given a declaratory judgment. The minority came to a different conclusion and underlined that such a possibility was important to give satisfactory protection of the guarantees given in the CRC (with a possible exception for provisions of economic, social and cultural character that had to have a supplementary domestic legal foundation).

47. Rt. 2015 p. 1388 para 291, with reference to General Comment No. 12 (2009) para 21.

48. Rt. 2015 p. 1388 para 291, with reference to General Comment No. 12 (2009) para 20.

Reflections

Of the 132 cases where the CRC is either used as part of the rulings of the Supreme Court or as a basis for the parties' submissions, the child was a formal party (either as plaintiff, intervenor or indicted in criminal cases) in 46 cases. Most of the latter were criminal cases. When adults are speaking on behalf of the children, either as parents (then in conflict with each other or with public authorities) or as public officials (then acting on behalf of the society), there is a risk that the argumentation is flavored by the interest of the adults. On the other hand, it should be emphasized that an effective implementation of CRC implies that adults can act on behalf of children, and without necessarily including the child in the legal proceedings as parties. Still, there is a risk that the way of reasoning is influenced by the adult's own interests, especially if the courts are not aware of the danger attached to using the CRC as some kind of legal shield.

Compared with other incorporated human rights instruments, ECHR is referred to by the Supreme Court or in the parties' submissions in 1472 cases, CCPR in 362 cases, CESCR in 9 cases and CEDAW in 3 cases. Seen by the numbers the CRC is not being called upon most frequently but is still more used in legal argumentation than CEDAW and CESCR. An interesting feature is that the CRC is more and more called upon, and of the 132 cases 49 are from the last five and a half years (2013 to July 2018). This indicates that the courts and their actors are becoming gradually more aware of the CRC. One should be reluctant to draw conclusions based on the figures, but some reflections may still be relevant. The CRC came into the HRA after both ECHR and CCPR and the high number of ECHR cases is most likely due to the fact that ECtHR through its practice has developed a comprehensive level of protection, but the widespread knowledge by lawyers and judges probably also has an impact. Additionally, many of the cases where ECHR is used as legal argument are from the field of criminal law, where children seldom occur as charged with a criminal offence. It should also be added that in many situations the child's legal protection can be offered both under ECHR and CRC, and in such situation an investigation of the scope of the CRC can be unnecessary if ECHR offers the same or better protection (see also below on interplay between the instruments). Subsequently, the CRC will especially be called upon in situations where it gives a legal protection of the child beyond that of other human rights instruments. For example, there are few cases concerning child protection where the CRC are invoked since the ECHR in this field may be considered to offer a more detailed protection (for both children and parents).

In many of the cases where the CRC is involved, there is interplay between different incorporated human rights instruments. In many fields, there is an overlap

of protection of the individuals, for example in cases involving expulsion, where the interference both has an impact on the family life (ECHR Article 8) as well on the best interest of the child (CRC Article 3). When assessing the human rights protection, the supervisory bodies will pay attention to other relevant instruments. In cases involving expulsion, ECtHR has for example used CRC Article as a legal source, and CRC Article 3 and the practice from the CRC Committee have influenced the protection under ECHR Article 8.

All the cases referred to above are judgments where there are explicit references to the CRC. Of interest are also cases where the CRC has not been called upon, while the Convention still may be said to have an influence of the legal reasoning of the Supreme Court. A case that can illustrate this impact is Rt. 2009 p. 411. The case related to the High Court's decision upon admission in a case regarding public care. The appeal board of the Supreme Courts selected an interpretation of the statutory provision that was in accordance with the strengthening of the rights of the child expressed through amendments of the Children's Welfare Act Section 6-3 on the legal standing of children. CRC article 12 is not mentioned, but the latter has had impact on the legal construction of Section 6-3, and it can be said that the CRC in this case came in silently into the case by the back door. It can also be claimed that the CRC in recent years has also had an impact on the way of legal reasoning in cases concerning children. There has been an increasing awareness of the need to grant children legal protection and the CRC has in many cases been the formal legal platform for such an approach. This development can in particular be seen to take place in cases concerning immigrants (either the child itself or its parents). One may say that there has been a development not only in the legal surface, but as well in the underlying legal culture on how the legal system approaches and understands cases involving children.

Despite an ongoing development where children's rights, as they are expressed in the CRC and interpreted by the Committee, have gained increased attention, one may claim that what is taken place is only a shift in legal argumentation, and not an alteration on how cases are solved. The 'litmus test' will be whether the outcome of a case would be the same even if the CRC was disregarded as a legal source. Such a test is impossible, and one must therefore make an assessment made on assumption. For my own part, I will claim that the CRC has had a real impact on Norwegian legal thinking, although some of the developments that have taken place could have occurred even without the CRC being incorporated in the legislation through HRA. Still, the impact of the CRC may vary between different legal fields. In criminal law CRC has been one factor leading to more lenient punishment of minor offenders. In immigration law CRC has also had an impact and

has led to more child-centric assessment. However, we have had three plenary cases in the recent five years (Rt. 2012 p. 1985, Rt. 2012 p. 2039 and Rt. 2015 p. 1388). In all of these cases the Supreme Court was divided, and the judgments reveal that there are different viewpoints on the impact of the CRC and in particular the weighing of the child's interest with the general interest in upholding a restrictive immigration policy.

9.6 CURRENT CHALLENGES

It is also useful to look ahead to see areas where Norway may face future challenges with the extent of incorporation within Norwegian law. A good starting point for discussing current challenges can be the CRC Committee's latest Concluding Observations to Norway, although not all contemporary issues may not be addressed by the Committee. Additionally, the CRC is a living instrument and one of the obligations of legal scholars is also to try to discover forthcoming issues. It is also a task to discuss and critically analyse the approach made by the CRC Committee.

A recurring issue in the Committee's remarks to Norway has been on access to welfare services and the differences in this respect between different municipalities. Also in the latest Concluding Observations to Norway this topic was addressed.⁴⁹ The issue is complex, partly because the municipalities are separate entities within in the state, where the principle of local self-government applies. Therefore, the welfare services must not be of the exact same level in all municipalities, but there must be an overall minimum standard. The newly introduced reform of the child protection services aims to improve the quality of services to children (cf. amendment 16 June 2017 No. 46, not yet in force). Still, there seem to be substantial differences between municipalities, both when it comes to services and coercive measures within child protection.⁵⁰ The CRC Committee has recommended that the Government should allocate earmarked funds to local authorities instead of block grants, to ensure that funds intended for the implementation of child rights are adequately used for their intended purpose.⁵¹ Earmarking is a domestically sensitive instrument since it gives the municipalities less leeway,

49. See CRC/C/NOR/CO/5-6 para 6(c), cf. also para 23(f). For previous recommendations, see CRC/C/15/Add. 23 para 24; CRC/C/15/Add. 126 paras 15 and 17; CRC/C/15/Add. 263 para 15; CRC/C/NOR/CO/4 paras 38–39.

50. On the latter, see CRC/C/NOR/CO/5-6, para 21(a)ii.

51. CRC/C/NOR/CO/5-6, para 6(d).

and it will be interesting to see if, and how, this recommendation will be implemented.

One of the explanations for the unequal access is that the Children's Welfare Act until recently has not been considered to provide children with individual legal rights, but merely states an obligation to the municipalities to provide services to children. Financial support to family members being home to take care of family members is still not an individual entitlement, and the Health and Care Services Act of 2011 limits the responsibility for the municipality to make a decision, without requiring a certain level of services.⁵² A major target group for this provision is parents of handicapped children. In contrast, there is a range of other welfare provisions granting individual legal rights to the citizens, like the Patients' Rights Act of 1999,⁵³ the Health and Care Services Act, and the National Insurance Act of 1997.⁵⁴ In this perspective, the lack of individual rights in the Children's Welfare Act was a rare exception, and many voices have been raised to alter the regulation. An independent expert group suggested that access to Child Care should be an individual legal right,⁵⁵ and the committee drafting a new Child Care Act has also taken this viewpoint.⁵⁶ One of the driving forces in the legal argumentation has been the CRC. Although legal provisions alone cannot secure access to welfare services for children in practice, the current legislation was insufficient and gave a wrong signal on which groups that should be given priority. The Children's Welfare Act was recently amended, and it is now stated that children are entitled to services (Section 1-5).⁵⁷

When the bCRC was ratified, the Ministry had suggested making a reservation regarding separation of children and adults in prisons, cf. CRC Article 37 c).⁵⁸ The Parliament opposed such a reservation, mainly because the Swedish Parliament had turned down a similar reservation. The background is partly that Norway in many areas is sparsely populated, with large travel distances between the different prison locations. Additionally, the number of children in prison is low. The Government emphasized that if Norway were to comply with both the principle of the

52. Act 2011-06-24-30 on municipal health and care services etc. (Health and Care Services Act).

53. Act 1999-07-02-63 on patients' and users' rights (Patients' Rights Act).

54. Act 1997-02-28-19 on national insurance (National Insurance Act).

55. NOU 2012:5 pp. 149–151.

56. NOU 2016:16 pp. 67–81.

57. Prop. 169 L (2016–17).

58. Since this reservation was not made, it is remarking that Norway still has made a reservation under CCPR Article 10 second paragraph (b) and third paragraph 'with regard to the obligation to keep accused juvenile persons and juvenile offenders segregated from adults'. See the CRC Committee's call for withdrawal, cf. CRC/C/NOR/CO/5-6 para 35(b).

separation of adult and juvenile prisoners and the principle of proximity, one would risk that the few juvenile prisoners would be completely isolated.⁵⁹ Separate juvenile units for juvenile prisoners have now been established in a trial project and young people who are detained in ordinary facilities receive special follow-up by the prison staff to prevent harmful effects of imprisonment. Despite the Government's arguments of being in a situation of conflict between two obligations, the Committee recommended that where detention is unavoidable, the Government should 'ensure that the children are not detained together with adults, both in pre-trial detention and after being sentenced, and in line with its previous recommendations'.⁶⁰ This issue has been addressed by Linda Gröning and Hilde Svrljuga Sætre in Chapter 5 in this book, and I will not pursue the topic here.

Another field of law where the CRC Committee repeatedly has expressed concerns to Norway is within immigration law. The Committee has previously addressed the decision-making process in immigrations cases as too lengthy.⁶¹ In the recent Concluding Observation the committee recommended that Norway 'establish clear criteria regarding the best interests of the child for all those authorities that have to take decisions affecting children',⁶² which clearly is intended to apply also in the immigration cases. The committee also recommended that Norway increase its efforts to 'strengthen compliance in practice with the child's right to be heard, particularly with regard to children who are more vulnerable to exclusion in this regard such as ... migrant, asylum-seeking and refugee children'.⁶³ Furthermore, the committee recommended that Norway 'strengthen the implementation of the child's right to be heard in asylum and expulsion procedures affecting children, particularly with respect to younger children, and ensure that children are given the possibility to be heard individually in all instances in all cases affecting them'.⁶⁴ Even though the two latest recommendation are explicitly targeting asylum cases, they are not directly criticizing the approach by the majority of the Supreme Court in the recent immigration cases presented above. A Concluding Observation should be just that – an observation and not a decision of an individual case – but it would have been of interest if the CRC Committee in their recommendation went into a dialogue with the Supreme Court and gave some guidance for forthcoming cases. Still, a form of critique – indirectly addressed to

59. CRC/C/NOR/5-6 para 337.

60. CRC/C/NOR/CO/5-6 para 35(b), cf. CRC/C/NOR/CO/4 para 58.

61. CRC/C/NOR/CO/4 paras 51–52.

62. CRC/C/NOR/CO/5-6 para 13(a).

63. CRC/C/NOR/CO/5-6 para 14(a).

64. CRC/C/NOR/CO/5-6 para 14(c).

the Supreme Court – may be found in the recommendation to Norway to under ‘no circumstances deport children and their families back to countries where there is a risk of irreparable harm for the children’.⁶⁵

The CRC Committee has in its previous reports expressed concern ‘at the number of children who have been removed from their families and live in foster homes or other institutions’.⁶⁶ In the Concluding observations to Norway in 2010 the Committee was concerned ‘that despite extensive assistance at home, the number of children removed from family care has increased’.⁶⁷ The committee was here too focused on the figures which by themselves do not tell if intervention was necessary to protect children.⁶⁸ In the recent Concluding Observation the committee is more nuanced. Amongst the issues highlighted by the committee is that out of home placements should be a measure of last resort and to ensure that siblings are not separated when placed in alternative care. Currently, several cases against Norway concerning various compulsory measures within child protection are pending before the ECtHR. If the conclusion will be that Norway has violated the human rights of the applicants (mainly parents), substantial reforms may be needed, but so far, the ECtHR has found that the interventions have been in conformity with the right to family life.⁶⁹ For a more in-depth analysis on this issue, see the contribution of Asgeir Falch-Eriksen and Marit Skivenes in Chapter 3 of this book.

The Committee has also paid attention to adolescents with Attention Deficit Hyperactivity Disorder (ADHD). In its Concluding Observation in 2010 it recommended that Norway ‘carefully examine the phenomenon of over-prescription of psycho-stimulants to children’ and to take ‘initiatives to provide children diagnosed with ADHD ... with access to a wide range of psychological, educational and social measures and treatments’.⁷⁰ In this statement by the committee takes the over-prescription is taken as a fact, without any references to research or other

65. CRC/C/NOR/CO/5-6 para 32(d).

66. CRC/C/15/Add.263 paras 23–24.

67. CRC/C/NOR/CO/4 para 34.

68. In this respect, it’s interesting that the committee has made an almost exact critique of Sweden (CRC/C/SWE/CO/4 paras 34–35), despite the fact that the numbers there on coercive measures are significantly lower than in Norway). See also expressed concern on the same topic regarding Denmark, CRC/C/DNK/CO/3 paras 33–34.

69. See ECtHR judgments 11 October 2016 *J.M.N. and C.H. v Norway*; 11 October 2016 *T.S. and J.J. v Norway*; 4 April 2017 *I.D. v Norway*; 7 September 2017 *M.L. v Norway*; 30 November 2017 *Strand Lobben and others v Norway* (the case is referred to the Grand Chamber); 26 April 2018 *Mohamed Hasan v Norway*; 6 September 2018 *Jansen v Norway*. The latter concluded that Norway had violated the applicants right to family life.

70. CRC/C/NOR/CO/4 para 43.

sources. The approach is a bit more nuanced in the latest Concluding Observation. Norway is recommended to improve ‘the diagnosis of mental health problems among children, ensure that the initial diagnosis with ADHD is re-assessed’, and ‘that appropriate non-medical, scientifically based psychiatric counselling and specialist support for children ... is given priority over the prescription of drugs in addressing ADHD and other behavioural specificities’.⁷¹ Parents and children should also be ‘informed about the negative side effects of treatments with psycho-stimulants and provided with information on non-medical treatments’. It is welcomed that the CRC Committee addresses issues that are important for children, even though they are of a different nature than the classical legal one. However, this is a challenging task that demands insights in fields beyond legal education. Even though many of the members of the CRC Committee have a background from other disciplines, recommendations should be based on well-established knowledge and research. It seems like that there has been a development in the viewpoints of the committee and the latest recommendation is drafted in a bit more cautious language and more concentrated on the legal issues (measure of last resort, etc.). Such a precautious approach may in the long run be in the best interests of the children concerned.

A last topic to be addressed here is the child’s right to privacy under CRC Article 16. Modern forms of media have facilitated new legal challenges. The right to self-determination is as such not guaranteed under CRC. The committee is careful not to establish norms of self-determination, although some signs of development in this respect can be traced under the umbrella of the child’s right to be heard.⁷² When it comes to new forms of media a noteworthy characteristic is the swift spreading of information to a large audience. If children are exposed, either by themselves, their relatives or their friends, it can be difficult to erase the information. Therefore, there can be a need to protect children from exposure, typically when it comes to pictures. However, such restrictions must be weighed against the principle of the child’s evolving capacity to determine for themselves. Additionally, there can be a necessity to protect children from exposure by their parents, but this can more easily be accomplished within the system of CRC, although the rights of the parents can be protected under other instruments (inter alia ECHR article 8). In Norway there have been discussions on both the issues mentioned above. When it comes to self-exposure the issue has been whether adolescents can publish picture with little or no clothes, without parental consent, and age limits in this respect (and the web site editors’ responsibility to validate the age of the

71. CRC/C/NOR/CO/5-6 para 26(c).

72. See General Comment No. 12 (2009).

adolescents). Regarding parental publishing the issue has been whether parents can submit videos to sites like 'YouTube' in cases of taking children into public care (where the actual takeover has been filmed by the parents and where the children involved can be identified). In both cases, the CRC has been called upon to protect the children involved, and it will be welcomed if the CRC Committee in the future address these kinds of issues.

For most children, Norway is a good country to grow up in (cf. Chapter 1). The recent recommendations by the CRC Committee demonstrate that there are still deficits in the protection of children's rights, and there may be additional blind spots not revealed by the committee. However, the overall impression is that the development is moving in the right direction in order to strengthen the protection of children, and the CRC has been one of the driving forces in this improvement. Even though the CRC is indeed important, it functions in an interplay with other legal sources, both national and internationally. The CRC Committee plays a crucial role. In order to fulfil its task, the Committee has a difficult assignment. It shall challenge domestic legislation and practices, but the recommendations have to be based on sound reasoning where the committee also listens to the explanations and argumentation by the respondent state. It may seem desirable to have a dynamic committee that moves like a high-speed train, but in the long run, a slower development may be more suitable.

9.7 CONCLUSIONS

How would the legal situation of children have been in Norway if we imagine that the CRC had not been incorporated? The counterfactual approach is impossible to answer but it still could be fruitful to consider the alternative. Even though the CRC has not been incorporated, it would still be a relevant source in legal reasoning, but the incorporation gives the CRC a more potent legal standing – as we also see in the following chapter.

As discussed above, it has both affected the legislator and the judiciary, sometimes also in an interplay (e.g. concerning sentencing of minors). The CRC has probably not only influenced the results in terms of the content of the legislation and outcome of court cases but also the manner of legal reasoning. Still, in some areas there are different viewpoints on how children's rights should be weighed against other societal values, in particular in the fields of immigration. The many plenary cases with dissenting opinions indicate that this division is found even amongst the members of the Supreme Court.

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10

Children's Participation in Family Law Proceedings

KRISTIN SKJØRTEN AND KIRSTEN SANDBERG

ABSTRACT This chapter addresses the child's right to participate in parental disputes by presenting the legislative developments and examining trends in judgments from the Norwegian Supreme Court and the Courts of Appeal. Extending a dataset examining children's participation in courtroom proceedings, it analyses the effect of recent amendments in the Norwegian Children Act which have strengthened children's right to have a say in litigation concerning custody and contact in the wake of family break-downs. The authors find that children are heard more often than before and that their voices are increasingly emphasized in such decisions. This represents a shift in how the child is viewed in case law, from interpreting the child as vulnerable and in need of protection to seeing the child more as a competent actor. These developments give rise to the question of how to balance the child's right to protection and the right to participate in the consideration of the best interests of the child.

KEYWORDS Children Act | parental dispute | child participation | legislative changes | legal practices | children's rights

10.1 INTRODUCTION

Children's participation in residence and contact cases brought before Norwegian courts is the main theme of this chapter. Parental disputes have an immediate impact on a child's daily life and on its relationship to its parents, siblings and wider surroundings. Given the mounting focus on children's right to have a say in decisions affecting themselves, there is every reason to ask whether this right is observed in parental disputes, and if so to what degree. How is the child's right to be consulted regulated in the Norwegian Children Act (*Lov om barn og foreldre*), and are children given an opportunity to express their opinions in relation to residence and on contact arrangements in practice?

The number of divorces and family breakdowns has remained stable in Norway over the past fifteen years. The proportion of children with parents in two households is about a quarter.¹ When relations break down, parents with children under the age of sixteen are obliged to attend mediation meetings pursuant to Section 51 of the Children Act with a view to reaching an agreement on residence and contact for their children. Most parents manage to settle questions of residence and contact arrangements for their children themselves, with or without mediation. However, between 15 and 20 per cent of parents have recourse to the courts to resolve their disputes. In 2015, 2,657 cases pursuant to the Children Act were filed with the district courts (Tingrettene). These cases accounted for 16 per cent of all cases currently being dealt with by the country's district courts. Seven out of ten cases are solved by means of an in-court settlement. The other cases are dealt with by the courts in the ordinary manner (Viblemo, Tobro, Knutsen and Olsen 2016).

According to Article 12, paragraph 1 of the Convention on the Rights of the Child (hereafter the Convention or CRC),² children have the right to express their views on matters affecting them. This applies in particular, according to Article 12 (2), to any judicial and administrative proceedings affecting the child. The Committee on the Rights of the Child (hereafter the Committee) emphasizes in its general comment to Article 12 that divorce and separation are among the most important issues in which the children are required to be consulted.³

Countries that have ratified the CRC are obliged to harmonize their national laws in line with the provisions of the Convention. How the CRC is implemented varies from country to country. Some choose to transpose the whole Convention into national legislation (incorporation), while others draft their own laws and/or add provisions that are meant to accommodate the provisions of the Convention (transformation). Having incorporated the CRC via the Human Rights Act⁴ of 2003, the Convention counts as Norwegian law, and should any conflict arise between the Convention and other Norwegian laws, the Convention's provisions have priority (cf. Section 3 of the Act). This is an important part of the background to the legislative developments in Norway.

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1. Statistisk Sentralbyrå (2015a) and Statistisk Sentralbyrå (2015b).
 2. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.
 3. Committee on the Rights of the Child, *General Comment No. 12, The right of the child to be heard*, UN. Doc CRC/C/GC/12 (2009) ('General Comment No. 12).
 4. Act of 21 May 1999 no. 30 to strengthen the position of human rights in Norwegian law (Human Rights Act).

10.2 IMPLEMENTATION OF ARTICLE 12 OF THE CRC IN THE NORWEGIAN CHILDREN ACT

10.2.1 THE CRC (ARTICLES 3 AND 12) AND THE CHILDREN ACT (SECTION 31)

A primary consideration in all matters concerning children is what serves the best interests of the child. Children's right to be heard must be seen in light of this principle (Sandberg 2016a). Article 3, para 1, of the CRC reads as follows:

In all actions concerning children, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In parental disputes, a court shall undertake a comprehensive and concrete assessment of the best interests of the child on the basis of relevant facts in each case. The child's wishes are but one of several factors to include in an assessment of the child's best interests, and Article 12 of the CRC gives children the right to participate:

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.

This provision was previously considered to be one of the more controversial rights in the Convention insofar as the right to participate represents an actor's perspective on children in recognizing children's capacity to evaluate their own needs and wishes, at least to a degree. At the same time, the relative significance of the child's views will be determined by adults in light of the child's maturity and age.

Articles 3 and 12 of the CRC have equal status, and it is frequently contended that knowledge of the child's views is important in order to make an assessment commensurate of the child's best interests.⁵ Such an assessment of the relationship

between the child's best interests and its views is clearly expressed in General Comment No. 12 by the Committee:

There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.⁶

Section 31 of the Norwegian Children Act determines children's right to be heard in matters of residence, contact and parental responsibility:

As and when the child becomes able to form its own point of view on matters that concern it, the parents shall consider the child's opinion before making a decision on the child's personal situation. Importance shall be attached to the opinion of the child according to his or her age and maturity. The same applies to other persons with custody of the child or who are involved with the child.

A child who has reached the age of seven and younger children who are able to form their own points of view must be provided with information and opportunities to express their opinions before decisions are taken concerning personal matters affecting the child, including parental responsibility, custody and access. The opinions of the child shall be given weight according to his or her age and maturity. When the child has reached the age of 12, the child's opinion shall carry significant weight.⁷

This official translation of Section 31 by the Government is closer to the wording of Article 12 of the CRC compared to the wording of the original Norwegian version of the Children Act, where Section 31 has the wording 'to state their opinion' (*'å si sin mening'*). It follows from the Convention⁸ and the Children Act that the right to be consulted should not be interpreted as an obligation on the child to express a view. The right to be heard must be a real right in the traditional sense

5. See, for instance, Zermatten (2010) and Sandberg (2016a).

6. General Comment No. 12, para. 74.

7. Official translation, see <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>

8. See General Comment No. 12.

of the term, where the right holder has a choice to make use of the right or decline (Hart 1982). Children must be given an opportunity to express their opinion, but they should be under no compulsion to do so. Children shall also be given age-appropriate information on their rights.

10.2.2 AGE LIMITS

The current wording of the Children Act follows from the considerable strengthening of the child's right to be involved over the years. Until 2004, children enjoyed an unconditional right to express their opinions only from the age of twelve. In 2004, the age limit was lowered to seven, and as the preparatory works to the amendment indicate, it was recommended that children under seven should also be heard if they have views they want to make known in the case.⁹ The reason for introducing the seven-year rule was that it would give all children the right to be heard from this age; it was not meant, however, to be a lower age limit regarding the hearing of children. Yet, in practice, it has tended to be interpreted and applied as a lower age limit (Skjørten 2010).

The Committee in its general comment on Article 12 advised against the introduction of age limits for the hearing of children:

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States Parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.¹⁰

The amended Children Act, which came into force January 2014, states that children under the age of seven *shall* be given an opportunity to be heard if they are capable of forming a view on the matter.¹¹ The reason for introducing the amendment was that it would bring the wording of Section 31 of the Children Act more in line with the Committee's concluding observations to Norway's reports and that research, which had revealed a need to specify in the law that younger children who had views of their own should also be given an opportunity to make those views known.¹²

9. Amendment of 20 June 2003 no. 40, entering into force 1 April 2004. See Ot.prp. no. 29 (2002-2003), point 10.5.

10. General Comment No. 12.

11. Amendment of 21 June 2013 no. 62, entering into force 1 January 2014.

12. Prop. 85 L (2012-2013) pp. 37–38.

10.2.3 TO MAKE THEIR VIEWS KNOWN

It is worth noting that Article 12 of the CRC uses the term 'the right to express' with reference to the child's views. The words encompass more than a mere phrase, however. In its general comment to Article 12, the Committee states that the right to be heard must be given a wider interpretation than simply the right to make one's views known verbally:

Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.¹³

As mentioned, the Norwegian wording of Section 31 of the Children Act uses a narrower specification for the right to be heard where the right is associated with stating one's opinion, that is, expressing it verbally.¹⁴ Insofar as the Convention applies today as Norwegian law, one might ask whether it would not have been better to formulate the right of children to be heard in the Norwegian Act using the formulation in the Convention's provision. We return to this question at the end of the chapter.

10.2.4 THE CHILD'S OPINION AND THE BEST INTERESTS OF THE CHILD

The right to be heard is often referred to as a procedural right, meaning that children have the right to be involved in the case, but not a right to a particular outcome. For the court, it means that children shall be offered an opportunity to express their views, and if they choose to do so, their views must be considered as part of the wider assessment of the case.¹⁵ All decisions relating to residence and contact shall have regard for the child's best interests, and it is for the judges to decide which of the arrangements will be best for the child in the individual case. This follows from Section 48, first paragraph, of the Children Act:

13. General Comment No. 12, para. 21, first bullet point.

14. The wording of the Children Act must be seen in conjunction with the original wording of Section 31 with the introduction of the new Children Act in 1981. Despite substantial amendments to this provision to accommodate Convention Article 12, the wording still indicates that it is a verbal statement children should be asked to provide.

15. Children's right to participate is explained in more detail in Section 5 below.

Decisions on parental responsibility, international relocation, custody and access, and procedure in such matters, shall first and foremost have regard for the best interests of the child.¹⁶

The preparatory works to the Act mention different factors to be included in an assessment of the child's best interests.¹⁷ In addition to the child's opinion, mention is also made of risks arising from a change of residence; the best overall parental contact arrangement; stable conditions in the home; the child's attachment to parents and the parents' personal characteristics as caregivers. In assessing the child's wishes and other factors, the child's maturity and age shall be considered, and for children aged twelve and over, their wishes shall be given particular weight. In practice, the strength and stability of the child's views, along with the reasons informing its choices, will also be considered (Sandberg 2016a). But the gravity of the arguments against following the child's wishes may have an effect as well.

The basic premise of the provisions of the Children Act regulating parental contact is that it serves the best interests of the child to maintain good contact with both parents following the breakdown of family relations.¹⁸ However, legislative changes in recent years have modified this premise to account for situations in which the child is at risk of violence and abuse. The purpose of several amendments introduced in 2006 was to strengthen children's protection against violence and abuse. Section 43 of the Children Act, which regulates contact, was therefore extended to include:

If such access is not in the best interests of the child, the court must decide that there shall be no access.¹⁹

The above-mentioned Section 48, according to which decisions on residence and contact shall be based on the best interests of the child, was expanded at the same time with the addition of a new paragraph:

When making such decisions, regard shall be paid to ensuring that the child is not subjected to violence or in any other way treated in such a manner as

16. Official translation, see <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>.

This section is placed under the procedural rules of Chapter 7 of the Act, but also provides substantive guidelines on judicial assessments.

17. See, for instance, Ot.prp. no. 104 (2008–2009) p. 18.

18. Ot.prp. no. 103 (2004–2005) pp. 28–29.

19. Section 43, para 1, third sentence.

to impair or endanger his or her physical or mental health.²⁰

In the amendments of the Children Act of recent years, changes have been informed by the child's right to participate and to be protected from violence and abuse. This was the main theme of the 2013 amendment,²¹ according to which children should not be forced to have contact against their wishes. In order to strengthen the child's perspective in parental disputes brought before the courts, the preparatory works also urged parties to pay greater attention to the child's current situation:

The Ministry assumes that the courts will, to a greater extent, decide contact-related matters in light of current circumstances and that the child's subjective experiences will be given greater weight. It is also assumed that contact against the wishes of the child will not be prescribed, not even supervised contact, until the circumstances of the child and the family are adequately known and assessed.²²

It is further made clear that if children are not heard in a case in which they are entitled to be consulted by law, the lapse is to be considered a procedural error which could possibly lead to the nullification of the judgment.²³

Alongside this amendment the system of supervised contact was also amended, with the introduction of two forms of supervision, supported and protected. In the case of protected supervision, a supervisor shall be present at all times during a visit; this arrangement is especially intended to guard against situations in which children may be at risk of violence, sexual abuse or other forms of neglect. In the case of supported supervision, the supervisor is present only during parts of the visit for the purpose of advising the parents and supporting and preparing the child for subsequent visits without supervision. These supervisory schemes are financed by the government. A court may also require the parties to find a private supervisor to assist them for a period of time during the visits. In our review of the jurisprudence below, we will see that children's right to express their opinion does have an effect of the choices made by the courts between these different forms of supervision in cases where the court is not convinced that unaccompanied contact will be in the best interests of the child.

20. Section 30 of the Children Act dealing with parental responsibility has a similar wording. The amendment of 2010 added a sentence to this section specifying that violence is illegal also in connection with the child's upbringing.

21. Amendment of 21 June 2013 no. 62, see Prop. 85 L (2012–2013).

22. Prop. 85 L (2012–2013) p. 6.

23. Prop. 85 L (2012–2013) p. 35.

A child's right to be heard and their right to be protected from violence and abuse were constitutionally strengthened in 2014 with the incorporation of a new provision, Article 104, to the Constitution:

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.²⁴

The pertinent question now is whether these legislative changes have led to an increase in children's participation in court decisions on residence and contact in the wake of family breakdowns.

10.3 INVESTIGATION OF JURISPRUDENCE

To illustrate how the law is practised, we have chosen to examine recent judgments from the Norwegian Supreme Court and the Courts of Appeal on issues related to residence, custody and contact in cases regulated by the Children Act. All rulings by the Supreme Court and Courts of Appeal are recorded in the Norwegian Lovdata database. The judgments analysed here come from that source. Many court decisions are appealed to the Supreme Court, but there is no right in these cases for such a review. Most appeals are dismissed and only a very small minority reach the Supreme Court. The judgments handed down by the Courts of Appeal offer therefore a broader picture of the state of the law concerning the hearing of children.

Regarding the decisions of the Supreme Court, we have limited our examination to judgments dealing with the right of children to be heard in this type of case over the past decade. In this period the Supreme Court issued three judgments and one ruling in cases falling under the Children Act of relevance to the question of

24. Unofficial translation provided by the Storting (Parliament).

children's participation in parental disputes (Rt. 2007 p. 376; Rt. 2010 p. 216; Rt. 2011 p. 1572; and HR-2017-18-U).

Our analysis of the case law of the Courts of Appeal is based on 491 judgments dealing with issues of residence and contact. The judgments are divided into four periods between 1998 and 2015. The oldest decisions, comprising a total of 129 judgments mainly on residential questions, are from 1998 to 2000. The next three periods involve decisions on residence and on contact. The second period consists of judgments from 2006 to the first half of 2007, 163 decisions in all. The third period is 2012, with a total of 100 judgments on residence and contact. The fourth period is 2015: 99 judgments in all concerning matters of residence and contact. The case materials comprise every judgment delivered during the selected periods in which residence and/or contact were assessed pursuant to the Children Act. To make sure the selection included all judgments in the chosen periods, we performed searches for the relevant legal provisions, and undertook a manual examination of all judgments handed down in these periods. For our selection of judgments it is the time the judgment was handed down that is of central importance. This may differ from the year noted in the case reference, because this refers to the year when the case was filed, not when the judgment was passed. The data are part of an ongoing longitudinal study on parental disputes and children's rights at the Norwegian Centre for Violence and Traumatic Stress Studies.

Since the judgments span a period of eighteen years, it gives us a chance to identify trends in the jurisprudence regarding children's right to participate in parental disputes over residence and contact. Two relatively recent legislative changes were designed with a particular view to strengthening children's right to be heard: The 2004 amendment, which lowered the age for children's unconditional right to be heard from twelve to seven; and the 2013 amendment according to which children under the age of seven should be heard if they so desire and are able to form views. The selected periods with judgments from the Courts of Appeal are well suited to illuminating the case law before and after these amendments.

The judgments from the Courts of Appeal are coded onto a comprehensive coding table, and the data fed into the Statistical Product and Service Solution (SPSS) programme. The data are not suitable for advanced statistical analysis, but registration in SPSS allows us to keep track of the judgments, run frequency analyses and crosstabs on selected themes. It makes it possible to gain a general picture of, for example, the proportion of cases where children were heard and whether the outcome matched the child's views. In the further analyses, we apply qualitative methodology along with a *thematic analysis* of judgment texts (Braun and Clarke 2006). This analytical approach is particularly good at revealing general patterns

in larger numbers of judgments. First of all, we examined all judgments in the specified periods to identify cases where children were given an opportunity to express their opinion. These cases were then analysed more closely to ascertain the extent to which the child's voice was given weight and influenced the wider assessment of the child's best interests.

Since the Children Act distinguishes between children over and under seven years of age, we decided to apply the same distinction in our examination of cases in the following account. In our description of the implementation of Article 12 of the CRC in the Norwegian Children Act, we pointed out that the wording of Section 31 of the Act, which refers only to the right of children to express themselves verbally, is narrower than that of Article 12, which also includes other ways of expressing a view. In order to answer the question posed above – whether there is a need to amend the wording of Section 31 of the Children Act – we decided to include an analysis of the courts' use of observation in cases involving younger children. This analysis is based on new judgment data from 2015.

Parents and children mentioned in the judgments have been anonymized. Mother and father are referred to as A or B according to which of them submitted the case to the Court of Appeal. Children are referenced by C, D, etc. by age and number of siblings involved in the case. When citing judgments, we add in square brackets who the letters refer to, whenever this is necessary to understand the extract of the judgments.

In this chapter, we expand on earlier publications dealing with the right of children to be heard by including new cases from the Court of Appeal for the year 2015 and relevant cases from the Supreme Court over the last decade. The new cases from the Court of Appeal give us an opportunity to detect any changes in legal practice following the 2013 amendment, which strengthened the right to be heard of children under seven. Case materials from 2015 comprise a total of 129 children, three in five of whom were under seven.

Finally, we need to emphasize that this source material of judgments from the Courts of Appeal and the Supreme Court only provides information at these judicial levels. We know little about the case law of the courts of first instance, one major reason being the lack of databases with complete records of parental disputes handled by the district courts. Only a small number of district court judgments are recorded in Lovdata, and they are not representative of decisions at this judicial level either. In order to improve the possibility to do research in this area, including measuring the implementation of children's right to be heard, we would like to recommend that judgments from the courts of first instance should also be recorded in publicly available databases. We also need to emphasize that since this

chapter is limited to the hearing of children in parental disputes pursuant to the Children Act, our findings cannot be transferred to other areas of law, where we know that children's right to be heard is observed differently (see, for example, Strandbu, Thørnblad and Handegård 2016; Magnussen and Skivenes 2015).

10.4 THE PRACTICE OF THE NORWEGIAN SUPREME COURT – CHILDREN OLDER THAN SEVEN

We look first at how the Supreme Court addressed the views of the children in the three judgments from the past ten years in which the issue was considered. In principle, the practice of the Supreme Court is precedential for how these cases should be dealt with. However, as the best interests of the child are assessed according to the concrete situation, a judgment may not have any significant bearing beyond the particular case. However, it is interesting to look for patterns or indications of how these cases should be dealt with, in individual cases or altogether.

In Rt. 2007 p. 376, the District Court ruled first that the two children aged twelve and nine respectively should live with the father and not be relocated to their mother. The Court of Appeal decided that they should live with the mother. For the Supreme Court, the key question was to assess the relative importance of maintaining the status quo (staying with the father) as against the children's wishes to live with their mother. The Supreme Court had already ruled in several judgments that relocation was not in children's best interests, and in the few judgments where a change of residence was ordered anyway, the justification was that relocation would undoubtedly benefit the child (Bendiksen and Haugli 2015). In Rt. 2007 p. 376, the Supreme Court assumed the children were accustomed to living with the father and that relocation to the mother could only take place if the move benefited the children:

The benefit that may accrue to the children in this case is to live where they themselves have expressed a desire to live. In accordance with Section 31 of the Children Act, children who have reached the age of seven shall be allowed to make their views known before a decision is made regarding their personal circumstances, including with which of the parents they shall live. When the child is twelve years old, emphasis should be placed on the child's opinion. However, the child's opinion cannot in itself be the decisive factor. Children should not, regardless of age and maturity, be given responsibility for choosing between their parents. On the other hand, when a child has reached a certain age, and clearly expressed a firm opinion, it should be given considerable

weight. Otherwise, the system of hearing children, which often imposes a heavy burden on them, may seem disrespectful and offensive.²⁵

The expert appointed by the Supreme Court was instructed to investigate the father's claim that the mother had manipulated the children. The purpose of this investigation was to give the Supreme Court a better basis on which to determine the weight of the children's views. The expert concluded that the children had not been manipulated, they had not expressed any kind of ambivalence and their wishes had remained constant over time. They believed their mother understood them better and was emotionally closer to them than their father, and this conviction informed their views. Relocating to the mother would require the children to change schools. This did not affect their desire to move to their mother's. Based on the expert's report, in which the claim of manipulation was rejected, the Court decided to give significant weight to the wishes of the children, and the children were as a result permanently relocated to the home of their mother. The Supreme Court concluded by saying that the emphasis on the wishes of the children would be to the children's benefit:

Based on this, it is clear to me that the wishes of the children, as expressed here, must be given considerable weight. If one were to go against their wishes, it would have to be because the change of setting required by moving would be harmful, or at least hazardous. I have come to the conclusion that this will not be the case.²⁶

This judgment determines that the views of children of a certain age and with clearly expressed and consistent opinions shall be accorded substantial weight. To go against their wishes, the judge continues, could only be contemplated if their preferred arrangement was likely to harm them or at least present a risk to them. The arguments against listening to the preferences of the child can therefore be so strong that the court believes a different arrangement will be better for the child, but those arguments would have to be very weighty indeed in a case like this.

In Rt. 2010 p. 216, the Court addressed questions of permanent residence, contact and parental responsibility in respect of a seven-year-old girl. Her mother and father had never lived together. The girl had always lived with her mother and had expressed a clear desire to continue to do so. This arrangement should indeed continue, the Supreme Court concluded, highlighting the assessment of the court

25. Rt. 2007 p. 376 para 23.

26. Rt. 2007 s. 376 para 28.

appointed expert according to which relocating to the home of the father would place the girl under a great strain:

It is difficult to predict how C would be able to adjust and settle down to a new life with her father – in the longer run. But in the shorter term, it is clear that, as far as C is concerned, if she does have to move from her mother to her father, contact with whom she has so clearly expressed reluctance to, it will elicit strong reactions in the form of anxiety, adjustment difficulties and grief reaction.²⁷

To obtain information on which to assess contact arrangements, the expert was asked to observe interaction between father and daughter during a visit:

Although the January visit was marked by C's customary attitude to her father, and her expressed opposition to having any contact with him, the impression was nevertheless that C exhibited neither fear nor rejection, as one might have expected. She was insecure and tense, but at the same time a sense of ambivalence shone through in that she behaved with her father in a relatively interested and exploratory way.²⁸

The expert recommended contact under supervision to give the girl an opportunity to form her own impression of her father. The Supreme Court ordered daytime contact six hours a month, and the mother to appoint a person to be present during the visits. The Court in its conclusion refers to the expert's assessment while relying on the presumption that contact is in the best interests of the child:

Given the presumption that contact with both parents would be in the best interests of the child, and given the expert's opinion that such contact would serve C's best interests in the longer term, I have found that contact between C and A [father] should be authorised. Such contact must take place in the presence of a person of trust who is able to ensure C's well-being, in accordance with the recommendation of the expert.²⁹

In this case, the Supreme Court appears to have placed greater emphasis on information obtained by the expert while observing contact between father and daughter, than on the girl's stated opinions regarding contact.

27. Rt. 2010 s. 216 para 30.

28. Rt. 2010 s. 216 para 36.

29. Rt. 2010 s. 216 para 38.

The final Supreme Court judgment (Rt. 2011 p. 1572) relates to contact and parental responsibility for two boys aged four and seven respectively. While both parents agree that the father should have contact, they disagree on the extent. Both children have expressed a wish to have contact, and the elder of the two would like to see the contact with his father increase over time. The Supreme Court emphasized the elder boy's wishes:

I stress in addition what C has said about enjoying being together with his father and that he wishes to expand this contact and would like to spend the night at his father's. He will soon be eight years old, and his opinion shall be accorded weight, cf. Section 31, second paragraph, of the Children Act.³⁰

The Court in this judgment decided on different contact arrangements for the two children, with supervision during parts of the visits. The decision was explained with reference to, among other things, the observations of the expert of the interaction of the youngest boy with his father during visits. We will look at this in greater detail when we address the hearing of children under the age of seven.

In these cases before the Supreme Court, all of the children over seven were heard, and in the two cases concerning the question of residence, emphasis was indeed placed on the children's opinions. In one of the two cases dealing with the issue of contact, the Court emphasized the seven-year-old boy's desire for extended contact with his father. In the second judgment, contact was determined against the girl's wishes, on the grounds that it would be in her best interests to have contact with both parents, and based on the expert's recommendations.

We should also mention a ruling from the Supreme Court of 2017 (HR-2017-18-U). The Court of Appeal had refused to hear an appeal dealing with the permanent residence of two children aged nine and seven, without them having had the opportunity to express their opinions to the Court. The expert and a designated spokesperson for the children had talked with the children eight and four months respectively before the Court made its decision, in connection with the District Court's handling of the case. The Supreme Court annulled the decision for the following reasons:

Children's right to be heard is a basic procedural requirement in cases concerning permanent residence. The Court of Appeal should therefore have taken a clear stand as to whether the importance of this right – and thereby the impor-

30. Rt. 2011 p. 1572 para 62.

tance of a proper clarification of the case – in this instance prevented a summary decision of the appeal.³¹

Here again, the importance of children's right to be heard is emphasized insofar as it is considered a procedural error on the part of the court in failing to assess the importance of consulting the children in the context of illuminating the details of the case. This is true not least when the children are over seven, but as the law is currently worded, the same should apply when a court fails to explain clearly why a child seven years or under has not been heard. The ruling of the Supreme Court confirms the statements in the preparatory works and previous decisions of the Supreme Court in which failure to allow children an opportunity to express their wishes in cases in which they are entitled to be heard is tantamount to a procedural error.³²

10.5 COURTS OF APPEAL – CHILDREN OVER SEVEN

ARE CHILDREN HEARD?

An earlier study of judgments handed down by the Courts of Appeal a few years before and after the 2004 amendment found that children's right to be heard from the age of seven could be observed within this court after the amendment, as regards residence (Skjørten 2013).³³ Today, most children over this age are offered an opportunity to express their views. Our new analysis of judgments shows that this increased inclination to hear children has continued. In 2015, only three out of 53 children over seven were not given an opportunity to express their views.³⁴ In most cases, the children expressed their views to an expert. In some cases, however, the judges themselves talked with the children. As children over seven are heard in almost all cases in which they are entitled to be heard, one of the reasons may be that if a child has not been given the opportunity to express its

31. HR-2017-18-U para 18.

32. See Prop. 85 L(2012–2013) p. 35 and, i.a., Rt. 1999 p. 1183 and Rt. 2006 p. 929.

33. In this study, the judicial material from 1998–2000 and 2006–2007 was used.

34. While the judgments state the children's year of birth, the judgment summaries and the decision itself tend to use the children's age. Only in one of the judgments are we uncertain of whether the child is six or seven. In this case we chose to code the child's age as six and a half. This child was not consulted. If we are wrong in our assumption and the child is in fact seven years old, the figures above will need to be corrected to give a total of 54 children over seven years of age, four of whom were not given the opportunity to express their opinion. However, this potential source of error has little effect on our general conclusions.

opinions, the losing party can demand a judicial review of the case on grounds of procedural error.

International research on consultation of children in private negotiations to resolve residential and contact arrangements shows that children want to be informed and be given a chance to express their views (Skjørten, Barlinghaug and Lidén 2007; Harold and Murch 2005; Smart 2002; Cashmore 2003). However, being offered an opportunity to express one's views in a private context is quite different than doing likewise in a legal context. This research is therefore not readily transferable to a legal context. So, do children make use of their right to be consulted in parental disputes brought before the courts? In the judgments from 2015, only two of the children who were offered an opportunity to express their views did not want to avail themselves of their right to be consulted. Children's views vary from clear, well-reasoned wishes on residence and contact, to vaguer preferences. According to the Norwegian guidelines on consulting children in cases pursuant to the Children Act, the child need not have a clear opinion on the outcome of the case. Information that is not directly related to residential and contact questions can also be valuable to an assessment of the best interests of a child:

Nor should it be the case that the child must have an opinion on the outcome of the case to express its views. The child may also have important information to share concerning, for example, how everyday life is experienced, the nature of its relationship to its parents for better and worse, and whatever happens to be important in everyday life.³⁵

This more open approach to consultations with children has doubtlessly contributed to the fact that most children who are offered the opportunity to express their opinions make use of it.

WEIGHTING OF THE WISHES OF THE CHILD

As mentioned above, the child's opinion forms part of the mandatory comprehensive assessment of the child's best interests. In this assessment, while the child's opinion may be given a certain weight, other factors counteracting the child's views may persuade the judge to conclude that, all in all, a different arrangement would be better for the child. In the following we examine court decisions where children's wishes had an impact in the sense that the court considered the child's

35. Veileder Q-15/2004, Norwegian Ministry of Children and Family Affairs. p. 41.

wishes as one of several factors speaking *in favour* of a decision in line with the child's opinion.

How large an impact does a child's wishes have on the decision? In her investigation of judgments from the Courts of Appeal a few years before and after the 2004 amendment, Skjørten (2013) found that children's influence on the outcome of the case had increased. Prior to the amendment, children's wishes were one of several factors given weight in two out of ten court decisions involving children over the age of seven.³⁶ A couple of years after the amendment, the ratio was four in ten decisions involving children in the same age category.³⁷ In the space of a short period of time, children had thereby acquired a much stronger voice in parental disputes.

If we compare age and weight of the children's wishes in cases before and after this amendment, the views of younger children are increasingly likely to be included as a factor in the decision. In the pre-amendment cases involving children under nine years the child's views were not included in the court's reasoning. A few years after the amendment, the views of children aged seven and eight were one of several factors affecting the outcome in almost two in five cases (Skjørten 2013). While the decision went against the views of a quarter of the children, judgments in the remaining cases complied with their wishes, although the decisions were justified by other factors. Our new analysis of judgments from 2015 shows that this increased weight of children's views has remained constant over time.

In cases where the court does include the wishes of children as an important factor in a decision in line with the children's preferences, the children often present a clear, well-reasoned opinion they have retained over time. It is often discussed in judgments of this type how far a decision against the children's wishes might be detrimental to the well-being of the children. In the following case (LB-2015-109494), the court summarized the expert's assessment of the two children aged twelve and ten:

In the opinion of the expert the children's statements are relevant in this case and may and should be accorded significance. The two [children] appear today to have found their voices to a greater extent than before, or have at least realized that if they do not present their views with sufficient clarity, they will not be heard. The children appear normally mature and autonomous for their age, and in their statements appear thoughtful and reasonable reflected. They give a clear impression that what they are saying is their own opinion irrespective

36. Judgments from 1998, 1999 and 2000.

37. Judgments from 2006 and 2007.

of any thoughts we might have of the influence exerted in their home environment. If the children are not consulted or their statements taken into account, this would clearly result in a not inconsiderable conflict for the children, and would unavoidably pose significant challenges for them and their carers, at least for a period.

Against this background, the Court of Appeal is of the opinion that the wishes of D and E should be given not insignificant weight in determining where they should live on a permanent basis, and that were the Court to order them to move to the mother of X against their expressed wishes, it would be a cause of friction, at least in the short term.

This increased emphasis on the child's wishes is particularly evident in questions about denial of contact. As explained earlier, the legal premise underlying assessments concerning contact is that maintaining good contact with both parents after a family breakdown is in the best interests of the child. When the law was amended in 2006, however, a specification was incorporated in Section 43 which said that if such contact is not in the best interests of the child, the court must decide that no such contact shall occur. The same amendment introduces a further specification of Section 48 on the best interests of the child, to ensure that the child is not subjected to violence and abuse.

Skjørten's (2016) study of decisions by the Courts of Appeal on residence and contact questions for the year 2012 found that contact was denied one of the parents in nine out of the hundred judgments in all. The grounds for refusing contact were the *risk of violence*, *parental conflicts* and the *child's wishes*. A clear distinction was drawn in the argumentation between cases with a risk of violence and all the others. In the two cases where the Court dealt with the risk of violence, the parent denied contact was unfit, in the opinion of the Court, to provide the necessary care. The child's wishes not to have contact were decisive in five other judgments. The children in these cases were aged from eleven to fourteen. In four of these judgments, it was the opinion of the Court that the parent denied contact was indeed able to care for the child. In these four cases, denial of contact was not grounded in the parent's inability to care for the child, but in the risk of inflicting harm on the child by forcing it to have contact with the parent and thereby violating the child's integrity. It is worth noting that courts may follow the wishes of older children not to have contact with a parent, even in cases where the court does not believe the parent is unfit to care for the child. In the last two cases, where contact was denied because the parents' mutual hostility was believed to be detrimen-

tal to the children, two dissenting opinions stood out in the judges' consideration of the fitness of the parents to care for the children. In the first case, the minority believed the father should gradually be granted contact up to 50 per cent, and in the second, the minority believed the child should live with its father on a permanent basis.

In the Bill (Prop. 85 L (2012–2013)) the Ministry of Children and Equality said, 'proposals and comments in the Bill should together help lower the threshold at which the courts shall/should determine that contact should not take place'.³⁸ According to earlier jurisprudence, there had to be weighty reasons to deny contact. The best interests of the child shall be the decisive criterion, the Bill pointed out, and weighty reasons should not be understood as an additional criterion.³⁹ The Supreme Court confirmed in Rt. 2013 p. 1329 that weighty reasons are not an additional requirement for denying contact over and above the assumption that contact would not be in the best interests of the child.⁴⁰

The extent to which a child's wishes are emphasized in cases where the child does not want contact does vary, nevertheless, with age. We have previously seen how the Supreme Court in Rt. 2010 p. 216 prescribed contact against the wishes of the seven-year-old girl. There are also examples of the Courts of Appeal deciding in favour of contact in cases where younger children said they did not want contact. An example is LB-2015-33008, where the Court found that the father should have contact with his boys aged eight and five, gradually increasing to almost one third of the time (which is deemed to be 'ordinary contact' under the Children Act). Both boys said they wanted to live with their mother and were averse to visiting their father. The Court gave weight to their residential wishes, but not to their statements about avoiding contact with their father:

Both C and D have repeatedly said they want to live with their mother. They have also repeatedly said they do not want to visit their father. According to Section 31, second paragraph, final sentence of the Children Act, the children's point of view shall be given weight in accordance with age and maturity. As will be shown below, the children are very loyal to their mother, and they say what they think mother wants them to say. This means that the children's views are given less importance than they would otherwise have been. It is nevertheless difficult to ignore the fact that they themselves mean what they say about where they want to live. A certain weight must therefore be given to the children's views.

38. Prop. 85 L (2012-2013) p. 6.

39. Prop. 85 L (2012-2013) section 7.2.4.1.

40. Rt. 2013 p. 1329 para 39.

In this case, the parents agreed that the father should have contact with the children, although the mother wanted the visits limited to daylight hours. In support of the conclusion to permit ordinary contact, the Court of Appeal referred to the statement in Rt. 2010 p. 216 that contact with both parents is good for the children.

However, increasing emphasis is being placed on what the child itself believes would be the best arrangement. This has implications for how decisions that go *against* the wishes of the child are justified. As an example, the main question discussed in the following judgment concerned where two boys of fifteen and twelve would reside on a permanent basis. The Court of Appeal judge had talked with the boys, and they were clear about wanting to live with their mother. The issue at the forefront of this case then was achieving the right balance between the best interests of the children and their stated wishes. In the opinion of the Court of Appeal it would be best for the boys to live with their father. Neglect was the prominent feature of the home of their mother. The father was considered sufficiently fit to care for the children. In addition to explaining the reason for its decision, the Court apologized to the boys for ruling against their wishes on the question of residence:

The Court of Appeal has a good impression of [...] the two boys whom the legal question concerns. There is therefore reason to apologize to C and D [the boys] in that the Court of Appeal found it impossible to comply with their wishes, with regard to what the Court of Appeal considers both in the short and, not least, somewhat longer term, as the best outcome for both boys.⁴¹

An apology like this can be interpreted as implying that the judges considered the decision – which in their view represented the best outcome for the boys – to entail at the same time a violation of their integrity since they themselves were of a different opinion.

10.6 CHILDREN UNDER SEVEN YEARS OF AGE: CONSULTATION OR OBSERVATION?

The Committee on the Rights of the Child has been critical of setting age limits to children's right to be consulted. In its general comment on Article 12 of the CRC, the Committee explicitly states that children have the right to be consulted from the age at which they are capable of forming views on the matter in question. Children shall also be given information on the situation adapted to their age and matu-

41. LG-2006-62064.

riety. Children who cannot express themselves verbally, the Committee also states, may express their preferences by non-verbal means of communication.⁴²

The Norwegian seven-year limit introduced in 2004 was not intended to establish a minimum age limit on children's right to be heard. As stated in the preparatory works, the aim of the law was rather to give children a right to be heard from the age of seven. But should the need arise, judges should also hear younger children. However, as Skjørten (2010) found in her study of judgments from 2006 and 2007, only 10 per cent of the children under seven had been heard.

Following the latest amendment of the Children Act in 2013, which entered into force 1 January 2014, Section 31 explicitly states that children under the age of seven shall also be given an opportunity to express themselves if they are able to form views on the circumstances of the case. Our perusal of judgments from 2015 showed a clear increase in the consultation of younger children. Here, 20 per cent of children under seven were heard. It appears that the 2013 amendment has indeed encouraged the courts to talk with the younger children. Nevertheless, all these children were five or six years old. Thus, while noting the positive trend, the following recommendation from the Committee to Norway in 2018 may still be relevant to the courts: 'Increase its efforts to strengthen compliance in practice with the child's right to be heard, particularly with regard to [...] children of a younger age [...].'⁴³

As noted above, the phrase used in Article 12 of the Convention is children's 'right to express' their views, while Section 31 of the Children Act has the wording 'to state their opinion' ('å si sin mening'). Today, however, were conflict to arise between the Convention and Norwegian law, the Convention shall have priority. Observation of contact between parents and children could perhaps be seen as an indirect way of sounding out the opinions of the children. Observation also means collecting information of a non-verbal nature. Whether it is correct to equate this latter, indirect procedure with a situation in which the child can express its own views directly, is questionable, however.

In Rt. 2011 p. 1572, the youngest child was four and the eldest seven. In this case, different degrees of contact were ordered for the two brothers. In the reasons given for ordering less contact for the youngest boy, the Court emphasized in particular the expert's observation of the interaction between father and child:

42. See Section 2.3 above.

43. Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, 1 June 2018 (advance unedited version), para. 14 (a). See also Sandberg (2016a) p. 122.

The father finds it very difficult indeed to interact with D [the youngest boy]. The expert's statement describes a situation in which the father had bought toys that were too advanced for D [to play with]. The father lay the responsibility for D's negative behaviour on the boy, and did not reflect over whether he had done enough to facilitate the situation. The report remarks: 'Interaction during this sequence was destructive for D. He was desperate, tried to get closer to [the expert] and finally focused on the television set.'⁴⁴

In the judgments handed down by the Courts of Appeal in 2015, we found that observation of visits was relatively widespread in cases involving small children. In a quarter of the cases, observations of contact between children and parents were a source of information to the courts. In addition, children were consulted in one of five cases. In other words, just under half of the children were either heard verbally or observed in interaction with parents. The proportion of children under the age of seven who were heard or observed, was somewhat higher in cases where contact rather than permanent residence was the main issue. Contact cases are more likely to involve problems and uncertainties regarding the fitness of one of the parents to have contact, such as aggressive behaviour, substance misuse or psychological problems. In many of these cases it makes sense to consider supervision.

The 2013 amendment came with a new criterion regarding the 'child's needs' in Section 43a of the Children Act, for requiring a publicly appointed supervisor to be present during visits, in addition to the already existing criteria of the child's best interests and special circumstances. The Bill states that 'where the child has previously had contact, the child's feelings with regard to the contact must be given considerable weight'.⁴⁵ The 'child's needs' criterion opens up for other ways of obtaining information about the child's responses to parental contact than simply by talking to the child. However, this criterion is linked to assessments of whether there should be a publicly appointed supervisor in a contact case. A closer analysis of cases involving observation of child–parent interaction has shown that supervision pursuant to Section 43a was considered only in just under half of those cases. This means that observation of interaction between children and parents takes place at about the same frequency in cases where a publicly appointed supervisor is considered, as in cases where this is not an issue.

Observations of interaction between children and parents can be a source of important information about the child's relations with its parents. Observations of

44. Rt. 2011 p. 1572 para 48.

45. Prop. 85 L (2012–2013), p. 49.

contact are usually undertaken by an expert appointed by the court. The following case offers an insight into how the observation of children and parents proceeds. In this case, LF-2013-211489, there were four children aged sixteen, fifteen, thirteen and four. The three eldest had been consulted and expressed no desire to have contact with their father, partly because he had physically abused both them and their mother. Significant weight was attached to their wishes, and their father was denied contact with them. In the view of the Court, the four-year-old boy was too young to be heard, so the Court instead let the expert observe contact between father and son:

F's age has made it impossible to ask his point of view concerning contact with his father. The expert for the Court of Appeal arranged a meeting between F [the boy] and A [the father] in the son's child care facility in May 2015 to observe their mutual interaction. The following is from the expert's report of this observation:

The general impression was that the meeting went very well indeed for F. Although he was hardly able to remember his father from the two meetings he had had with him after returning to Norway, he clearly understood that it was 'daddy' he was meeting and spending time with. The two soon hit it off and F showed great interest in getting to know his father better. The father was good-natured in his behaviour with the boy and they soon found a friendly, intimate tone. F was clearly at ease with his father and felt safe in his company. At the end of the visit, after one and a half hours of contact, I asked F if he thought it would be nice to see his father again sometime soon, and he said it would be. He said he would like his father to come back – and more often. He would also like to visit his father at home, he replied.

The expert recommended contact. The quoted passage also shows the expert based the recommendation on speaking with the boy, not on observation alone. The Court of Appeal, like the District Court, supported contact with supervision provided by the family counselling services six times a year for two and a half hours.

Based on information obtained by observation, the Court found in LH-2015-66418 that it would be best for the boy of five to have contact with his father, sixteen hours a year at most under constant surveillance. This is the strictest form of supervision and is used in cases where there is a risk of violence or abuse, and where the court believes contact of such a very limited extent would still be bene-

ficial for the child. In this case, according to the mother, the boy risked being sexually abused by the father. Based on extensive evidence, including the testimony of the father's daughter from a previous relationship of suffering sexual abuse at the father's hands, there was indeed, the Court believed, a risk of abuse:

In the opinion of the Court of Appeal, D's [father's daughter from an earlier relationship] testimony – seen in conjunction with other information in the case – implies that the risk of sexual abuse is sufficiently grave that contact between C and father may only take place within the framework of protected supervision, cf. the Children Act Section 43a, cf. regulation on access under supervision pursuant to the Children Act.

The Court of Appeal had tasked the expert with assessing the possible risk of sexual abuse and to observe contact between the father and son, while also considering whether it might not be warranted to have a talk with the boy. The expert carried out a series of observations of contact between father and son:

There are notes from a number of visits conducted before and after the District Court's judgment. [...] In essence, they bear witness to interaction between father and son of a satisfactory nature. [...] The expert [...] is of the opinion that C appears to have benefited from the visits and there have been no negative reactions either before or after his visits to his father.

The observations indicate that the boy enjoyed visiting his father. In spite of the risk of abuse, the Court prescribes contact, albeit under constant supervision to protect the boy from abuse. The protected contact was limited to 16 hours a year divided by 8 visits. It is not mentioned in the judgment whether the expert, in addition to observing the visit, spoke with the boy about his wishes. In this case, the Court also considered concluding with no contact at all, but positive reports from observations of contact between father and son led to the conclusion of protected contact.

In the next case (LB-2014-205741) there was also a risk of child abuse during visits. The Court was persuaded that the father had probably abused the mother physically on a couple of occasions but was not persuaded that the three-year-old daughter was at risk of being harmed by the father during visits. In referring to, among other things, reports of several observations of contact submitted by the publicly appointed expert for the District Court, the Court of Appeal prescribed limited contact between father and daughter without supervision:

The Court of Appeal further notes that the District Court's expert [...] was, as mentioned, present during five meetings between B [the father] and daughter. Psychologist [...] has stated that contact with her biological father had given the child a great deal of enjoyment, while the father in turn demonstrated a considerable capacity to care for the child – by approaching it in a careful and sensitive way.

In cases where children were seen to react positively during visits, observations have reinforced the decision of the court to prescribe contact, also in cases when there is initial doubt as to whether contact is in the child's best interest. It is also worth noting that in Rt. 2010 p. 216, in which a seven-year-old girl was both heard and observed in interaction with her father, observation-based information was given more weight than the views of the child itself about contact. This may indicate that non-verbal expressions are perceived to be more authentic than verbal statements. Perhaps judges believe that verbal statements are more easily influenced than what is expressed non-verbally.

If we look at the proportion of children under the age of seven who have either been heard or observed, almost half fall into these categories. In the group of children aged five and six, nearly two-thirds were either heard or observed in interaction with their parents. In the group of three- to four-year olds, a third was observed. Of a total of five two-year-olds, one of the children was observed during parental contact. The term 'express' embraces both verbal and non-verbal forms of communication. If we include observations in the interpretation of the child's right to be consulted, the courts are generally more inclined to let smaller children express their opinions too. However, in the judgments we have examined, the courts still distinguish between consulting and observing children. There may be good reasons for this. One may ask whether the observation of young children as practised in Norwegian courts meets the Convention's criterion whereby the right to express oneself should not be interpreted as a duty and that children should be informed about how the information they provide is to be used. In the case of observation, it is highly doubtful whether the children were given an opportunity to say no, and refuse to participate. Nor is it stated whether they were informed about what the information obtained by observation would be used for. Observation can otherwise be seen as a way of sounding out other aspects of the best interests of the child than eliciting the child's own view. Tisdall and Morrison (2012: 164) refer to a similar distinction between observation and consultation in the Scottish courts:

When the stated *views* of children are not considered sufficient for giving much weight, whatever a child's age, then recourse is made to *observed behaviour* of children. Of frequent note is whether the child seems loved, happy, and/or settled. Reactions at school are given high prominence. Such observations are not discussed as non-verbal expressions of children's views, but rather as indications of their welfare.

The Convention is complex. On the one hand, children's right to protection and care is emphasized, i.e., rights based on a perception of children as vulnerable and not fully capable of making decisions concerning their own lives. On the other hand, however, there is also an emphasis on children's right to participate, turning the spotlight on the competent child. In the charged field between protection and self-determination, observation of child–parent interaction lies closer to protection, while the hearing of children is closer to self-determination.

10.7 CONCLUDING REMARKS

A main finding of the analysis of children's participation in judicialised parental disputes is that children are increasingly being consulted and their voices increasingly being emphasized in decisions by the courts. There is also a significant movement towards accentuating the opinions of younger children in these decisions.

Our analysis is limited to parental disputes falling under the Children Act. There are wide variations in Norway in the way children's right to participate is practised in different areas of the law. For example, children are less likely to be consulted in connection with mediation proceedings to settle issues of residence and contact following a family breakdown and in child welfare cases. In recent years, one has witnessed an increase in the tendency to consult children in these areas too (Strandbu, Thørnblad and Handegård 2016; Magnussen and Skivenes 2015). However, in their recent concluding observations on Norway, the Committee on the Rights of the Child recommends that the government 'ensure that children are informed about the possibility of participating in mediation processes in the context of their parents' separation',⁴⁶ indicating that there is room for improvement.

Returning to parental disputes in court, there has been a similar development in court practices in Scotland regarding child consultation (Tisdall and Morrison

46. Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, 4 July 2018, para. 14 (d).

2012). There too, the tendency to seek the opinions of the children has advanced rapidly over the past few years. As we noted above, failure to consult children may be considered a procedural error under Norwegian law, and on this point, we find a clear parallel to Scottish practice where failure to hear children is 'a recognized ground of appeal and, in some cases, has been the *sole* ground' (Tisdall and Morrison 2012, p. 160). The link between the right of children to be heard and the consequences for the courts of having decisions revoked if this right is not effectively respected seems therefore to have led to an increase in child consultations. There is another interesting parallel between the legal systems of Norway and Scotland. According to the Norwegian guidelines on child consultation, hearings also involve, as noted above, the views of the child on the issues addressed in the case as well as other information likely to shed light on pertinent questions. We find a similar conception of what children have a right to express their opinions on in Scottish case law, where other aspects of the children's situation than the precise issues being considered in the case can be included in the hearing of children:

This shows some move to recognizing that the only issues at stake are not children 'choosing' between their parents but other aspects of children's lives affected by decisions on parental responsibilities and rights. (Tisdall and Morrison 2012, pp. 160–161)

Other aspects than the child's relations with its parents can include, for example, its relations with its friends, leisure activities and school. This more open approach to children's right to express their opinion can affect both the children's desire to express themselves and the inclination of the experts and judges to talk with the children. When the conversation does not require the expression of clear preferences and choices, it can help explain why most children offered the opportunity to express themselves choose to avail themselves of their right.

As mentioned earlier, the right of children to be consulted is defined in the Norwegian wording of Section 31 of the Children Act as the right to state an opinion. Article 12, first paragraph, of the Convention uses the phrase 'right to express those views freely', implying both verbal and non-verbal ways of making one's views known. An important question, therefore, is whether the Norwegian Children Act should not be amended in conformity with the wording of the Convention. It is possible that this should be done for the general right to be consulted pursuant to Section 31, first paragraph, of the Children Act. However, the second paragraph, which deals with decisions concerning, among other things, parental responsibility, residence and contact, is closer to the second paragraph of Article

12. The latter speaks of the child's right to 'be heard' and in order to meet the requirement in the Convention it is probably sufficient that the child is given an opportunity to state its opinion ('*seie meininga si*'), as the second paragraph of Section 31 of the Children Act puts it.

The changes in jurisprudence reflect the legislative changes of recent years. In turn they reflect wider changes in society concerning perceptions of children's competence and capacity. In childhood sociology, Corradi and Desmet describe this paradigm shift as follows:

Regarding the conceptualisation of children, the theoretical framework most recurrently, albeit often implicitly, adopted, is that of the '(new) sociology of childhood'. This means that childhood is socially constructed, and children are considered competent social agents (see e.g. James and Prout 1997) – in reaction against the previously prevalent childhood image of the incompetent child. (Corradi and Desmet 2015: 238)

The child is increasingly perceived as sufficiently competent to participate in decisions concerning its own life, even though this does not mean decisions can be left to the child completely. In international research, concern has been expressed in case this increased focus on children's opinions encourages judges to follow the child's view as an easy way out in a difficult case (Parkinson and Cashmore 2008). The responsibility imposed on the children in such decisions could prove detrimental. For the time being, this does not appear to be happening in Norwegian courts. The main impression gained from our analysis of the judgments is that the child's wishes are considered and weighed in a conscientious manner together with other factors in the case, based on the best interests of the child and in line with the legislator's premises and the formulation of the legislative text. As long as this remains the case, the increased weight of the child's opinions should be considered a positive development. It satisfies Article 12 of the Convention without compromising Article 3 requiring a comprehensive assessment of the best interests of the child.⁴⁷

It is, however, important to keep an eye on the further development regarding children's right to be heard. As discussed in another article, we have seen a shift in how the child is viewed in case law on residence and contact from interpreting the child as vulnerable and in need of protection to seeing the child more as a competent actor (Skjørten 2016b). To comply with Article 3 in the Convention, the

47. On the relationship between the best interests of the child and the right of the child to be heard, see Sandberg (2016b), p. 67.

decision-maker must keep both perspectives in mind when making decisions on residence and contact arrangements for children and be aware that in some instances the child's wish may be in conflict with the best interests of the child. As described earlier, we found that the decisions went against the views of the children in a quarter of the cases. If in the future the outcome in almost all cases turns out to be in accordance with the views of the child, it should set alarm bells ringing.

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11

Asylum

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ABSTRACT This chapter examines whether Norway’s law, policies and practice in the field of asylum are in compliance with the UN Convention on the Rights of the Child (CRC). It begins with a discussion of Norway’s asylum legislation and interpretation of child-sensitive legislation. This is followed by analysis of migration-and-refugee policies and regulations and the implications of new regulations in the Immigration Act after increase in the migration flow in 2015–2016. Two contested regulations and their implications are especially analysed given increasingly frequent refusal decisions, and the forced return of young asylum seekers and families, usually following a stay at a holding or detention centre. The author finds worrying tendencies with the reversal of various children’s rights in the area of immigration. The analysis of the current state of children’s rights in the area of asylum has shown that the CRC is still far from being fully implemented in Norway.

KEYWORDS asylum | children’s rights | child-specific forms of persecution | immigration law | unaccompanied minors

11.1 INTRODUCTION

Migration and asylum have been at the centre of multiple debates concerning Norway’s respect for children seeking asylum. The numbers are not insignificant. Over the past six years in the European Union, there has been a six-fold increase in the total number of child asylum applicants.¹ Norway has partly witnessed a similar phenomenon.² The number of applicants increased markedly in 2015

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1. See <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>. In 2015 and 2016, around 30 per cent of asylum applicants in the EU were children.
 2. About 85 per cent of the UM applicants were boys. Over the past ten years, the largest numbers of UMs in Norway came from Afghanistan, Eritrea and Somalia. In 2015, ten per cent of the UMs came from Syria.

(from 2,400 to 31,145), which included a contemporaneous leap in the numbers of unaccompanied minors (UM) (from 1,200 to 10,300). However, there was a substantial decrease in such applications in the period 2016 to 2018, due to the EU-Turkey Readmission Agreement,³ stricter border controls in many European countries and new, stricter regulations in Norway. In this context, a substantial discussion continues on whether Norway is ensuring the rights of children seeking asylum, both unaccompanied minors (UMs) and those arriving with their families (accompanied minors).

Existing assessments of Norway's implementation of human rights in the field of asylum highlight the contested status of the asylum-seeking child as primarily either a child or an asylum seeker (see, for example, Vitus and Lidén 2010, Parusel 2017). The political marker of *children* refers to an inclusive childhood discourse and policy framework based on children's indiscriminate rights. Further, refugee children are seen as vulnerable when exposed to various dangers in conflicts and wars that affect their lives, survival and development. They may suffer due to child-specific forms of persecution, as well as other forms of persecution as individuals and members of families. By contrast, the concept of *asylum-seeker* activates discourses of border control based on politicized suspicion, welfare restrictions and the expansion of an asylum system.

The ambivalent positions of asylum-seeking children are embedded in the legislation. On one hand, the Norwegian Immigration Act of 2008 includes provisions and formulations intended to strengthen the legal position and rights of asylum-seeking children as children. The intention was to ensure that national regulations on immigration were in accordance with the Convention on the Rights of the Child (CRC)⁴ and in line with the Human Rights Act 1999⁵ as well as the Norwegian Constitution.⁶ On the other hand, migration and asylum are highly politicized areas, and the legislation is frequently adapted to new political dis-

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3. EU-Turkey Readmission Agreement came into force in 20 March 2016. The intention of the Agreement is to end the irregular migration from Turkey to the EU. Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU. For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU. http://europa.eu/rapid/press-release_MEMO-16-963_en.htm
 4. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.
 5. Lov om menneskerettighetenes stilling i norsk rett, LOV-1999-05-21-30.
 6. Grunnloven 1814. In 2002, the entire CRC text was incorporated into national legislation through the Menneskerettsloven [Human Rights Act] of 1999. In 2014, the Grunnloven [Norwegian Constitution] of 17 May 1814 was revised, with the addition of a chapter on human rights. The four main CRC principles were included, in Articles 104, 93 and 98.

courses and public attitudes towards asylum seekers. In recent national law and policy reforms, the rights of the child have been at the forefront of concerns and negotiations.

This chapter assesses whether Norway's law, policies and practice in the field of asylum are in compliance with the CRC. I begin by discussing the extent to which children's rights have been implemented in Norway's asylum legislation and how the content of child-sensitive legislation can be interpreted. This is followed by the identification of core areas in the discussions on the extent to which children's human rights have been implemented in migration-and-refugee policies and regulations. The discussion then moves on to the implications of new regulations in the Immigration Act after increase in the migration flow in 2015–2016. I examine two contested regulations and their implications in terms of increasingly frequent refusal decisions. A rejection may lead to the forced return of young asylum seekers and families, usually following a stay at a holding or detention centre. The conditions for children in such centres are therefore discussed, with reference to CRC Article 37 (see also chapter 6). Finally, I discuss how the principle of non-discrimination relates to unaccompanied minors in reception centres.

This study combines and synthesizes two main types of data, both of which have been collected and analysed in recent research projects:⁷ firstly, *documentary analysis* of legislation, regulations, proposed amendments and asylum-case assessments; secondly, *interviews* with accompanied minors, UMs, legal guardians (representatives) of UMs, and case workers in the immigration administration (i.e. the Norwegian Directorate of Immigration [UDI] and Immigration Appeals Board [UNE]). Analysis of statistics provided by the immigration authorities is also included.

11.2 LEGAL COMMITMENT TO CHILDREN'S RIGHTS IN THE AREA OF ASYLUM

Article 22 of the UN Convention on the Rights of the Child (CRC) lays out state authorities' responsibilities concerning asylum children:

State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable

7. See Lidén et al., 2008, Lidén 2011, Lidén et al., 2011, Lidén 2012, Lidén et al., 2013, Stang and Lidén 2014, Tyldum et al., 2015, Lidén and Salvesen 2016, Lidén 2017. Most of the research has been commissioned by the Ministry of Justice, Ministry of Children and Equality and Immigration Authorities.

international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. (CRC Article 22.1)

The 2016 New York Declaration for Refugees and Migrants expresses the political will of world leaders to ensure children fundamental rights and legal standards in the area of asylum.⁸ Moreover, the Council of the European Union has issued directives on asylum issues⁹ and action plans including effective protection of children in migration, with a focus on strengthening cross-border cooperation.¹⁰

In accordance with CRC Article 3, ‘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’.¹¹ The principle of non-discrimination as defined by CRC Article 2 is also central to discussion of the standards of asylum procedure, protection and humanitarian assistance given to asylum-seeking children. CRC Article 6 recognizes state parties’ responsibility to ensure every child’s inherent rights to life and development. CRC Article 12 obligates state parties to ensure that children can freely express their views in matters that affect them and that their views shall be given due weight. Further, several other CRC articles are relevant for asylum children: the right to care and provision, to health, education and to social reintegration of the child victims of any form of exploitation, torture and armed conflicts.

11.2.1 THE CHILD’S PERSPECTIVE IN THE NORWEGIAN IMMIGRATION ACT

In light of these legal provisions, the goal of a child-sensitive asylum procedure will be attained when *every* asylum-seeking child has his/her *own assessment* that takes into consideration his/her individual situation. The non-refoulement principle includes *child-specific* assessment of vulnerability to ill-treatment, abuse and possible future persecution. Furthermore, a child-sensitive perspective should include adequate options for the *child’s development*, such as sufficient provision of basic needs, care arrangements and access to education. Also important is the

8. See <http://refugeesmigrants.un.org/print/declaration>

9. Council Directive 2004/83/EC on the minimum standards for qualification and status and the Reception Conditions Directive of 2013.

10. In line with the ‘ten principles for integrated child protection systems’ – https://ec.europa.eu/info/sites/info/files/10_principles_for_integrated_child_protection_systems_en.pdf

11. CRC Article 3:1 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

child's health status, including the possibilities of recovering from traumatic experiences such as abuse and violence and reintegrating into society. Children's short references of *time* makes it more vital for them than for adults to reduce short-term uncertainties, normalize their lives and ensure that they develop fundamental skills for the future.

The preparatory work for the Immigration Act, Ot.prp.nr.75 (2006–2007) justifies the child's independent legal position:

The need for a child's perspective in refugee law is particularly relevant in relation to evidence assessment and in relation to providing protection. Children do not have the same conditions to substantiate that they have a need for protection as adults or to convey the individual circumstances of importance. (Ot.prp.nr.75 (2006–2007) p. 92)

The Norwegian Immigration Act of 2008 included certain provisions and formulations that strengthen the legal position and rights of asylum-seeking children. The assessments, made under Section 28 of the legislation, which regulates refugee and asylum status, must take into account whether the applicant is a child, and the legal criteria are to be interpreted in a child-sensitive manner. The legal threshold to obtaining asylum based on refugee status is thus lower for children than for adults. Circumstances that for adults may not qualify as 'well-founded fear', 'persecution', 'torture' and 'inhuman and degrading treatment' may do so for children. Consequently, children may be granted asylum based on exposure to human-rights violations that would not necessarily qualify adults for asylum.

11.2.2 CHILD CONVERSATIONS AND UM ASYLUM INTERVIEWS

The starting point of my evaluation of realization of children's rights in Norway is the asylum procedure, the core of which is the asylum interview and assessment of the asylum application. The child hearing in the asylum procedure is essential to determining the child's need for protection and to ensure child-sensitive asylum claims.

Any person who wishes to apply for asylum in Norway is directed to the offices of the Police Immigration Service (PU) in Oslo. For unaccompanied minors (UM) a legal guardian, referred to as a representative,¹² supports the minor during the

12. The regulations regarding guardianship for UMs were recently reformed, and Chapter 11A concerning representatives for UMs was added to the Immigration Act in 2012. The regulations came into force on 1 July 2013. The term *representative* replaced *legal guardian* for those in the asylum system.

application process.¹³ Since 1 June 2011, the Immigration Service has offered an on-call legal guardian service, so that UMs can register asylum claims with representatives present at any time.¹⁴ After the consultation at the PU, the applicant is transported to a transit reception centre and stays there until the asylum interview is completed. The applicant subsequently stays at a reception centre until the application has been processed;¹⁵ although UMs younger than 15 years old stay in care centres, while those 15–18 years old stay in reception centres for minors. The time it takes to assess a case depends on the number of applicants, the country of origin and the case details. Within the UDI, a special unit with competence in processing children (*Barnefaglig enhet*) was created for UMs in 2009.¹⁶ In most cases, assessment takes about three to five months. If an application is rejected by the UDI, the applicant can appeal the decision to the Immigration Appeals Board (UNE). A very small number of appeals alter the UDI's decision.¹⁷ In 2014, 90 per cent of the UMs were granted asylum but this fell dramatically to 29 per cent in 2017; although 40 per cent obtained temporary permission to stay until they reach the age of 18 years, mainly applicants from Afghanistan.¹⁸

To discover children's experience of human rights violations, they must be sufficiently heard. The child's right to be heard (CRC Article 12) is expressed in the Immigration Act Section 81 and regulated in more detail by government regulations under the Immigration Act Sections 17-2 and 17-3.¹⁹ As we shall see, Norwegian immigration authorities have made some efforts to adjust the asylum procedure to serve children, but questions remain.

13. The Immigration Act Section 98a states that the provisions regarding guardianship 'apply to persons under 18 years of age (minors) who are applying for protection and who are in the country without parents or other persons with parental responsibility'. Guardianship is a voluntary mandate organised by the local county governor (*fylkesmann*). A mandatory course is needed to become a guardian.

14. Any person who wishes to apply for asylum in Norway is directed to the offices of the Police Immigration Service (PU) in Oslo.

15. A lawyer is appointed to each applicant early in the application procedure, but this service is limited to three hours free of charge (Section 92 of the Immigration Act).

16. Ideally, UM cases are given priority to ensure the fastest possible processing and settlement of such applicants.

17. Each year, only 6–10 per cent of the appeals are considered at board hearings. If the board chair believes there is no doubt about which outcome the case should have (the UDI's rejection is maintained), the case is decided by the board chair or a case officer.

18. See: <https://www.udi.no/statistikk-og-analyse/statistikk/asylvedtak-etter-statsborgerskap-og-utfall-for-enlige-mindrearige-asylosokere-2017/>

19. *Forskrift om utlendingers adgang til riket og deres opphold her [immigration regulations]*, FOR-2009-10-15-1286. Administrative regulations of immigration 2009 (made by the Directorate of Immigration).

Asylum procedures differ from other evidence procedures in that the evidence and witness statements that can confirm the applicant's claims are limited. In addition to evidence, documentation on identity, incarceration, torture and abuse may be lacking. The case assessment then depends on the chronology, consistency and reasonability of the personal testimony given in the interview. Critical to the credibility of the oral information and assessment of the case are also supporting expert opinions and country reports from Landinfo (Bollingmoe 2014). In a study on UDI case workers' exercise of judgement, Liodden (2017) found that an additional challenge in unusual issues is that the discourses circulating among case workers lead to perceptions of low credibility in assessing most cases.

Asylum-seeking children make up a highly-differentiated group, in terms not only of age but also social background, education and experience and involvement in conflicts. The children's previous experiences with state authorities and police and their respect for, or fear of, authorities are significant to the hearings. Forms of communication are also culture-specific, including what words, concepts and formulations are appropriate to use when communicating with authorities. Case workers, therefore, must adapt their use of concepts and language to each child.

Accompanied minors are entitled to a conversation with the Immigration Administration (*Barnesamtalen*). For families, the conversation is voluntary, but every child in the family is encouraged to participate. Studies on children's conversations indicate that children must be adequately informed in advance about the conversation so that they can understand its purpose, prepare for it and comprehend what is at stake (Langballe et al. 2010, Lidén et al. 2008, Stang and Lidén 2014).

The conversation is one of several possible forms of hearings. Alternatively, the child may express themselves in writing. In addition, the parents are expected to provide information about their children during their asylum interviews.²⁰ The parents, however, cannot fully represent children and their experiences. The parents are not necessarily aware of the children's experiences because they may have not revealed them in order to spare their parents or family members, who may even have been the perpetrators of violence or abuse (e.g. forced marriage and sexual exploitation). The parents may also be unable to take in or understand the child's experiences. This inability can be exacerbated by chaotic situations.

Similarly to adult asylum seekers, UMs are entitled to asylum interviews. According to Section 17-2 of the Immigration Act, these interviews are to be conducted in a way that sheds as much light as possible on the asylum cases. Executive officers from a dedicated unit (*Barnefaglig Enhet*) conduct the asylum inter-

20. Administrative regulations: RS 2010-075 identifies issues concerning children to be covered in asylum interviews with parents.

views with UMs. The unit must ensure that the officers are competent in child cases and in interviewing minors.

The child conversations and asylum interviews are subject to specific guidelines on structuring, including how the questions are posed and followed up. Although the conversations have a fixed structure, they are expected to allow open communication to reveal the child's subjective descriptions and interpretations of events and experiences. These requirements for the child conversations are well-established principles from child hearings in court cases and child welfare services (Langballe, Gamst and Jacobsen 2010).

Before the child conversations and the UM interviews are conducted, each child needs to be informed about their purpose and consequences and the main legal sections regulating asylum. The Norwegian Association of Asylum Seekers (NOAS), UMs' representatives and the UDI are all responsible for informing children.

The use of competent interpreters is essential to conveying the information. Regardless of the child's commitment to participation, disclosing difficult and traumatic events, possibly including violent assault and/or torture, in an interview can be difficult. Information may be disclosed later in the asylum process, and it is therefore important to establish the credibility of any new information revealed in the course of the asylum process.

As the above review shows, some key steps have been taken to ensure the child's right to be heard in the asylum procedure. However, some aspects that are important to ensure procedural rights and child-sensitive perspectives are not in place, including ensuring a more inclusive age assessment of UMs (see below), and case workers' attention to and competence in child-specific forms of persecution.

11.2.3 ASSESSING CHILD-SPECIFIC FORMS OF PERSECUTION

Children may need protection for the same reasons as adults or family members who have been exposed to persecution. In this context, CRC Article 6 on the child's rights to life and development is highly relevant. International measures also identify child-specific forms of persecution. The UNHCR guidelines mention three specific threats to which children may be exposed: recruitment into armed conflicts, female genital mutilation (FGM) and human trafficking, including forced labour and sexual exploitation.²¹ Recruitment into armed conflicts includes

21. Jf. UNHCR 2009: guidelines on international protection. Child asylum claims. HCR/GIP/09/08. See also CRC Articles 38, and Articles 3 and 4 in the Protocol on the Rights of the Child on the involvement of children in armed conflict under the CRC.

not only participation in armed forces but also forced labour and sexual exploitation by armed groups (Committee on the Rights of the Child, General Comments No. 6). Children are also afforded protection, as they belong to a social group with common characteristics that make them especially vulnerable to persecution or inhumane treatment. The UNHCR guidelines refer to street children, children experiencing domestic violence and neglect, and children affected by HIV/AIDS. Furthermore, children belong to a social group that is vulnerable to gender-related persecution. Gender-related persecution includes the risk of abuse and human-rights violations related to gender relations. Much gender-related persecution is committed against girls and includes threats, sexual assault, honour-based violence, forced marriages, forced prostitution and FGM. Gender-related persecution can also affect boys. Examples include forced marriage and homosexual orientation and acts. For children who have been exposed to persecution, the threshold for granting protection should be lower than for adults.

Now it is important to consider the routines employed and the expertise available in the field of immigration to identify child-specific forms of persecution. UDI case workers state that they gain knowledge of child-specific forms of persecution mostly through case proceedings and information from UDI's Landinfo section, which is expected to be a professional, independent body that gathers and considers the relevant country information needed by Norwegian immigration management (Liudden 2017, Lidén 2017). Landinfo's focus on children has increased in recent years; however, attention to this issue remains limited, and the body is dependent on the awareness of case workers investigating child-related issues and their requests for relevant information (Lidén et al., 2008, Lidén 2012, Stang and Lidén 2014).

Previous research has found that factors that may limit the inclusion of adequate information about children's situations are numerous: for example, the assessment is focused on the parents' case, or there are insufficient requests for substantive knowledge on children (*ibid*). Organizational factors are also significant, including high staff turnover and limited resources allocated to children's asylum cases. Research also indicates that there is limited knowledge of and incomplete research on child-related topics. Among case workers, there seems to be a rather superficial understanding of the multiple ways that children participate in and experience armed conflicts (Lidén 2012, Stang 2008, see also Boyden and Berry 2004, UNHCR 2010). This lack of knowledge extends to health personnel and legal professionals, such as lawyers and UMs' representatives. Oxford Research (2012), for example, raised the concern that lawyers may lack knowledge of and training on child protection issues. Studies have emphasized the need for screening of vul-

nerable asylum seekers to supplement information and awareness about their experiences of abuse, torture and human trafficking. However, such screenings have not been prioritized in the asylum procedure.

11.2.4 AGE ASSESSMENT

Most asylum seekers lack credible identification when applying for asylum. Difficulties in estimating the age of young unaccompanied asylum seekers without identity documents have long been a problem for immigration authorities. In an evaluation of the age-assessment methods used by EU member states, the European Asylum Support Office (EASO) concluded that no methods currently available can establish with certainty the age of an individual. Therefore, age assessment should only be undertaken if there are doubts about the claimed age. Before resorting to medical examination, consideration should first be given to documents and other forms of documentation. The child's best interests should be the primary consideration, and assessments should be performed with full respect for the individual's dignity (EASO 2014, pp 6–7). Uncertainty regarding the child's age has significant implications for his/her identity and well-being, as well as the possibility of exercising his/her rights.

The decision to conduct an age assessment is taken as part of the initial procedure at the Police Immigration Service (PU). The PU estimates the age of young unaccompanied asylum seekers. If the minor is clearly underage, PU may decide to exempt the minor from the age assessment.²² Although the age of not all minors is disputed, unaccompanied asylum seekers whose declared age is 16 to 18 years are frequently referred for age assessment. In some cases, the immigration authorities may also initiate procedures to assess whether a child is younger than 15 years, as children aged 14 years and younger are placed in special child-care facilities administered by the child welfare services. If, during the consultation, the PU concludes that an apparent UM is most likely an adult, it may decide to start adult asylum proceedings. The age assessment involves a dental examination and hand X-ray, in addition to a medical observation and statement.

The PU obtains consent from the UM to conduct an age assessment, which is voluntary and requires the minor's consent. However, if the asylum applicant does not wish to complete the assessment or does not show up for it, this may be taken as an indication that the applicant is not a minor (Immigration Act Section 88) and negatively influence the applicant's perceived credibility and the outcome of the

22. Circular RS 2010-183: Guidelines for age assessments of UM asylum seekers.

asylum claim assessment (Staver and Lidén 2014). The final decision concerning an individual's age is made by UDI case workers as part of the asylum decision. Any documentary evidence and assessment of the individual's maturity and age made by professionals (e.g. a representative of the UM, law enforcement officers and professional staff at the child's reception centre) may also be considered, although this is not routinely done. These written documents can be examined during the child hearing, although the child is not routinely expected to discuss the age issue in the asylum interview.

Medical methods of age assessment have been criticized on several grounds (Crawly 2007; NOAS 2016). The main criticism is that they are not accurate; the margin of error is especially large in this age group. The immigration authorities acknowledge these limits. Medical examination is only to be used in case of doubt (Immigration Act Section 88). However, in some periods the age assessment has been used extensively. In 2015, for example, most UMs underwent age assessments. A substantial percentage were assessed as overaged or 17 years old, which led either to rejection or only temporary residence permission. Although immigration authorities acknowledge the limitations of age assessment, the discrepancy between the age assessment and the age information given by asylum-seeking children may also negatively affect their credibility.

In 2016, NOAS and Save the Children Norway (NOAS 2016) evaluated age assessment practices and concluded that they do not comply with the Immigration Act and United Nations (UN) guidelines. The report also found that more asylum seekers go through medical age assessment than is provided for under the Immigration Act and the UN guidelines. Medical age assessments are given too much weight. There is also a need for a holistic age assessment method examining both physical and psychosocial development.

In January 2017, UDI handed over responsibility for the dental and hand X-ray examinations to the University of Oslo. In March 2017, the university withdrew from the agreement with the immigration authorities due to the ethical implications and challenges of the measures. The situation remains unresolved.

11.3 CHILDREN'S RIGHTS WEIGHED AGAINST THE NEED FOR IMMIGRATION CONTROL

This subsection discusses how recent legislative amendments and practice have made the rights situation for asylum-seeking children more restricted. Due to a political commitment to stricter immigration policy, the Immigration Act was amended in 2015 and 2016 to include new regulations (Prop. 90L 2015–2016).

One of the new regulations removed the reasonability assessment from Section 28 (on granting asylum) of the Immigration Act, making forced return to the country of origin more likely, also when the applicant will be facing internal displacement upon returning (Vevstad 2017). This has implication also in relation to another clause on the granting of temporary residence permission to UMs aged 16 to 18 years. These two examples illustrate how human rights is an area subject to negotiations over changing political and rights interests. Children's rights tend to be made conditional on protective immigration policy and interpreted in a more restrictive way.²³

11.3.1 ELIMINATION OF ASSESSMENT OF REASONABILITY FROM THE IMMIGRATION ACT SECTION 28

A new regulation in the Immigrant Act, which came into effect in October 2016, removes the principle of assessing the reasonableness of forcibly returning a refugee to his/her country of origin. The removal of the reasonability assessment also implies the removal of thorough assessment of the child's best interests under Section 28 in the Immigration Act (on granting asylum). If a case is rejected under Section 28, it is then assessed to identify conditions that support granting of a residence permit on humanitarian grounds. In such cases, the reasonability assessment is then assessed under Section 38, evaluated against immigration regulation concerns. This amendment is not intended to expand the content of the grounds assessed in Section 38 (Prop. 90 L (2015–2016), 51–52).

In the granting of residence permits on humanitarian grounds the child's best interests is a primary consideration.²⁴ The Immigration Act expresses the best-interests principle in Section 38, but unlike Section 28 on asylum, the assessment under Section 38 also provides for consideration of other factors in order to control and/or limit immigration, prevent illegal actions and safeguard society at large. In such cases, the child's best interests are a primary but not the exclusive nor the decisive consideration. The principle of the child's best interests should be balanced with the need for immigration control.²⁵

23. See HR-2015-2524-P - Rt-2015-1388.

24. This principle similarly follows from the Norwegian Constitution Article 104 and CRC Article 3 No 1.

25. In Norway, the Immigration Appeals Board (UNE) holds the authority of statutory legal interpretation in the area of immigration. UNE (2016) has clarified how to balance the principle of the child's best interest with the need for immigration control.

This issue of weighing the child's best interests against the need for immigration control has been much debated. The wording of CRC Article 3(1) permits flexibility and gives preference to other strong interests in special situations.²⁶ Nevertheless, the child's best interests must be identified, specified and taken as 'the paramount consideration' when in conflict with other interests or rights (Committee on the Rights of the Child, General Comment 14, Sandberg 2016). Children's rights experts emphasize that the more confident one is what the child's best interests in a case are, and the greater the importance a decision has for the child, the higher priority that the child's best interests should be given. According to e.g. Sandberg (2017), Stang (2012), Stang and Lidén (2014), the practice to, as a rule, prioritize immigration control over the child's best interests is hardly in accordance with the CRC's interpretations of the term 'basic' in Article 3 No 1.

International rights provisions on return to country of origin

Regarding the returning of child asylum seekers to their country of origin, the Committee's General Comment No. 6 states that this is not an option if it would lead to a 'reasonable risk' of violating the child's fundamental human rights and, in particular, if the principle of non-refoulement applies under the UN Convention of 1951 Relating to the Status of Refugees, Article 33. The Committee stresses that, in principle, return to the country of origin shall occur only if it is in the child's best interests, taking into account safety, security, available care arrangements and the child's views on and level of integration into the host country.²⁷

The UNHCR requires the primary option to be the return of refugees to a safe part of their country of origin. However, in 2002, the UNHCR added the principle of measuring the reasonability of such returns (UNHCR/GIP/03/04). The assessment must consider:

[...] age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. (UNHCR/GIP/03/04)

26. In accordance with the Committee's (2013) General Comment 14, it does not violate the CRC, in some cases, to set aside consideration of the child's best interests in favour of other matters.

See discussion of Norwegian Supreme Court jurisprudence on this topic in Søvig's chapter.

27. Committee on the Rights of the Child (2005) General comment no 6, para. 84.

In 2012, the UNE (2012) made this standard the main principle of its return practice. This is in line with the European Union (EU) Council Directive (2004/83/EC) on minimum standards for the qualifications and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection. The directive regards return as an option as long as it is deemed to be ‘accessible’, ‘safe’ and ‘reasonable’.

In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. (Article 8.1–2)

The CRC Committee states that an administrative examination must include an overall assessment of the child’s best interests. An asylum request cannot be refused simply on the grounds that the return is justifiable; rather, refusal must be based on relevant and sufficient weighty considerations, which must be specified in the decision (Sandberg 2017).

In the Ministry of Justice’s tender on the new regulations (Prop. 90L 2015–2016), most legal experts criticized the alterations in regulations concerning UMs and regulations that would have negative implications for children in families because of the extended use of the paragraph in the legislation to *not* grant protection to refugees with protection needs, with reference to the option for return to internal displacement in their home country.

The proposed new regulations in the Norwegian Immigrant Act were criticized for violating international law. Key hearing bodies considered in their statements that Norway should follow the UNHCR’s guidelines, identifying criteria for providing reasonability.²⁸ For example, the Norwegian Immigration Appeal Board emphasized that most countries apply the reasonability criteria. Hearing bodies also contended that the European Court of Human Rights follows the UNHCR’s guidelines and that the criterion on reasonability is reflected in the EU’s status directive Article 8.

The new, restrictive regulations have had consequences for the number of rejections, as was intended. Nearly all applicants from Syria and Eritrea are granted asylum, however most refugees from Afghanistan and Iraq, which are countries that the Norwegian immigration authorities assess as safe for return, have received

28. UNE, Advokatforeningen, Amnesty and NOAS were among those that criticized the new restrictions (see Prop. 90 L (2015–2016)).

rejections on their applicants. In 2017, residence permits were given to only 28 per cent of applicants from Afghanistan compared with 52 per cent in 2014.²⁹ In 2017, a majority of Afghan families with children received rejections.

Another consequence of these new regulations is that those eventually granted residence permits in accordance with Immigration Act Section 38 are not granted the same right to family reunification as refugees who are granted asylum under Section 28. This may have significant implications for children in families split by war and flight. This change is in line with stricter immigration policy but can conflict with the CRC principle of the child's best interests and with the European Convention on Human Rights Article 8.

Returning parents and children in need of protection as internally displaced people may raise new and extended concerns that relate, for example, to states' responsibilities regarding healthcare treatment and reintegration after child-specific forms of persecution, ill treatment, abuse or exposure to inhuman treatment of close relatives, as stated in CRC Article 39. Another issue is states' responsibility to ensure refugee children's right to education as defined by CRC Article 22 (see also *UNHCR Handbook* 2003). When a family is returned and faces internal displacement, it is no longer covered by the UNHCR's regulations.

11.3.2 LIMITATIONS ON UNACCOMPANIED MINORS

The new regulations also have implications for the assessment of asylum applications from UMs. In recent years, a large proportion of UM applicants (66–94 per cent) were granted residence permits, primarily on asylum grounds. However, the Norwegian authorities regard return to the country of origin as an option for adult refugees from Afghanistan, so UMs from that country are granted temporary residency until they reach the age of 18 years and are then immediately returned.

The practice of granting temporary residency permits to UMs was first implemented in 2009.³⁰ UMs who were 16 to 18 years old and did not qualify for asylum or residency on humanitarian grounds but would have had no access to proper care if returned to their country of origin could receive temporary, non-renewable residence permits that would expire once they reached the age of 18 years (Immigration Regulations Section 8-8). From 2009 to 2015, immigration authorities

29. <https://www.udi.no/en/statistics-and-analysis/statistics/asylum-decisions-by-citizenship-and-outcome-2017/>

30. This regulation was one of the thirteen points for limiting the number of (unwarranted) asylum applications proposed in 2008 (see Stang 2012).

were reluctant to grant temporary residency to UMs.³¹ In 2015, the Norwegian government proposed a new temporary residency regulation including all UMs who did not have pending asylum claims or were younger than 16 years old. This proposal was heavily criticized by the hearing bodies of the tender for creating an unsecure situation with extra stress and vulnerability.³² Nevertheless, the Ministry of Justice continued to apply the regulation to minors aged 16 to 18 years (Prop. 90 L (2015–2016)).

The hearing bodies argued that temporary residency increases mental health problems and may reduce motivation for participation in school, work and other activities. It prevents minors from settling down, forming attachments with caregivers, integrating into Norwegian society, graduating from school and planning for the future. The UNHCR was also critical of the proposal, citing the CRC, particularly the principle of the child's best interests.³³ The UNHCR stated that children should not be discriminated against in the asylum procedure due to their status as children.

Children recognized as refugees following a child-sensitive application of the Convention should be granted full protection status and an ordinary permit. That children are recognized according to child-specific standards does not mean that they do not fully meet the criteria of the refugee definition, only that it has been applied in an age- and child-sensitive manner. (Section 67)

Under the new regulations, the number of UMs granted temporary residency each year has increased substantially. Over that period, the numbers of UMs disappearing from reception centres also increased significantly (Lidén 2017). UMs tend to remigrate to other EU countries, where they either remain as street-dwellers without asylum status or seek asylum (Aasen et al, 2016, NOAS 2018a).³⁴

31. From 2009 to 2015, a total of 221 UMs received temporary residency. Twenty percent of them were returned to their country of origin after reaching the age of 18, while one third 'disappeared', mostly to other EU countries. Others have been settled in Norway (Dok.8:13 S (2015–2016); see also Aasen et al. 2016). In 2017 342 Afghan UMs received temporary residency. Also, Sweden and the United Kingdom grant temporary residency for UM, however, fewer than in Norway, both in numbers and in percent of the UM applicants. Another difference is e.g. that in Sweden the minor can have a second assessment after turning 18, which is not an option in Norway (see NOAS 2018b).

32. See also Committee on the Rights of the Child (2005), *General Comment No 6*, para. 89, which stipulates that children must be given a secure juridical status if reunion with their family is not possible.

33. Juristforbundet, UNHCR, Rettspolitisk Forening, Press, Amnesty, Helsingforskomiteen, Advokatforeningen and NOAS see the proposal as in violation of Norway's international obligations.

34. See also <http://missingchildreneurope.eu/News&press/Post/1023/Europol-confirms-the-disappearance-of-10-000-migrant-children-in-Europe>

In the autumn 2017, numerous of those granted limited residency turned 18. This elevated the critique of the new regulations. Fourteenth November 2017 the Norwegian Parliament decided to re-introduce assessment of reasonability for unaccompanied minors, giving those with a decision to return a new assessment on certain conditions.

11.3.3 THE CHILD'S BEST INTERESTS AS THE PRIMARY CONSIDERATION

General Comment No. 14 on the child's right to have his/her best interests taken as the primary consideration emphasizes three main aspects. Firstly, this right applies in *all* matters concerning the child. Secondly, if a legal norm is open to more than one interpretation, *priority* shall be given to the interpretation that most effectively serves the child's best interests. Thirdly, a best-interests determination implies *a formal process* with strict procedural safeguards.

So far, the politicians have discussed the principle of the child's best interests in cases in which children stay in Norway for a long period. The UNE (2013) prepared guidelines for how the child's best interests were to be understood in such cases, and due to strict interpretation of these guidelines, several long-staying children were rejected because their parents had not proven their identities. Consequently, in December 2014, the immigration regulations were amended to give more weight to the child's affiliation to Norway. The rules are still strict: generally, children must have lived in Norway for a minimum of 4.5 years and have attended school for one year.³⁵ The amended guideline on the best-interests assessment calls for examination of the child's affiliation and social networks. There may be reason to consider best-interests assessments in light of the new practice of reasonability assessment. This consideration now also applies to the return of families and children who have *protection needs*. They may have experienced severe threats, extortion and violence before and during their flight, and they may need healthcare and support. If the return would be to an environment in which they were previously exposed to persecution, the child's subjective feeling of insecurity will increase. This relates to the interpretation of CRC articles on rights to life and development, health, education and support and social inclusion after experience of abuse, violence,

35. According to the partnership agreement between Solberg-Government, The Christian Democratic Party and the Liberal Party (2013), a permanent arrangement for long-staying children, including changes in Immigration Regulation, Section 8-5, should be elaborated. The 2016 UNE report showed that 82 per cent of (80 of 92) families that appealed for a change in the UNE's decision were granted residency permits.

abuse and exploitation.³⁶ The Norwegian immigration authorities have not publicly clarified how the child's best interests are to be interpreted in cases of returning refugee children with protection needs to their country of origin or how the principle of an asylum threshold that is lower for children than it is for adults is to be implemented.

11.4 FORCED RETURN – CHILDREN IN HOLDING CENTRES

For children in families whose asylum application has been rejected, confinement at a detention centre may be part of the return procedure. In such cases of forced return, CRC Article 37 on custody and holding centres is relevant to the asylum assessment.³⁷

The Trandum Detention Centre (*Trandum Utlendingsinternat*) is the only centre specially designed for legal detention of irregular or undocumented migrants – and is discussed in more detail in Chapter 6. It is managed by the Police Foreign Unit and is authorized and operated in accordance with the *Immigration Act*.³⁸ The centre is a former military barracks near Gardermoen International Airport. For most rejected asylum seekers facing forced return, either to another European country, in accordance with the Dublin Convention³⁹ or to their country of origin, a stay at Trandum is part of the forced return procedure.

According to the Immigration Act Section 106, under certain circumstances a foreign national may be arrested and remanded in custody; for example, if he/she does not cooperate in clarifying his/her identity or has used a false identity, or if there are clear grounds for suspecting evasion. The overall custody may not exceed 12 weeks, unless there are particular reasons to the contrary. According to the Immigration Act Section 107, a foreign national who is arrested and remanded in custody under Section 106, as a rule, shall be placed in a holding centre administered by the police.⁴⁰ Neither Section 106 nor Section 107 specifically addresses

36. Committee on the Rights of the Child, General Comments Nos. 6 (unaccompanied minors), 7 (early childhood), 13 (violence), 15 (health) 18 (harmful cultural practices), 20 (adolescence) are among the General Comments that contribute to the interpretation of relevant CRC rights.

37. Committee on the Rights of the Child (2007) *General Comment No. 10* on child rights in juvenile justice stresses the basic principle (session 79); the use of deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time.

38. See, in particular, Chapter 12 of the *Immigration Act* and *Immigration Directive 2009*.

39. Dublin Convention (Regulation No. 604/2013) is a [European Union \(EU\) law](#) that determines the [EU Member State](#) responsible for examining an application for [asylum seekers](#) seeking [international protection](#) under the [Geneva Convention](#) and the [EU Qualification Directive](#), within the [European Union](#).

40. See also discussion in Chapter 6 on policing.

or refers to the best-interests principle, but the provisions are expected to be interpreted in a child-sensitive manner, and both the best-interest principles in CRC Article 3 No 1 and the CRC provisions regulating deprivation of the liberty of children have to be taken into account (see Committee on the Rights of the Child's General Comment No. 10).

The Parliamentary Ombudsman conducted two investigations of the conditions and practices at Trandum, the main holding centre, and made several critical comments.⁴¹ The 2012 report does not state whether the children were UMs or were detained with their parents. The 2015 report states that a total of 330 children, including 10 UMs, were detained at Trandum. The average time spent at Trandum in 2016 was 1.5 days for UM and 2.5 days for children in families (Lidén 2017).

Researchers and lawyers have protested that the conditions at Trandum are not in accordance with Norway's obligations under the CRC and other human-rights conventions, especially the best-interests principle.⁴² There seems to be a systematic absence of assessments of the human-rights principle of proportionality in such cases (NOAS 2017). In June 2017, the Borgarting Court of Appeal concluded that the Norwegian authorities had violated the European Convention on Human Rights Article 3 by detaining a family at Trandum for too long.⁴³ For children, detention should always be the absolute last resort, but assessments of alternative measures are not always made, for example, according to the provisions of the Child Welfare Act. The detention of children at the Trandum holding centre, therefore, is violating the state's obligations under the CRC. In a court decision from 2017 the court of appeal [*Lagmannsretten*] concluded that the CRC Art. 37 b as well as the European Convention on Human Rights (ECHR) Article 3 and 8 had been violated when a family with four children, aged 7–14, were detained at Trandum for a period of 20 days.⁴⁴

41. Sivilombudsmannen [Parliamentary Ombudsman], *Besøk til politiets utlendingsinternat på Trandum høsten 2012* [Visiting the Trandum holding centre, autumn 2012] and *Besøksrapport politiets utlendingsenhet på Trandum, 19–21 Mai 2015* [Report on a visit to the Trandum holding centre, 19–21 May 2015].

42. UNICEF, Save the Children and the Children's Ombudsman have reacted to the practice. See also the 2017 NOAS report.

43. This period is 20 days of detention for a family with four children aged 7 to 14 years.

44. See LB-2016-8370 *Fengsling. Barn. Tvingende nødvendig. EMK Art 3 og 8* [Detention, Children, Absolutely necessary, EMK art 3 and 8] <https://www.udiregelverk.no/no/rettskilder/underrettsavgjørelser/lb-2016-8370/>. Due to the criticism, the immigration administration in 2018 established a separate centre for children and families. However, that this may lessen the burden does not change the fact that children are imprisoned for a period of time.

11.5 RECEPTION CONDITIONS AND THE PRINCIPLE OF NON-DISCRIMINATION

CRC Article 22 expresses the general principle of non-discrimination, which is articulated throughout the CRC, that refugee children have the same fundamental human rights and protection needs as other vulnerable children. As already mentioned, the UNHCR regards Norway's new regulation on temporary residency for UMs as possible discrimination against children. In this context, it is important to consider the status of asylum seeking-children living in reception centres, especially whether they have the same fundamental human rights and protection needs as other vulnerable children.

In accordance with the Norwegian Human Rights Act of 1999, asylum-seeking children have the same access to education, healthcare and child-welfare services as other children in Norway. Asylum-seeking children up to 16 years old have an equal right to primary and lower-secondary school education. They are enrolled in introductory classes at local public schools. Since 2014, asylum-seeking children aged 16 to 18 years have been granted access to education. Minors who completed lower-secondary school before arriving in Norway are enrolled in upper-secondary school after taking an introductory class. However, most young refugees do not have education equivalent to lower-secondary school on arriving in Norway and must attend classes to complete this level, either while living in reception centres or once settled in a community (Pastoor 2015). Those who receive residency permits have the same right to education as Norwegian citizens.

The non-discrimination principle (CRC Article 2) was also a strong argument for the transfer in 2008 of administrative responsibility for UMs from the Immigration Directorate (*Utlendingsdirektoratet*) to the child welfare system (*Barnevernet*). Non-governmental organizations such as Save the Children, the Children's Ombudsman and child-rights activists, along with lawyers and researchers, argued that the care situation for UMs in ordinary reception centres did not meet the quality standards that apply to children living in childcare institutions under the Child Welfare Act. Since 2008, UMs younger than 15 years have been entitled to live in special care centres administered by the Directorate for Children, Youth and Family Affairs, to ensure that they receive the same standards of care and support as children in child-protection institutions.⁴⁵ Consequently, the Child Welfare Act's provisions on quality standards for institutions, qualifications of staff members, the rights of children living in institutions, use of coercive measures and regular

45. The 2008 care reform resulted in the addition of a chapter to *Barnevernloven* [Child Welfare Act] of 1992 to regulate care centres for UMs (Chapter 5A).

supervision by the county governor have been implemented at the care centres for UMs. These standards, however, are not equal to those of most institutions governed by the Child Welfare Act (Deloitte 2014).

The UDI continues to supervise the reception centres for UMs aged between 15 and 18 years. These centres are not adapted to house minors granted temporary residency, which means that such UMs are living in the centres for too long, with worries and uncertainty while awaiting their return. An increase in serious health problems has been documented.⁴⁶ The reception centres are not regulated by child welfare legislation, and there is no specific required staff-to-minors ratio. There are insufficient properly trained staff members, and the staff-to-minors ratio is lower than in care centres (Lidén et al. 2013; Berg and Tronstad 2015). Despite the care reform for UMs younger than 15 years old, it can reasonably be argued that discriminatory treatment is still being practiced against UMs aged 15 to 18 years who live in ordinary reception centres administered by the Immigration Directorate.

Child protection is another area of concern, especially whether children in the asylum process have access to equal help and support as other vulnerable children. Researchers have highlighted limitations in the procedures for identifying and following up minors who have had complex experiences of sexual and other forms of abuse due to armed conflicts, flight and human trafficking (Berg and Tronstad 2014, Lidén et al., 2013, Lidén and Salvesen 2016, Paulsen et al., 2014, Tyldum et al., 2015). The concerns include the children's everyday need for security, care and support when living in reception centres. The researchers found that local child welfare offices only follow up on grave problems involving UMs. For example, the June 2017 report by the Group of Experts on Action against Trafficking in Human Beings (GRETA) concerning the implementation of the Council of Europe's Convention on Action against Trafficking in Human Beings urges the Norwegian authorities to adopt a national referral mechanism which takes into account the special circumstances and needs of child victims. The report also recommends that Norway take further steps to address the problem of children going missing while in state care.⁴⁷

CRC Article 39 specifies that states parties shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of the

46. See letter from UDI to the Ministry of Justice, <https://www.abcnyheter.no/nyheter/norge/2017/02/09/195276393/udi-flere-enslige-mindrearige-har-forsokt-ta-sitt-egget-liv>. See also a letter from the Child Ombudsman, <https://www.vg.no/nyheter/innenriks/i/7aMx9/barneombudet-sterkt-bekymret-for-enslige-mindrearige-i-mottak>

47. See <https://rm.coe.int/greta-2017-18-fgr-nor-en/1680782abc>

child victims of any form of neglect, exploitation, abuse, torture, armed conflicts or any other cruel, inhuman or degrading treatment or punishment. Also, CRC Article 24 on the right to health and Article 18 on child care are relevant to ensuring that asylum-seeking and refugee children receive sufficient support. International asylum-seeking children have the same access to welfare services as children who are Norwegian citizens, however the local welfare services may be reluctant to give these children sufficient support.

Access to healthcare services, especially the treatment of chronic diseases or traumas, is another area of concern. Children not granted residence permits may still only access emergency health services. Researchers have documented trauma symptoms and mental health treatment needs among unaccompanied refugee minors on arrival in Norway (Jakobsen et al. 2014; Vervliet et al. 2014). The children's health problems may even increase when living in reception centres (Jensen et al. 2014). While children's asylum proceedings are under way, health institutions may be reluctant to start treating mental problems or chronic health problems due to the uncertain prospects. This also concerns minors with a temporary permit to stay.

11.6 CONCLUSION

CRC Article 22 stipulates that refugee children are to receive appropriate protection and humanitarian assistance in order to enjoy the applicable rights set forth in the convention and other international human-rights and humanitarian instruments. Norway has taken important steps to implement the rights of the child in the area of immigration. These steps include the child conversation, the procedures for assigning representatives to all UMs upon arrival, the establishment of a child-competent unit within the immigration administration, the opening of care centres for the youngest minors, and granting of equal education rights to those minors less than 16 years old. Improved participation rights are important for children if they are to disclose their experiences of persecution, inhuman treatment and abuse. For young asylum-seekers, the principle of non-discrimination has been important in setting standards of care and schooling. The intentions expressed in the Immigration Act to ensure child-sensitive assessments and to set an asylum threshold that is lower for children than it is for adults are also significant steps in the right direction.

However, in all these areas, the positive intentions have been challenged in practice because of resource shortages and the need to prioritize sufficient competence. Another area of concern with regard to assessing the rights of the child in

immigration is the *age assessment* (NOAS 2016), the practice of which should comply with the UN guidelines for a holistic age assessment, which considers both physical and psychosocial development. The child's participation rights must also be respected in such assessments. Furthermore, if the age assessment establishes that asylum-seekers who claim to be minors or who are claimed to be minors by their representative are in fact 18 years or older, this may influence the immigration authorities' (UDI's) *credibility assessment* of asylum claims and thus case outcomes, even if confidence in the age assessment methods is low. The consequences may be severe: children assessed to be over-age do not receive support from representatives and their cases are assessed according to adult criteria.

New regulations in the Immigration Act have made the intention to ensure child-sensitive practices more ambiguous and less certain. Meeting the requirements of the CRC may run counter to the political and public demand for restrictive immigration policy. In recent years, immigration control has been tightened by setting aside key provisions of the CRC, for example, by removing the reasonability assessment from the Immigration Act section on asylum and by granting UMs only temporary residency. In their recent concluding observations, the Committee on the Rights of the Child comments on these new regulations.⁴⁸ The Committee is concerned with children being sent back to countries where their rights are at high risk of being violated, which would contravene the principle of non-refoulement.⁴⁹ Prioritizing immigration control at the expense of the child's best interests may violate not only the *individual* child's right to have his/her best interests made a primary consideration but also the child's right for *priority* to be given to the interpretation that most effectively serves his/her best interests when a legal norm is open to more than one interpretation (Sandberg 2017). The Committee also comments on the increase in the use of temporary residence permits for unaccompanied asylum-seeking children, and the absence of any system to automatically reassess the cases of unaccompanied children with temporary residence permits, 'resulting in the fear that their applications for permanent residency would be denied, which they see as an important reason for the relatively high number of children who have disappeared from reception centres.'⁵⁰

A further concern is the detention of children at the Trandum holding centre as part of the return procedure. With an increase in the numbers of rejected refugee families being returned by Norway to their countries of origin, the number of

48. UN Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6 (2018), paras. 31–32.

49. *Ibid.* para. 31(c).

50. *Ibid.* para. 31a.

detained children will also increase. The Committee on the Rights of the Child is concerned about the possibility of detention of children for up to 9 days prior to their deportation and says that children are under no circumstances placed in detention based on their immigration status.⁵¹

A final area of concern, also for the Committee on the Rights of the Child, is the conditions for UMs aged 15 to 18 years placed in reception centres. As the standard of care is unregulated and their access to education is limited, their treatment can justifiably be regarded as a form of discrimination. Furthermore, the reception centres have not been adapted to house the growing number of minors granted limited residency, which means that such UMs are detained in the centres for too long, which exacerbates their worries and uncertainty while awaiting return to their country of origin. An increase in serious health problems among such minors has been documented. As I have shown, there are also serious limitations in the procedures for identifying and following up children with health problems and those who have had traumatic experiences of conflict and flight, violence, abuse and exploitation. The physical and psychical vulnerability of minors is insufficiently taken into account, not only in day-to-day care and support practices in reception centres but also in provision of healthcare and child welfare services. Yet another concern is that asylum-seeking minors who need extra support have insufficient access to healthcare and child welfare services. Finally, the problem of asylum-seeking children ‘disappearing’ from state care needs to be properly addressed. This is also an arena for concern of the Committee on the Rights of the Child. They recommend that Norway ‘address further root causes of disappearance of children out of reception centres’ and to ‘increase efforts to search for missing children, provide them with the necessary protection, redress and rehabilitation, and ensure that if they have fallen victim to crimes, perpetrators are brought to justice.’⁵²

In summary, compared to many other European countries, Norway has made significant progress in ensuring children’s rights in the asylum field. Commendably, Norway has adopted a child-friendly asylum procedure, has given its immigration regulations a child-sensitive perspective and has given asylum-seeking children access to schools and critical healthcare and child-welfare services. However, as discussed above, there are several areas of concern in which children’s rights are not in place or have even been reversed. A child perspective must necessarily consider children’s short time perspectives, whereby months and years are vital for their welfare, education and development. As intended by Norway’s law-

51. *Ibid.* para. 32(f).

52. *Ibid.* para. 32(b) and (c).

makers, the new regulations in the Immigration Act have led to a considerable increase in the numbers of asylum rejections and forced returns to the country of origin. Also, increasing numbers of families with protection needs and UMs with temporary residence permits face demanding conditions. These recent retrograde developments are compromising certain fundamental rights of the child.

As I have argued, in Norway there are worrying tendencies to reverse children's rights in the area of immigration. In periods with high numbers of asylum applicants, the situation of asylum-seeking minors becomes especially precarious. For responsible immigration control, it is important to have robust procedures and plans in place to cope with such peaks while protecting those children who may be even more vulnerable at such times. Prioritizing tight immigration control over the child's best interests is a hotly contested issue that raises conflicting concerns, interests and rights. For example, the political commitment to new restrictions was justified by the argument that they would discourage families and UMs from migrating to Norway. This raises the key question of whether human rights, including the principle of the individual child's best interests should be restricted in order to prevent potential negative effects of migration that concern other children. The dilemmas in this field are plentiful, but the CRC is unequivocal: it grants every child the same individual rights. Above all, this analysis of the current state of children's rights in the area of asylum in Norway has shown that the CRC is still far from being fully implemented in this country.

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12

Disability

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ABSTRACT The chapter addresses the rights and practices towards disabled children and their families in the lights of the UN Convention of the Child and the UN Convention on the Rights of Persons with Disabilities. Although all articles in CRC apply to disabled children on equal terms with all children, a few that are of special interest in the Norwegian setting are highlighted. Drawing on longitudinal data, the chapter discusses issues related to a) growing up in a family environment b) family supports, c) inclusive education, and d) participation with peers in leisure and/or cultural activities. The analysis suggests that the outcome of current policies and practices for disabled children in these areas are out of keeping with CRC provisions and that access to services is paved with obstacles.

KEYWORDS disability | children | family support | participation | education | children's rights

12.1 INTRODUCTION

This chapter addresses the rights and practices towards disabled children and their families in the lights of the UN Convention of the Rights of the Child (CRC),¹ in particular, current practices related to supports to families, inclusive education and participation with peers. CRC was ratified by Norway in 1991 and incorporated into Norwegian legislation in 2003. The CRC was the first UN

1. Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

Convention with a provision that explicitly addressed disabled children (Article 23) and in 2006, the Committee on the Rights of the Child published General Comment 9 on the implications of the CRC for the rights of disabled children.² Even though all convention provisions apply to disabled children on equal terms with all children, some appear to be of special interest in the current Norwegian context. The issues raised by the Committee on the Rights of the Child in their comments on periodic reports from the Norwegian government do for instance address social participation with peers;³ family support and inclusive education.⁴ Disabled children are also protected by the Convention on the Rights of Persons with Disabilities (CRPD), ratified by Norway in 2013.⁵ The dual protection is among others addressed in the General Comment 9 from the Committee on the Rights of the Child.⁶

This chapter starts out by discussing some core themes from the CRC of special current interest for disabled children and their families, and how provisions in the CRPD address those topics. The main body of the chapter is, however, a presentation of recent empirical data that illuminate to what extent current practices comply with the UN conventions.

12.2 THE UN CONVENTIONS AND DISABLED CHILDREN

Although most provisions in the CRC are of relevance to disabled children, some speak more directly to issues that have been raised by research, disabled peoples' organizations, in the public debate in Norway and by the Committee on the Rights of the Child. This chapter will in particular address the following points regarding the rights of disabled children:

1. Growing up in a family environment/ family supports
2. Inclusive education
3. Participation with peers in leisure/cultural activities

2. Committee on the Rights of the Child (2006).

3. Committee on the Rights of the Child (2000), para. 38; Committee on the Rights of the Child (2005), para. 29.

4. Committee on the Rights of the Child (2018), section F

5. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

6. Committee on the Rights of the Child (2006).

(1) Neither the CRC nor the CRPD have provisions that directly address the right to grow up in a family setting or with their parents. On the other hand, the issue is raised in the preambles to both. The CRC maintains that State Parties are ‘... recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment’ and the preamble to the CRPD claim in paragraph (x) that ‘... the family is the natural and fundamental group unit in society ... and that persons with disability and their family members should receive the necessary protection and assistance...’. Article 23 (5) of the CRPD also specifies that ‘State Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting’ (cf. also CRC Article 9). General Comment 9 also provides an interpretation of the implications of CRC for the right to grow up in the family and family supports.⁷

The recognition of the right to grow up with the parents or in an alternative family setting was part of the background for initiatives taken by the Council of Europe to combat institutionalization of disabled children in the mid-2000s (Council of Europe 2005). In a Norwegian setting, this right may be politically self-evident and in practice, out-of-home placements appear to be rare (Tøssebro, Paulsen and Wendelborg 2014). The reason why we highlight this point is, however, not that the right to grow up in a family setting is frequently violated, but related to the preconditions for growing up at home in a normal family setting. This is among others related to the support the families need.⁸ The support system, or the “division of labour” between families and the service system, was an important dimension when the “growing up at home”-policy was implemented in Norway from the 1960s onwards and continues to be a vital part of the current debates on supports for disabled children and their families. Thus, the issue of preconditions for “growing up at home” related to family supports will be analysed in this chapter.

(2) CRC Articles 28 and 29 address the right to education in general, whereas the disability-specific Article 23 specifies that education should be provided in a way that supports social integration and individual development. The article also has a general clause on facilitation of ‘the child’s active participation in the community’. General Comment no. 9 states that ‘Inclusive education should be the goal of educating children with disabilities’.⁹ The CRPD Art. 24 addresses education and the duty for State Parties to ensure that disabled children are provided rea-

7. Committee on the Rights of the Child (2006).

8. CRC Art. 18 and 27. cf. Committee on the Rights of the Child (2018).

9. Committee on the Rights of the Child (2009), para. 66

sonably accommodated education and that disabled children are not excluded from the general education system. In the Norwegian setting, there are debates on current trends regarding segregation of disabled children from mainstream classrooms and also concerning the quality and levels of ambition in the education of disabled pupils (cf. Meld St. (white paper) no. 18, 2010–2011; NOU (public committee report) no. 17, 2016; Bachman, Haug and Nordahl 2016; Tøssebro and Wendelborg 2014; Barneombudet (Ombudsman for children) 2017). The issue of segregation also relates to the worries from the Committee on the Rights of the Child concerning participation with peers.¹⁰ Thus, we will look into recent evidence regarding segregation and quality in education.

(3) The worries from the Committee on low levels of participation among peers are not just about the education system but also related to leisure type of activities, cultural participation etc.¹¹ The rights to social participation are specifically addressed in CRPD, Article 30, and can be inferred from the general article on disabled children in the CRC on participation in society and access to ‘recreation opportunities supporting their personal development, social integration and cultural development’.¹² Social participation is also a general aim in disability policies internationally, and was one of the slogan keywords for the UN international year (1981) for persons with disabilities.

12.3 DATA SOURCES

The empirical basis for this chapter is available Norwegian research on disabled children and their families, in particular a longitudinal study of disabled children born 1993–1995 with physical disabilities, intellectual disabilities, learning difficulties and multiple disabilities: ‘Growing up with disability in Norway’. Data was gathered from parents at five points in time during the childhood and adolescence, in 1999, 2003, 2006, 2009 and 2012. About 600 families responded to questionnaires whereas qualitative in-depth interviews were conducted with 30 families in the county of Sør-Trøndelag. It was thus a mixed methods design with survey data and qualitative data covering many of the same topics. The families were recruited by the child rehabilitation units that exist in every county in Norway and the procedures were approved by the Norwegian Data Protection Authority. Details on bias, attrition and data gathering across waves are available in

10. Committee on the Rights of the Child (2005; 2018).

11. Cf. Committee on the Rights of the Child (2009), para. 70

12. CRC Art. 23

Tøssebro and Wendelborg (2014; cf. Tøssebro and Wendelborg 2017 for an English outline). The main biases are underrepresentation of families from the capital area and minority families. The children themselves responded to a brief questionnaire or were interviewed when reaching adolescence, in 2009 and 2012.

12.4 GROWING UP AT HOME AND THE DIVISION OF LABOUR BETWEEN FAMILIES AND THE PUBLIC

The policies on growing up in a family environment have a history that dates back to the 1960s. The changes that occurred at that point in time may be seen as “old days” but they also highlight why one needs to see the two issues of ‘growing up in a family environment’ and ‘family supports’ in conjunction. Briefly speaking, policies changed from ‘either-or’ to ‘both-and’ during the 1960s (cf. Tøssebro 2015).

The historical bottom line was that parents were responsible for their children and that the public provided a limited set of generic services, such as education. However, such services were not adapted to the whole range of children and those that did not fit in, were excluded. They were left in their families’ care. During the 19th century one saw the emergence of alternative services for disabled children, such as schools for deaf and blind children, and later also for children with mobility problems and intellectual disabilities. At the onset, the idea was to provide education but in the early 20th century, the arguments shifted to family protection (Kirkebæk 1993). One realized that the burdens placed on families were too extensive and that a disabled child tended to disrupt the whole family. Thus, public services were expanded in order to ‘save’ the family. This took the shape of ‘either-or’. The public supports that evolved were total in the sense that the schools were 24-hour boarding schools where the children went to school, ate, slept, and lived. The role of the family was reduced to minor or none. Sometimes parents were even told to forget their disabled child (Grunewald 2008). The last point applied in particular to the emerging long stay institutions, but even special schools were total in character. In a number of cases, schools also evolved into long stay institutions, especially schools for children with intellectual disabilities (Kirkebæk 1993; Wiking 1995).

The reasoning behind the development was of a dual nature. One intended to ‘save’ the families and also to enable parents to care adequately for their other children. The other aspect was distrust in the parents’ ability to educate and care for children with special needs. Services specialized towards specific diagnostic

groups were needed. This second argument was gradually challenged, beginning in the 1950s.

In the early 1950s there was a discussion in Sweden on boarding vs. non-boarding special schools (Grunewald 2008, p. 333). The argument was that life at boarding schools removed children from the society in which they were expected to live as adults. Thus, the schools were less likely to make the children fit for an independent adult life. In Norway, a well-known child psychiatrist, Nic Waal, argued that the family in the vast majority of cases was a better therapeutic environment: No institution could provide adequate alternatives to the care and type of stimuli that a normal family typically caters for (cited after Edlund 2010, p. 269). A typical family environment simply provides stimuli that are better suited to scaffold the psychological development of all children.

Such voices were few in the 1950s but in the early 60s a rapid change took place, and the division of labour between the public and families were rethought. The change was in part triggered by economic considerations. Waiting lists for institutions and special schools were seen as a real problem and in 1959 the Norwegian government argued that if children stayed with their parents, the costs per pupil would be a third (Tøssebro 1999). The economic arguments were, however, tuned out as the policy was strengthened. A Norwegian white paper from 1967 on disability policy claimed that to grow up at home gives a better prognosis for the children. The role of the public should thus not be to move the children from the home, but to support families in such a way that it facilitated a normal childhood and a normal family life (St. meld. (White paper) no. 88, 1966–67). This policy change echoed innovations in child protection which was codified by law fifteen years earlier, in 1953 (Hagen 2001). Support in the family came to be the preferred option and if this was impossible, the alternative should be another family. The change was thus not just about disabled children but applied to child welfare in general.

Since the mid-1960s, to grow up at home has been an uncontested principle. It is hardly discussed as a topic in disability policies at all. It is simply taken for granted. From that time few new children were admitted to institutions and the special schools/special education were based on the principle that children lived with their parents and went to school at daytime. The policy change did, however, not imply that the care simply was left to the families once again. The idea was to set up a range of services supporting the families; including day care, education (also for children earlier seen as uneducable), economic supports, respite care, assistive technology, etc. And even though there was a lack of services in the 1960s, the direction and movement was clear. A 1999 survey of disabled children

aged 4–6 years in Norway suggested that 98.5% lived with at least one of their parents and that the majority of the remaining lived with another (foster) family (Tøssebro and Lundebj 2002). The proportion living in child homes in adolescence was somewhat higher (Tøssebro et al. 2014), but basically it is taken for granted that disabled children grow up with their family – with supports from a welfare system which in Norway is mainly public.

Thus, it is uncontested that disabled children should grow up with their family, and if not possible, it should be in a family setting. It is furthermore an uncontested policy ideal that the public should provide the support needed to maintain a normal family life and a childhood as normal as possible. The public debate is to what extent this policy ideal is made real in the everyday lives of disabled children and their families, that is, to what extent the public in reality carries out its part of the ‘new’ division of labour. We will in particular address the experiences with the current division of labour from the parents’ perspective.

12.5 FAMILY EXPERIENCES WITH THE SERVICE SYSTEM

The most stressful is not having a disabled child. It is the combat with the service system. This is maintained by many parents, and we agree (our translation)

This statement is from a father of a five-year-old child, quoted from Tøssebro and Lundebj (2002, p. 190). It refers to a paradox. Since the 1960s, Norway has established a comprehensive system of supports for families of disabled children, but the interaction with this system is not only experienced as support. It also turns out to be an extra burden.

There is however also another paradox. The ‘Growing up’-surveys included a number of items on supports and satisfaction with a number of agencies in the support system. Even though there are exceptions, the satisfaction appears reasonably good. In general, two thirds to three quarters are satisfied or very satisfied, which is the level expected on this type of questions. The result is approximately the same for all waves of the data gathering (cf. Kittelsaa and Tøssebro 2014). There is some variation across type of service but that is not the main point here. The point is that during the face-to-face interviews, we were presented for a very different image. The majority of parents expressed high levels of frustration and disappointment.

There may be a number of possible explanations of the diverging results, such as geographical variation. There is however no reason to expect that the county chosen for interviews is extraordinary in this respect. Another possibility is that different research methods return different results. This may occur if frustrated parents have a high response rate for interviews and low for questionnaires or because the ticking of responses on a structured questionnaire may produce more positive responses than when people speak freely in a face-to-face setting. We will not rule out that the research method may make a difference, even though variation in response rates appears unlikely. However, it seems unlikely that methods effects are an important explanation. The case is that when speaking freely, parents did not address the same issues as the questionnaire. The questionnaire primarily asked about the services that people were provided, whereas during the interviews, the main issue was not the services as such but the process of accessing services. It was about information, applications, etc. Thus, the likely interpretation is that the paradox arises because the main problem in the current “division of labour” is not the quality of services as such, but an access process that appears like a combat from the point of view of parents.

The stories and examples told by parents vary. Some report helpful interaction and professionals taking the role of a gate opener. However, the main message is frustrations and can be summarized in the following five points (cf. Tøssebro and Lundeby 2002, Kittelsaa and Tøssebro 2014):

12.5.1 INFORMATION

Parents report that they are rarely informed about possible supports but have to find their way themselves. Some report that they have been in contact with a support agency, asking about a specific support. They are told that they do not fit the eligibility criteria, but *not* that there exists another type of support that suits their needs and for which they are eligible. Such experiences apply both to the state organized social security measures and supports from the local government. A mother claims that *You have to find out about rights and possible supports yourself. There is no one at the social security office that informs you about possible supports*, and the spouse adds: *they rather conceal the rules and regulations* (Tøssebro and Lundeby 2002, p. 211). Based on a study around 1980, Ingstad and Sommerschild (1984) claimed that social security speculated in parents' lack of information. This finding was unexpectedly replicated in our interview study. Similar criticisms were, however, directed towards many parts of the support system, including hospitals at the point in time when the child was first diagnosed. A

family report that *we were told that the child had a brain injury and was going to be severely disabled. Then their job was obviously done. We were waiting for a while. What is going to happen now? Are we going to be referred to a social worker or psychologist? What kind of supports will be triggered? Nothing happened. Absolutely nothing* (Tøssebro and Lundebry 2002, p. 201). The main exception to this type of criticisms applies to the county-based child rehabilitation units, which more often took the role of information provider and gate opener. However, it tends to take some years before parents meet this service.

12.5.2 FRAGMENTATION

The Norwegian support system comprises a number of measures and a number of agencies with responsibility for different types of support. It is not for a newcomer to understand who is responsible for what. This problem escalates the information problems, but the fragmentation problem goes beyond this. First, it is an additional burden for parents to relate to a number of public agencies and some experience that they have to take on the role of coordinating various services. Second, the fragmentation may produce “grey areas” where agencies point at each other regarding who is responsible for what. A number of parents report such experiences. An example is a worn-out family that was called to a meeting involving several agencies, in order to set up adequate support, or so they thought. The result was however a meeting where different agencies were arguing about lack of resources and who was responsible for what. The situation of the family remained unchanged (Tøssebro and Lundebry 2002, p. 220). During the progress of the ‘Growing up’-study, the government introduced a system with “individual plan” and assigned “coordinators” in order to remedy the fragmentation. Such measures were implemented for the majority of the children in this study by adolescence, but with limited impact. When children were 17–19 years old, only 11 per cent of the parents agreed that the individual plan did result in more holistic and coordinated supports. Thus, currently it appears as if individual plan is a promising measure in need of improvement.

12.5.3 THE RIGHT PERSON

Civil servants appear to take different roles. Some act like gatekeepers protecting the public purse, whereas others take the role of gate opener. The parents point to the importance of encountering the right person in the support system. Many claim that they gradually learn whom to contact in order to get the help they need. Some

report that things changed when they met the right person but also that things got more complicated when this individual quit, was pregnant or replaced after reorganization of the agency. Thus, regarding variation between civil servants, the main point is not criticisms across the board but that parents experience a kind of bureaucratic arbitrariness related to how street level bureaucrats understand and execute their role. Everyday life is dependent on meeting supporting people in the welfare system.

12.5.4 PENALTY ROUNDS

A substantial number of parents have experienced that applications for support were turned down. This applies to all kinds of services but in particular special education and social security. When the child reaches adolescence, three quarters have filed a complaint over a denial at least once. There may of course be good reasons for such denials, but this seems to be an unlikely explanation as 60–80 per cent report that the complaint was fully or partly successful. In some cases, parents report that this is frustrating but that they in the end get the support they need. In other cases of successful complaints, however, this is not the case. If one for instance complains over a denial of summer respite care, it does not help much if the decision is altered – in October. The same is also sometimes reported for special education. The main issue is, however, that there appears to be a threshold built into the system that excludes parents who give up and do not file a complaint. We cannot rule out that parents present their case more clearly and convincingly during the complaint than in the initial application. It is however unlikely that this is the full explanation and it does not change the fact that penalty rounds are part of being the parent of a disabled child. Sometimes denials lead to new strategies from parents: A mother was in October granted a week of summer respite care after filing a complaint. Next year, she changed her strategy. Instead of applying for one week of respite care, she applied for five. Then she was allocated two weeks in the first instance.

12.5.5 SUBJECT TO SUSPICION

A feeling of being subject to suspicion follows in part from the above points. Parents tend to feel discomfort in the interaction with the service system; they feel that they are met like someone trying to take advantage of or misuse the support system. This, in combination with the experience of penalty rounds, also implies that parents feel they have to describe their beloved child in the most burdensome

manner possible, in order to be regarded as eligible for the support they apply for. Thus, the interaction becomes burdensome in itself. Opting out is however not a possible choice. The families need the support and are thus stuck in the rather uncomfortable interaction.

12.5.6 VARIATION IN EXPERIENCES – TIME AND FAMILY RESOURCES?

There is reason to expect that the above descriptions fit better during the first years of the childhood. As time goes by, parents will be more familiar with the system, better informed, the fragmentation appears less chaotic and many have found ‘the right person’ in the service system. Furthermore, some types of support will run more or less automatically when allocated, such as the basic and supplementary benefits (grunn- og hjelpestønad). This expected trajectory is however only partly the case. Parents argue that it helps to become familiar with the system and the criticisms are less severe when the children are adolescents. But on the other hand, the pattern and types of frustrations are unexpectedly stable. Some relate this to new milestones. Needs change, transitions from day care to school and later to secondary school produces new rounds of access processes, the ‘right person’ in the service system gets pregnant, has quit or is replaced due to reorganization of the agency. Even though the economic support from social security is based on long-term decisions, supports like special education and respite care are short term – some social services for no more than three months. Thus, access processes are not only about the entry into the support system during early childhood, they are permanent facts of life for families with disabled children.

A number of the critical points above are likely to be associated with the families’ ability to master an unfamiliar and bureaucratic system. One would thus expect variation according to family resources, for instance related to their level of education. Our data hardly confirms such an expectation. This may be because the frustrations are mainly evident in the qualitative interview data, and not the survey data. Thus, we were not able to systematically analyse experiences by socio-economic variables in the medium-sized sample, only based on the rather small qualitative sample. And in the qualitative sample, frustrations apply both to families with high and low socioeconomic status.

There is one qualification concerning the unexpected missing association with family characteristics which relates to one of the biases in our data: the underrepresentation of minority families. In order to partly correct for this, some colleagues did a series of qualitative studies specifically on minority families with disabled children (Berg 2012). One of the main conclusions was that frustrations

and problems were escalated in minority families, but also that cultural differences (such as understanding of disability) and misunderstandings appears to play a limited role in this escalation. The point is rather that the frustrations outlined above, such as information problems and fragmentation, are even more severe in minority families due to language problems, less information about the welfare system and fewer resources in the social network (knowing someone who knows whom to contact). Thus, the source of the escalation appears to be issues related to the minority status rather than cultural difference. But the group as such is nevertheless more vulnerable.

In short, the narratives of parents suggest that the gap between policy ideals and the realities experienced by the families of disabled children is wide, and that this in particular relates to peoples' encounters with the service system and the process of accessing services rather than the quality of services as such. This does not imply that disabled children are deprived of a childhood in a family setting but it causes stress and frustrations among parents. Thus, the road to 'necessary protection and assistance' (cf. the preamble to CRPD) is paved with thresholds and is experienced as a combat with what is intended to be a support system.

A number of the above points suggest that many street-level-bureaucrats act like gatekeepers. This applies at least to information, penalty rounds and suspicion. The intriguing question is why civil servants encountering families with disabled children appear to be more eager to protect the public purse than to support them. We cannot answer this, but their dual role is likely to be relevant. Their job is to serve the eligible but also to reject people who intend to misuse the system. This duality is inherent in social services. The problem is that thresholds intended to keep the ineligible out has a pervasive effect on the everyday lives of people that need and are eligible for the supports.

12.6 INCLUSIVE EDUCATION?

Articles 28 and 29 of the CRC address the right to education in general, whereas the disability-specific Article 23 specifies that it should be provided in a way that supports social integration.¹³ There is furthermore a general clause on societal participation. The CRPD also addresses education and the duty for state parties to ensure that disabled children are not excluded from the general education system.¹⁴ In Norway, every child has the right and access to education, disabled or

13. Cf. Committee on the Rights of the Child (2009), para. 66

14. CRPD Art. 24.

not. The question is, however, to what extent disabled children are included in regular educational settings.¹⁵ Education in inclusive settings is seen as important for social integration of disabled children and the possibility to participate in educational and leisure time settings on same terms as other children.

Inclusive practices appear to be affected by the age of the child. Disabled children had a legal right to be prioritized for admission to preschools (day care centres) since the first act on preschools in 1975. At that time, and up to 2005, preschools were defined as care- and family-supporting services. By the new preschools act (Lov om barnehager 2005) these institutions changed from being care- and family-supportive services to become pedagogical services preparing children for school. Furthermore, all children in Norway gained the legal right to admission to preschools in 2009 and in 2011, about 97 per cent of the children aged 3–5 years attended (Statistics Norway 2012). However, because of the early right to be prioritized, preschools have a long tradition of providing care to all children, including disabled children.

As suggested by data shown in Figure 12.1, most disabled children attend regular preschool units; only about 12 per cent of children did not. The vast majority of children with physical or intellectual disabilities aged 4–6 years attended regular preschool groups in 1999. However, about a quarter of the children with multiple disabilities attended special preschools or special groups in regular preschools.

In the compulsory primary school, achieving a ‘school for all’, or one that is fully inclusive, is an important policy goal and part of the official aims behind the system of education for all children in Norway (Haug 1999). Before 1975, the state ran special schools, whereas municipalities were responsible for general primary education, that is, all other children. In 1975, a legal and administrative integration took place. The Special School Act was embodied into the general Education Act, and municipalities became responsible for the education of all children. However, special schools did not disappear. Some were transferred to municipalities whereas others continued to be run by the state, providing education that was purchased by municipalities. However, inclusion policies and ideology were gradually strengthened. In the late 1980s, legislative changes gave every child the right to attend their local school and to belong to a regular class together with their peers, but parents could apply for or accept other options. In 1992, all state-run special schools were closed with the exception of schools for sign language students. The ideology was that special education should take place in a classroom setting together with peers at the local school.

15. Cf. Committee on the Rights of the Child (2018).

Given such a core value base of inclusion, one would expect that schools make substantial efforts to accommodate disabled children in regular schools and classrooms throughout their primary school years – even and perhaps especially when relations between disabled children and their environment change as they grow older. However, as Haug (1999, p. 238) points out, the belief that Norway has put the goal of the inclusive school into practice have to be questioned. The use of special schools or special units at regular schools was fairly stable from the 1960s to 2005. About 0.8 per cent of the total pupil population attended special schools in the 1960–70s, and subsequently reduced to 0.6–0.5 per cent in the late 1990s and up to 2005 (NOS 1994; Skårbrevik 1996; Tøssebro 2006; Wendelborg 2006). Compared to other European countries, there was less use of segregated educational provisions (special schools/special classes) in the Norwegian school system in the mid-1990s (Vislie 2003). However, the use of segregated educational provisions increased in Norway to about 1 per cent in 2006–07 and to 1.3 per cent in 2008–09 (Wendelborg 2010). The proportion seems to be reduced since then, but there is some uncertainty about how schools define segregated provisions after 2011 (Wendelborg 2017).

These general figures on segregation in the education system provide information about the system at large, but are less informative as to the proportion of disabled children that are provided segregated schooling. As shown in Figure 12.1 the inclusive practices of preschools appear gradually to be replaced by segregation as children grows older. The segregation of an increasing number of disabled children takes place particularly during the transitions from one type of school to another (preschool to primary school, primary to lower secondary school, lower secondary to higher secondary school).

Thus, in the transition from preschool to primary school, there is a substantial increase in the proportion of children who do not attend regular educational settings. About one third of the children attend educational settings separately from peers without disabilities in early primary school. This proportion remains stable until the transition to lower secondary school, when it further increases to half of the pupils with disabilities. In upper secondary school only a third remains in regular educational settings. These results suggest that schooling for children with disabilities is a trajectory out of the general peer group.

Figure 12.1 shows that segregation from regular educational settings is not only related to age, but also type of disability. The separation from peers takes place rather early for children with multiple disabilities, somewhat later for children with intellectual disabilities, but as children reach adolescence it also applies to children with physical impairments.

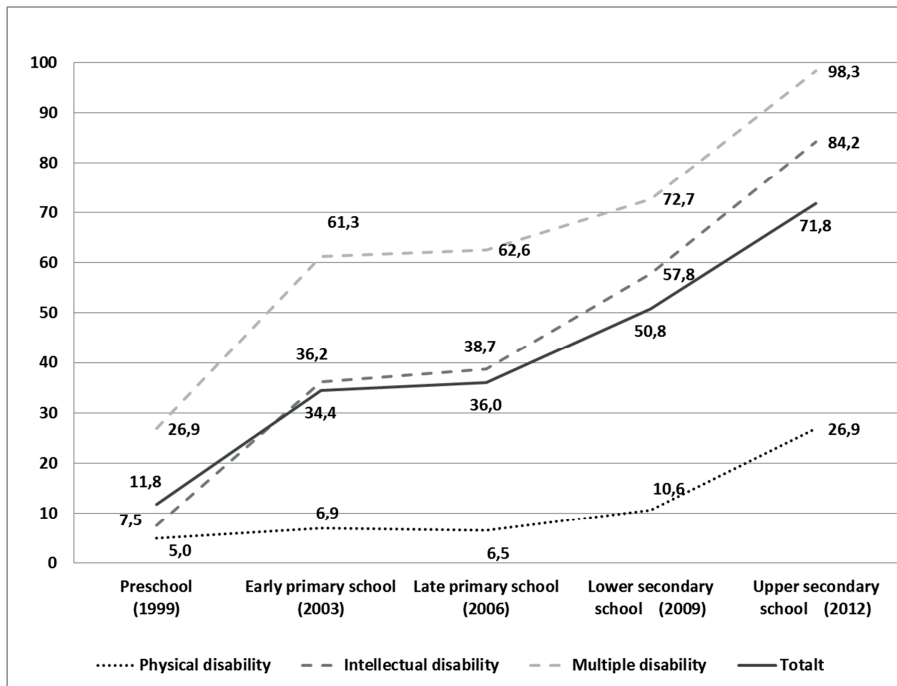


FIGURE 12.1 The development of the proportion of pupils getting their education outside regular class by age and type of disability (longitudinal data 1999–2012).¹⁶

Source: Wendelborg (2014).

Marginalization from regular class depends on more factors than age and type of disability. Some findings were expected, for instance that pupils with more severe impairments participate less in regular classes. However, the story of marginalization also comes with surprises. The number of inhabitants in the municipality is for instance of great importance for the proportion outside regular classrooms. Municipalities with many residents and in urban areas use segregated solutions to a greater extent than municipalities with smaller population size and density. This difference between municipalities (local governments) has probably both practical and ideological explanations. The practical explanation is in line with what Meijer and De Jager (2001) have pointed out; to set up a separate school system for children in sparsely populated areas is inconvenient, both because of an insufficient number of pupils with disabilities and because children would have to be transported substantially longer distances to a special school unit. Thus, the solution is more likely to be educational provisions within the local regular school.

16. $n=558$ (1999), $n=448$ (2003), $n=392$ (2006), $n=364$ (2009), $n=241$ (2012).

However, this does not explain why Oslo, the capital of Norway, uses segregated solutions more than other major cities. Neither can it explain why more children attend regular classes in municipalities with about 20–40 thousand inhabitants compared to the larger cities. Thus, local policies or ideologies also appear to play a role. There may even be an interaction between practical and ideological issues. If it is impractical to set up a segregated measure, or none exists, the school authorities are likely to put more effort into making inclusive settings work. This will in turn affect ideology and future practices. On the other hand, if there exist options of segregated measures, schools are more likely to see that as an easy way out and are less motivated to put much effort into making inclusion work. In short, the supply of educational provisions is likely to affect policies, ideology and the experienced need for segregated options, that is, demand.

The proportion of disabled children who are attending regular schools is not the full picture of the inclusiveness of education. Another element is that some pupils formally belong to a regular class, but scarcely participate in classroom activity. In primary school about a quarter of the disabled children who attend regular schools, participate less than half the time in class. This proportion increases with age. In secondary school, well over 40 per cent is more than half the time outside of the regular classroom. This segregation within an “inclusive” setting appears to be correlated with special education. When controlling for degree and type of disability, the number of hours with special education has a relatively strong effect on number of hours out of class. This suggests that the special education practice may in reality be a barrier to participation among peers, in particular the practice of taking the child out of class for special education lessons instead of developing strategies for special education within class (such as two teacher systems).

This practice may reflect the regular schools’ adaptation to the tension between the ideology of inclusion and their maintenance of existing traditional practices. It may also be a result of how schools manoeuvre in waters with contradictory pressures from different parts of the educational policies and ideologies. The Norwegian school system aspires to bring about a truly inclusive school, in which all children have access to the same facilities without segregation. However, there are other educational aims and ideologies that counteract this, such as the focus on performance, achievements and competition. In the everyday teaching, such diverging ideologies are not easily managed by teachers and there is reason to note that the increase in the total number of segregated children followed the shock-waves due to mediocre results on the 2001 PISA tests and subsequent reforms with focus on achievements.

After the transition to upper secondary school, the practice of taking pupils belonging to regular classes out of the classroom is reduced. The reason is not that there has been an inclusive turn in upper secondary school, but rather that few disabled pupils are attending regular educational settings at all. At the age of 17–19 years of age, less than 10 per cent of the children/youth in the ‘growing up’-study were attending a regular classroom where they participated more than half their time together with peers. Education for disabled children is thus a trajectory out of the general peer group, rather than social integration.

This pattern of segregation from peers obviously deviates from the national policy ideals of inclusive education. Some argue that it takes place because it is more convenient for the general school system – that it is a safety valve for traditional teaching methods. Teachers need to put less effort into accommodation for the full variation among pupils if disabled children are excluded. However, there are also voices that claim that the provision of segregated measures is in the best interest of the child. Such voices tend to refer to three types of arguments: (1) that disabled children will learn more in a more specialized educational setting, (2) that parents and children should have the opportunity to choose among options, including segregated options, and (3) that inclusion very often in reality leads to isolation and loneliness. We will discuss the first two points briefly here and address the “loneliness issue” in the next section on participation among peers in leisure and cultural activities.

There is limited research on learning outcomes for disabled children in different educational settings in Norway, but internationally there is a substantial body of research including a number of literature reviews. Such reviews tend to find that the evidence is inconclusive. Some studies show an advantage of inclusive settings but also the other way around. In general, the reported effects are vague, and the most reasonable conclusion is that it is not the issue of inclusion vs. segregation that matters when it comes to learning outcomes (cf. Hegarty 1993, Baker, Wang and Walberg 1995, Lindsay 2007, Dyssegaard and Larsen 2013). The argument for segregated solutions because of improved learning outcomes is thus not supported by existing evidence.

In this context, it is also relevant to note that the educational provisions for pupils with disabilities, and in particular with intellectual disabilities, has been criticized for low expectations and low ambitions regarding learning, thus not preparing them for an ‘ordinary’ or ‘independent’ life (cf. NOU (Norwegian public committee report) no 17, 2016). This criticism is supported by parents of children with disabilities who claim that individual education plans (mandatory if the child receive special education) tend to be “copy and paste” of learning goals of other

children and not according to the level of competence of their children (Wendelborg, Kittelsaa & Wik 2017). Major concerns about the process of referral for special needs education, as well as the quality and content of the training, have also recently been raised by the Norwegian Ombudsman for Children (Barneombudet, 2017). The concerns include worries about the use of teachers without formal qualifications for this group of pupils. Thus, in addition to the issue of segregation, even official voices like the Ombudsman for children and a public committee report also in practice question if educational provisions for all groups of disabled children are in keeping with Article 29 (a) of the CRC, specifying the right to education directed to the development of 'the child's personality, talents and mental and physical abilities to their *fullest* potential'.

The issue of the opportunity to choose segregated options is both related to the Education law and the CRC. According to the Education law only parents can decide that their child shall attend a school other than the neighbourhood school. One could therefore argue that the increasing segregation with age is due to parental choice, probably because they find inclusive education unsatisfactory. The CRC, Article 12, addresses the child's right to be heard – to express their views and that the view is given due weight in accordance with the age and maturity of the child.¹⁷ The increasing proportion in segregated setting by age could thus be in respect for the views of the children. The question is however what empirical evidence exists concerning the views of children and parents, and how this should be interpreted.

The children taking part in the 'Growing up'-study were interviewed or responded to a questionnaire in 2009 and 2012, when they were 14–19 years old. When asked what type of school they prefer, a vast majority of the adolescents reported that they preferred a school together with their general peers (Wendelborg 2014). However, there are some nuances. First, priorities appear to depend on the current type of school. Close to 100 per cent of disabled children in regular schools prefer this option, whereas there is more variation among children in special schools or classrooms. The majority responds that they prefer a regular school with more children with a similar type of impairment. Second, during interviews both children and parents report relief after the transition from regular school to a special school or unit. It is thus reason not to simplify this matter. We will shortly come back to interpretations but let us first have a look at the parents' attitudes and choice.

In the international literature, the views of parents have been found to vary according to the characteristics of the child (Lundeby 2006), including, for

17. Committee on the Rights of the Child (2009).

instance, diagnosis (type of disability) and age (Kasari et al. 1999). Parents' opinions also appear to be affected by current educational placement (Jenkinson 1998; Kasari et al. 1999) and worries about inadequate training and attitudes of teachers in regular schools, lack of resources and specialized instruction, and concerns about the social integration and academic progress of their child (Jenkinson 1998; Leyser and Kirk 2004; Palmer et al. 2001; Roll-Pettersson 2001). Parents' perceptions about regular placement are also influenced by parental characteristics such as educational level and income (Stoiber, Gettinger and Goetz 1998).

The attitude of the parents taking part in the 'Growing up'-study appears to reflect the type of school the child attends. This can be an indication that the increasing number in segregated settings reflects parents' choice. However, longitudinal studies on deinstitutionalization and choice of school suggest that it may be the other way around, that current placement has a strong impact on attitudes. Many parents change their view after involuntary relocations. Therefore, the 'Growing up'-study focused on the parents' reasoning and experience of the choice setting rather than ideological opinions. This analysis (Lundeby 2006) suggested that some parents chose a segregated setting because they either feared or had experience of inadequate accommodation in inclusive settings. However, it was equally important that choice in reality was very restricted. The headmaster of the local school could for instance claim that the school had no experience with disability and really nothing to offer, or (s)he could point to lack of resources in the regular school. In the case of parents who had experienced unsatisfactory accommodation, one could also argue that the choice is not about inclusive or segregated education, but a response to a regular school that is not sufficiently adapted to the full variety among pupils. Thus, children were integrated in a non-inclusive regular school. If the school does not develop inclusive practices, there is no reason to be surprised that it does not work well. The point is therefore that the parental choice is taken in a context that discourages certain choices. The fact that there is a strong correlation between municipal population size and proportion in segregated settings also suggests that structural drivers are playing a part.

We will thus argue that even though parents sometimes chose or accept a proposed segregated option, this cannot be seen as the driver of segregation. This does not imply that we argue that the parental choice is uninformed. It is likely to be informed, but that abstract preferences are likely to play a minor role compared to contextual and situational factors. Consequently, there is a need to be clear about the distinction between parents' choice at the individual and situational level and the obligations of the state and local governments. At the individual level, the choice of parents and the opinions and experiences of children should be

respected. At the policy and school owner level, however, the question is priorities for future development of the educational system. The current state of affairs suggests that there is a need for the development of educational provisions that are really inclusive, that is, accommodated to the needs of the full variety of children. And as for the obligations according to the CRC, it is the obligation of the state to develop inclusive settings that are the issue. The restricted and contextually based choices of parents cannot be used as an argument to disregard this obligation.

The issue of loneliness will be addressed in the wider perspective of social participation with peers in general, to which we now turn.

12.7 PARTICIPATION IN SOCIAL AND CULTURAL ACTIVITIES

Schools are an important point of departure for social and cultural activities not only during school hours. There are organized after school activities such as brass bands, school choir, sports activities, school plays and activities around public holidays. School may also be the starting point for unorganized activities. Thus, if you don't participate together with your classmates in school time, chances are that you neither do so in "after school activities". In the Growing up study there were several examples of children with disabilities who watched the class perform at school plays while they themselves sat in the audience. Parents also told stories of linked lives in which the child's experiences and marginalization influence the parent's role and position in the local community. The father of a boy with disabilities attending a regular school reported that he never was invited to the common parents' meetings in his son's class (Wendelborg and Tøssebro 2010). He described how this had a negative impact on his role as an ordinary parent in the local community: the parents of children in the 7th grade – the grade his son attended – always organized the celebration of the Norwegian national day on the 17th of May. All the parents were assigned tasks, except for him: *But it is like you are kept ... outside, you see. It became very clear just then when it came to the 17th of May.*

Disabled children and youth participate less in leisure activities as such and are often grouped together with others with disabilities (Kunnskapsdepartementet [Department of Education] 2008). However, they report to a higher degree compared to their general peers that they are members of organizations, except for sports clubs (Ødegård 2006). At the same time, they report that participating in organized leisure activities was not an important part of their everyday life (Løvgren 2009). This 'devaluation' may, however, be an adaptation to missing inclusion in such activities, an interpretation that is supported by the fact that the

disabled children in the referred study reported the experience of prejudices and negative stereotypes (Løvgren, 2009). In the ‘Growing up’-study, disabled children participated less with their general peers as they grew older. This applied to both organized and general leisure activities. However, their participation with other children with disabilities increased. Thus, disabled children experience an increasing encapsulation together with other disabled children in leisure time – a parallel development as seen in the education system. This development is influenced of type of disability and degree of impairment.

Thus, the image of low participation by peers, as commented upon by the Committee on the Rights of the Child in 2005,¹⁸ is sustained. It is, however, also important to address to what extent the parallel developments in school and leisure time are linked or not, which is related to the issue of loneliness. As noted in the previous section, it is frequently claimed that integration in reality leads to isolation and loneliness, whereas segregation provides the opportunity for inclusion among disabled peers. The data from the ‘Growing up’-study does not support such arguments. Controlled for type and degree of impairment, pupils attending and taking part in classroom activities score better on measures like having friends, social participation in school and leisure time, perceived social acceptance, peer intimacy and quality of life (Wendelborg and Paulsen 2014; Wendelborg and Tøssebro 2010; 2011; Wendelborg and Kvello 2010; Wendelborg 2017). But on the other hand, pupils attending regular class but with low participation in the classroom, score lower on the same measures than children attending special schools or units. Thus, attending regular classes is not a sufficient condition for integration, more friends and participation with peers. It is also necessary that the disabled pupils have sufficient anchorage in the regular class. A special education practice that takes pupils out of class for individual training appears to be a risky strategy for social participation with general peers. In short, the argument that integration leads to isolation is not supported by the data, but this is in part dependent on how the integration in the regular classroom is organized.

12.8 CONCLUSIONS

The main data source of this chapter was the longitudinal study ‘Growing up with disabilities in Norway’. The study collected data from families with disabled children born 1993–95. This cohort was chosen for a particular reason. The children were born after the implementation of a set of reforms intending to move the real-

18. Committee on the Rights of the Child, 2005, *Concluding Observations on Norway*.

ization of inclusion ideals a quantum leap forward. This included the dissolution of institutions for intellectually disabled people in 1991 and the transformation of state special schools into resource centres without children on a long-term basis in 1992. Thus, the children of this study were the first generation born into a system that was intended to make inclusive policies real. The aim of the study was thus to analyse what it was like to grow up with impairment in the emerging inclusion era.

The results show that disabled children in general are included in preschools but as they grow older, an increasing proportion is segregated from their peers. National statistics also show that in general, the proportion of all pupils that do not attend regular classes increased substantially during the first decade after year 2000. It is not quite clear what went wrong, but there is no doubt that the 1990s was the golden age of inclusion policies. This was replaced by political silence after year 2000, and the focus in education policy was certainly dominated by other issues, not least the shock in the aftermath of relatively mediocre results of Norwegian pupils on the PISA tests (2001). Thus, the results of this study can hardly be seen as an analysis of growing up in the inclusion era, but rather during the subsequent silence.

The analysis of this chapter suggests that the outcome of current policies and practices for disabled children are out of keeping with CRC provisions. This applies to the worries earlier noted by the Committee on the Rights of the Child concerning participation with peers, and the recent comments on inclusive education.¹⁹ Furthermore, the recent criticisms from the Ombudsman for Children (2017) and a public committee report (NOU no 17, 2016) suggests that the quality of education for some groups of disabled children falls short of the requirements of CRC Article 29 (a) on support for the development of their full potential.

Disabled children do in general grow up with their parents or in a family setting in Norway, and this is as such in keeping with the CRC and the CRPD. However, the data on the interaction between the families and the support system suggests substantial challenges. The results suggest that the main problem may not be the absence or poor quality of services as such, but an access process that is paved with thresholds which raises the question whether this is in keeping with the CRPD preamble's reference to 'that persons with disability and their family members should receive the necessary protection and assistance'.

This chapter has focused on issues related to inclusion and family supports, partly because those are important issues but also because of available data. There

19. Committee on the Rights of the Child (2018).

are, however, also debates on a number of other issues related to the CRC, such as the risk of bullying or abuse. Some reports suggest increased risk, such as a report by Ipsos (2016) on visually impaired children. This suggests that two out of three have experienced bullying in school. This is an alarming finding, but in general the state of the art in this area is more uncertain. The same goes for child poverty. Thus, in such areas the conclusion is not necessarily problems related to the CRC, but that there is an urgent need for a more solid knowledge base.

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13

Sexual Orientation, Gender Identity and Sex Development

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ABSTRACT This chapter explores the realisation of children’s human rights related to sexual orientation, gender identity/expression and sex characteristics in Norway. When children explore their identity and sexuality in ways that challenge the heteronormative understanding of society, they can be met with a number of informal sanctions, such as discrimination, exclusion and bullying. Drawing on quantitative and qualitative evidence, the chapter examines discrimination, violence (including bullying and harassment), health, and education. It shows that even though Norway has come a long way when it comes to diversity and equal rights, significant challenges remains for children challenging predominant conceptions of gender, sexuality and sex development.

KEYWORDS children’s rights | sexual orientation | gender identity and expression | sex development | discrimination

13.1 INTRODUCTION

13.1.1 CHALLENGING THE HETERONORMATIVE SOCIETY

What I have found hardest, and then I consider both the homosexuality and the transgender identity, is the loneliness. To be so fundamentally different from the other children, and to hide something like this inside over time, to feel like a deviant – without having done anything for it to be this way. It is lonesome.¹

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1. The testimony of a 25-year-old informant in the study *Seksuell orientering og levekår* [Sexual Orientation and Living Conditions] by Andersen, Normann og Kirsti Malterud (ed.), 2013. My translation.

From an early age, children can fall in love or be attracted to another child of the same gender (D'Augelli and Grossman, 2001), or experience that the sex they were assigned at birth does not reflect their gender identity (Olsen et al., 2015). Moreover, some children are born with bodily features that make the body neither typically male nor female (Grasmo and Benestad, 2017). Throughout history, and still in many countries, persons who act, feel or look in a way that challenges traditional conceptions of gender, sexuality and sex development have been sanctioned, in the most extreme cases by law and punishment (see e.g. Carroll and Mendos, 2017), but also in many societies by social sanctions like bullying and lack of fundamental rights (see, e.g. FRA, 2013).

An important aspect and cause of these challenges is the *heteronormative* understanding of society. Heteronormativity is the assumption that all people are heterosexual men or women as they were registered at birth, and that this is the default or 'normal' state of a human being (see e.g. Kitzinger, 2005). When children explore their identity and sexuality in ways that challenge this understanding, they can be met with a number of informal sanctions, such as discrimination, exclusion and bullying. Even though Norway has come a long way when it comes to diversity and equal rights in this field (ILGA, 2017), there is still reason to believe that challenging predominant conceptions of gender, sexuality and sex development can have negative consequences for children in some areas (Thorsnes, 2016).

This chapter will discuss four main areas where LGBTI children face particular challenges, namely discrimination, violence, including bullying and harassment, health and education. These topics are by no means the only relevant issues to be discussed in this context, and several other topics, including the right to identity, could have been discussed in a project with a broader scope.

13.1.2 DEFINITIONS AND TERMINOLOGY

In accordance with the United Nations Convention on the Rights of the Child (CRC)² Article 1, a child is any person under the age of 18. Children can be aware of their gender identity and possible conflicts with their assigned sex from early childhood (Olsen et al., 2015), and when it comes to sexual orientation, children often become aware of their attraction towards others in early puberty (D'Augelli and Grossman, 2001). For intersex children, their condition is present at birth (Grasmo and Benestad, 2017).

2. United Nations Convention on the Rights of the Child, New York, 20 November 1989.

The acronym LGBTI, and sometimes LGBTIQ, meaning lesbian, gay, bisexual, transgender, intersex and queer, is often used when referring to people who challenge traditional conceptions of gender, sexuality and sex development.³ This acronym and the different terms it consists of will also be used in this chapter. However, it is important to keep in mind that many children, due to their young age, do not identify as lesbian, gay, bisexual, transgender or queer. Many intersex persons neither identify with this term nor the LGBTI movement as such (van Lisdonk, 2014). Hence, there is still a need to clarify the meaning of the terminology as it is frequently used in relevant sources on this topic.

The term *lesbian* is used to describe girls/women who are attracted to other girls/women, while *gay* could be used to describe any gender, but is most commonly used to describe boys/men who are attracted to boys/men. *Bisexual* is used to describe persons who can be attracted to persons of any gender. A *transgender* person is someone who has a different gender identity than the one they were assigned at birth. *Intersex* is used to describe a person who is born with unclear sex characteristics. The term intersex will be further explained in section 4 of this chapter.

13.1.3 THE NUMBERS

Estimating the number of children who are lesbian, gay, bisexual, transgender or intersex is not possible. Many children and youths will use time as adolescents and young adults to figure out questions concerning sexual orientation and gender identity. Rather than putting tags on children's sex, gender, identity or sexual orientation, the main focus of this chapter is the structures and norms in society that affects the realisation of children's human rights.

Still, some statistics do exist, indicating the scope of diversity in sex development, sexual orientation and gender identity/expression. Between 4–6% of the Norwegian population (adults) have had homosexual experiences, while this does not necessarily reflect a homosexual or bisexual identity (Grünfeld and Svendsen, 2013). According to the annual report from the National Treatment Service for Transsexualism, 441 persons were referred to the service for evaluation related to gender identity issues in 2016, of whom 45% were children.⁴ Seventy-five per cent of the patients were given treatment. Between 10 and 15 children are diagnosed as intersex⁵ in Norway every year (Grasmo and Benestad 2017).

3. ILGA Europe Glossary.

4. Oslo University Hospital, 2016.

5. In medical terms 'Disorders of Sex Development (DSD)'.

13.1.4 METHODOLOGY AND SOURCES

This chapter will discuss the level of implementation of the human rights of children challenging norms for gender, sexuality and sex development in Norway. The methodology employed combines the traditional legal method with qualitative and quantitative studies and sources.

The legal benchmarks for each section (discrimination, violence, health, education) will be established based on the obligations in the Convention on the Rights of the Child,⁶ with reference to the opinions and recommendations of the Committee on the Rights of the Child. The *General Comments* given by the Committee are not legally binding, but according to the Norwegian Supreme Court, *General Comments* can be important legal sources when interpreting the state's obligations under the Convention.⁷

Other international human rights conventions, in particular the European Convention on Human Rights,⁸ will also be used in interpreting the specific rights of the CRC. Moreover, the Yogyakarta principles provide guidance on how human rights standards should be used in relation to LGBTI issues.⁹ These principles are set forth in a soft-law document, which is based on established human rights standards and was developed on the initiative of the UN High Commissioner for Human Rights.

The level of implementation at the national level will be assessed by an analysis of the degree of legal and institutional commitment to the rights of the child, the general and specific realization of the rights and the quality of steps taken to address particular areas of concern. The quality of the measures is assessed by how well they contribute to the realization of the rights of the child. The degree and quality of commitment and realization will be decided by evaluating legal and policy documents, as well as existing research and analyses provided by monitoring mechanisms such as the Norwegian Equality and Anti-Discrimination Ombud and civil society organizations.

13.1.5 INDICATORS

When assessing the level of implementation of children's human rights in the areas of discrimination, violence (including bullying and harassment), health and education, important indicators include: existence of legal protection against dis-

6. United Nations Convention on the Rights of the Child, New York, 20 November 1989.

7. Rt. 2009, page 1261.

8. The European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November, 1950.

9. The Yogyakarta Principles – The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta, March 2007.

crimination and harassment; number of complaints of discrimination; access to remedies; reports of experienced bullying; level of medical self-determination; access to necessary health care and awareness and competence in educational institutions and teachers. While such indicators can be important in measuring the level of implementation of children's rights, they must be read in conjunction with other sources and relevant information and it is important to be aware of what they tell us – and what they do not.

13.2 DISCRIMINATION

13.2.1 THE PROHIBITION AGAINST DISCRIMINATION

Article 2(1) of the CRC obliges the state to respect and ensure the rights set forth in the Convention without any form of discrimination:

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.

The Convention does not mention discrimination on the grounds of sexual orientation, gender identity/expression and sex characteristics, but the UN Children's Committee has stated that they consider sexual orientation, gender identity/expression and sex characteristics as “other status” in relation to Article 2.¹⁰ This understanding is also in line with the interpretation of the prohibition against discrimination in Article 14 of the European Convention of Human Rights.¹¹ On the occasion of the International Day against Homophobia, Biphobia and Transphobia in 2015, the Children's Committee, together with a number of international human rights bodies gave the following statement:¹²

Around the world, children and young people who are lesbian, gay, bisexual, transgender (LGBT) or intersex, or seen as such, still face stigma, discrimination and violence because of their perceived or actual sexual orientation and

10. UN Committee on the Rights of the Child (2013).

11. See for example European Court of Human Rights (ECtHR), *X and others v. Austria*, application no. 19010/07.

12. The Committee on the Rights of the Child and others (2015).

gender identity, or because their bodies differ from typical definitions of female or male.

Generally, not all differentiation of treatment will constitute discrimination, 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'¹³ Even though the CRC does not explicitly mention such criteria, a reasonable understanding of the convention will include similar limitations (Heyerdahl 2016). Discrimination can be both direct and indirect: While direct discrimination is a situation of different treatment based on a ground such as sexual orientation or gender identity, indirect discrimination can occur when two persons are treated alike while their situations are significantly different.¹⁴ Discrimination might also occur at a structural level, meaning that systems or services are organized in a manner that results in discriminatory effects. In this section the focus is on discrimination at the individual level, while the following sections concerning health and education also have the perspective of structural discrimination, for example when it comes to lack of accessible health care for transgender children.¹⁵

Furthermore, children can be discriminated against on more than one ground, also called intersectional discrimination. For example, being both gay and having a disability might lead to particular challenges and possible discrimination. Intersectional discrimination of LGBTI children is specifically mentioned in the 2015 statement from the CRC Committee, where it is highlighted that states "should also address intersectional discrimination and violence against LGBT and intersex youth on the basis of race and ethnicity."¹⁶

13.2.2 THE RIGHT TO AN EFFECTIVE REMEDY

An 'effective remedy' is the opportunity to have a question of a human rights violation, such as discrimination, tried before a court or tribunal, and to have the possibility of receiving compensation in the case of a human rights violation. While the CRC does not contain an explicit right to an effective remedy, unlike the European Convention of Human Rights in Article 13, the Committee has stated that an effective remedy is necessary to ensure the effective fulfilment of the rights of the Convention.¹⁷ The importance of effective remedies for realising the rights set out

13. UN Human Rights Committee, General Comment No. 18: Non-Discrimination (1989).

14. See, e.g. ECtHR, *D.H. and others v Czech Republic*, application no. 57325/00.

15. This topic is discussed in section 4 of this chapter.

16. Committee on the Rights of the Child and others (2015).

in the convention is also the basis for the establishment of the Optional Protocol to the CRC on an Individual Complain Mechanism.¹⁸

In a judgment from 2012, the Norwegian Supreme Court found that the Convention does not contain such a requirement.¹⁹ The Court's judgment and the Committee's statement are in direct contradiction, which makes the legal situation at the national level uncertain. Whether or not this is a legal obligation to provide children with effective remedies for human rights violations, it is clear that the access to such remedies would strengthen the actual fulfilment of the rights of the Convention.

13.2.3 LEGISLATION AND ENFORCEMENT

The Norwegian Equality and Anti-Discrimination Act²⁰ prohibits discrimination and harassment on the grounds of sexual orientation and gender identity/expression. The law is enforced by the Equality and Anti-Discrimination Tribunal. The Equality and Anti-Discrimination Act protects children as well as adults, and is broader than the prohibition of discrimination in the CRC, as the law is not limited to the rights of the Convention but is applicable in all areas. The Act does not explicitly prohibit discrimination against intersex children, but their protection follows clearly from the preparatory texts.²¹

Since 1 January 2018, the Equality and Anti-Discrimination Act has been enforced by the Equality and Anti-Discrimination Tribunal.²² Before this date, the prohibition against discrimination was enforced by the Equality and Anti-Discrimination Ombud, a quasi-judicial body that provided statements and recommendations in individual cases.²³ Information about cases of discrimination for this chapter was collected when the Ombud was still enforcing the now repealed Act on Prohibition of Discrimination on the grounds of Sexual Orientation, Gender Identity and Gender Expression.

17. Committee on the Rights of the Child (2003).

18. Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, New York, 19 December 2011. The Protocol is not ratified by Norway.

19. Rt. 2012, page 2039.

20. Act no. 115, 19 December 2017, on Prohibition of Discrimination.

21. Prop. 81 L (2016–2017) The Equality and Anti-Discrimination Act.

22. Act of 19 December 2017 no. 114, on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal.

23. Act of 10 June 2005 no. 40, on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (repealed).

The Ombud handled individual complaints of discrimination from children and adults. Few children got in touch with the Ombud, but some parents contact the Ombud in order to obtain guidance in cases concerning discrimination. Between 1 January 2014, when the Discrimination Act came into force, and January 2017, the Ombud received about 15 requests for guidance concerning LGBT children.²⁴ The requests provide examples of possible discrimination, such as bullying on the ground of gender identity/expression, transgender children who are not allowed to change their name in line with their gender identity, and children who want their recorded name and gender on their diplomas to reflect their gender identity.

Only three of the 15 cases were handled as complaints, and two of them concerned the same child. Two of the complaints were against a hospital,²⁵ while the third was against a webpage spreading misinformation about homosexuality.²⁶ One of the complaints against the hospital was rejected on admissibility grounds, and in the other two the Ombud found no violations.

Three cases during a period of three years with no violations in any of the cases does not tell us anything about the level of discrimination based on sexual orientation or gender identity experienced by children. Even though the Equality and Anti-Discrimination Act protects children as well as adults, the complaints mechanism is a system made for adults, and children are not allowed to file complaints without the consent of their legal guardians.²⁷ Therefore, the available data does not tell us anything meaningful about the level of discrimination.

While children cannot complain without the consent of their parents, they can, paradoxically, at the same time be employed from the age of 15, c.f. the Working Environment Act,²⁸ as well as be punished under the General Penal Code from the age of 15.²⁹ Moreover the possibility should be taken into account that some parents may react negatively to their children's openness about sexual orientation, gender identity or sex development. In such situations, it would seem unlikely that these parents would support them in a case before the Tribunal.

24. Information about the cases received by the Ombud is not publicly available. The information in the following section has been obtained by concrete requests to the Ombud. The first reply with an overview of cases was received 23 November 2015, and updated version was received 23 January 2017.

25. Case 14/1677 Child refused treatment (no violation) and case 14/2375 Child refused psychological health care (rejected).

26. Case 14/1343 Information about homosexuality on website (no violation).

27. The Equality and Anti-Discrimination Tribunal, Case No. 22/2012.

28. The Act of 17 June 2005 No. 62 relating to Working Environment, Working Hours and Employment Protection, etc.

29. The Act of 20 May 2005 No. 28, The General Civil Penal Code.

In 2017, the Government adopted two important legislative and administrative changes in the field of non-discrimination; a new, common discrimination act for all protected grounds of discrimination, the Equality and Anti-Discrimination Act, as well as a new act concerning the work of the Ombud and the Tribunal. Discrimination and harassment against children were not discussed in relation to the new legislation, neither were issues concerning complaint mechanisms for children. This has been criticized by several actors including Save the Children,³⁰ and shows that the focus on children's rights is not mainstreamed in the Government's approach to non-discrimination issues.

13.2.4 NATIONAL ACTION PLAN

In 2016, the Government launched a new action plan against discrimination based on sexual orientation, gender identity and gender expression – *Safety, Diversity, Openness*.³¹ The action plan places a strong emphasis on children's rights, with particular focus on intersectionality and the importance of combatting discrimination and harassment through increasing the level of knowledge among professionals working with children. However, the action plan received criticism from civil society for being vague and not containing new actions. The LGBTI organizations Fri and Queer World found the action plan to be more of a description of what the Government is already doing in the field, with only occasional and vague new proposals.³²

13.3 VIOLENCE

13.3.1 THE PROHIBITION OF VIOLENCE AGAINST CHILDREN

Article 19 of the CRC obliges the state to protect the child from all forms of physical or mental violence:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

30. Save the Children Norway, Submission to Public Consultation – Improving the Enforcement in the area of Discrimination, 30 November 2016.

31. The Ministry of Children and Equality, 2016.

32. Blikk.no, 2016.

In General Comment No. 13, the Committee states that “violence” in Article 13 should be interpreted widely, and the term includes mental violence, such as “Insults, name-calling, humiliation, belittling, ridiculing and hurting a child’s feelings”.³³ The Committee underlines that Article 19 must be read in conjunction with Article 2 (non-discrimination), and finds that state parties must address discrimination against vulnerable or marginalized groups of children, such as LGBT children.³⁴ These forms of ill treatment can be described as harassment, which is also considered a particular form of discrimination, and can be defined as any improper and unwelcome conduct that has or might reasonably be expected or be perceived to cause offence or humiliation to another person.³⁵

The term harassment is also used in the Yogyakarta Principles, where children’s vulnerability for bullying and harassment in the educational setting is particularly highlighted. In Principle 16 para E, it is recommended that states shall ensure protection for students of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment.

13.3.2 CHILDREN EXPERIENCING VIOLENCE

Harassment and bullying

National studies indicate that young people who challenge the traditional conception of gender and sexuality can be more exposed to bullying and harassment, including sexual harassment, than the population in general (Roland and Auestad 2009, Van der Ros 2013). Roland and Auestad (2009) did a nation-wide survey in Norway about bullying and sexual orientation among 3 046 students in the 10th grade. The students replied anonymous to a web-based questionnaire. The study found that 48% of gay boys and 23.8% of bisexual boys experienced bullying two or three times a month, compared to 7.3% of the heterosexual boys. Similarly, 17.7% of the lesbian girls and 11.5% of bisexual girls had been bullied, compared to 5.7% of the heterosexual girls. Even though the numbers are uncertain due to few LGB respondents, there is reason to believe there is a link between the experienced bullying and the children’s sexual orientation (Anderssen, 2013).

In a qualitative study from 2013 called *Alskens folk* (“All Kinds of People”) by Janneke van der Ros, many of the 19 transgender informants describe bullying and

33. Committee on the Rights of the Child (2011).

34. Ibid, para 21.

35. This is the definition used in the Norwegian anti-discrimination legislation, including the Norwegian Sexual Orientation Anti-Discrimination Act, Section 8.

strong pressure to appear more in line with traditional gender norms. The main research question addressed in the study is how transgender experiences frame their living conditions and quality of life. In the study, a transgender man describes this experience from when he was in 5th grade, identifying as a boy, but feeling pressured to keep appearing as a girl (my translation):

It was when I hit puberty that everything began going to hell /.../, I also got bullied a lot. When I started 5th grade, I thought; either I'll be a girl, or I'll die. Then I bought pink clothes, a pink sweater and tight pants. When I went to class I got a standing ovation.

The experience shows clearly the strong expectations from his peer and teacher, and how he is rewarded for dressing in line with gender norms that are in breach with his own gender identity.

Findings concerning bullying at the national level are also supported by a comprehensive Europe-wide survey conducted by the EU Agency for Fundamental Rights (FRA),³⁶ finding that at least 60% of LGBT respondents had personally experienced negative comments or conduct at school because of their sexual orientation or gender identity. Eighty per cent had witnessed negative comments or conduct as a result of a schoolmate being perceived as LGBT. The survey also found that two out of three LGBT children hid their LGBT identity while at school.

Moreover, 'fag' ('homo' in Norwegian) is a frequently used defamation among Norwegian school children (Anderssen, 2013). Girls are also name-called 'lesbians' in a derogatory fashion, but it is less used than the male equivalent. The use of these words as in a defamatory way is indicative of negative attitudes towards being gay. According to Grønningsæter et al. (2013), the higher frequency among boys can also indicate that being a gay boy is a stronger breach of gender norms than being a lesbian girl. The same article points to heteronormativity as one of the root causes of bullying and harassment based on sexual orientation, meaning that children are punished by their peers for challenging traditional norms for gender and sexuality.

Domestic violence

A qualitative study concerning transgender persons (Van der Ros, 2013) and a quantitative study concerning gay and lesbian youth (Moseng, 2007) indicate that

36. The European Union Agency for Fundamental Rights, 2014.

children challenging norms for gender and sexuality can be more vulnerable when it comes to domestic violence than children in general. Moseng (2007) also finds that gay and lesbian children are more often in contact with the Child Protection System. Gay and transgender youth in Sami families are in particular vulnerable to violence in the family according to qualitative studies by Grønningsæter, Backer and Nuland (2009) and Van der Ros (2013). Other qualitative studies also indicate that children of immigrants and refugees are subjected to harassment, violence and force from their families and ethnic group (Elgvin, Bue og Grønningsæter, 2014). However, more research is needed to assess how the correlation between violence and sexual orientation or gender identity/ expression should be understood (Fjær, Mossige and Gundersen, 2013).

13.3.3 NATIONAL LAW AND POLICY

Civil law

Discrimination and harassment on the grounds of sexual orientation, gender identity or expression is prohibited in the Sexual Orientation Anti-Discrimination Act and the Education Act.³⁷ Since 1 January 2018, the latter includes a zero-tolerance policy against all forms of bullying, violence, discrimination, harassment and other violations, cf. Section 9 (A-3). Furthermore, all schools shall promote a good psychosocial learning environment for all children, cf. the Education Act Section 9(A-2). If a student or parent requests measures concerning the psychosocial environment, including measures against offensive behaviour such as bullying, discrimination, violence or racism, the school is obligated to make a decision on what measures should be used. If the school has not taken steps within a reasonable time, a complaint can be made to the County Governor.

Criminal law

Violence is prohibited in the General Penal Code, and domestic violence including violence against children is particularly regulated in Sections 282 and 283. According to Section 77, it is considered an aggravating factor if the criminal offence is motivated by the victim's homosexual orientation. The formulation in the Section 77 does not protect bisexual, transgender and intersex persons explicitly, but could be covered under the more general formulation of the section 'groups with a special need for protection'. The lack of explicit protection against

37. Act of 17 July 1998 no. 61 on Primary and Secondary Education.

hate crime is particularly highlighted by ILGA Europe in their recently published LGBTI Europe Map,³⁸ where Norway scores generally high, but only poorer when it comes to hate speech and hate crime. ILGA recommends including explicit mention of sexual orientation, gender identity and sex characteristics in laws designed to tackle hate crime.

Policies

The action plan against discrimination based on sexual orientation, gender identity and gender expression (2017–2020) suggests the need for more competence in a number of public positions such as teachers, health personnel and social workers. The action plan also mentions the vulnerability of LGBTI children in asylum-seeking families to exposure to violence during the flight and afterwards, and highlight a similar risk of children in other minority families. However, it does not seem like the Government is aware of the more general vulnerability of non-normative children when it comes to domestic violence. LGBTI issues are not discussed in the Directorate for Education’s Guide to teachers and school leaders concerning bullying.³⁹

13.4 HEALTH

13.4.1 THE RIGHT TO HEALTH

Article 24 of the CRC recognizes the right of children to the highest obtainable standard of health:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

The obligation must be read in conjunction with Article 2 on non-discrimination, prohibiting states from offering children a poorer health service than other children because of their sexual orientation, gender identity/expression or sex characteristics. In General Comment No. 15,⁴⁰ concerning the right to health, the Chil-

38. ILGA Europe, 2017.

39. The Directorate for Education, 2011.

40. Committee on the Rights of the Child (2013).

dren's Committee states that in order to fully realize the right to health for all children, State parties have an obligation to ensure that children's health is not undermined as a result of discrimination, which contributes to vulnerability. The Committee explicitly mentions discrimination based on sexual orientation and gender identity. This understanding is also in line with Yogyakarta Principle 17, which in relation to transgender rights in para G, provides that states shall facilitate access to competent, non-discriminatory treatment, care and support for those seeking body modifications related to gender reassignment.

CRC Article 3 concerning the best interest of the child, Article 16 concerning the child's right to private life, and Article 12 about the obligation to respect the view of the child, must all be taken in to consideration in all decisions concerning the health of the child. For health questions concerning gender identity and intersex children, the right to health must also be read in conjunction with Article 8 about the right of the child to develop its identity.⁴¹

When discussing what obligations the state has under Article 24, it is important to take into consideration that Article 4 of the CRC permits states the opportunity to fulfil the obligation progressively, and that the resources of the state should be taken into consideration. It is reasonable to expect, however, that Norway, who is among the countries with the highest Gross Domestic Product (GDP) per capita in the world,⁴² would be in a position to attain high standards. In any case, the main focus in this context is whether existing health services are provided without discrimination.

13.4.2 HEALTH AND GENDER IDENTITY

The need for health services

Being transgender means having a gender identity that is not the same as you were assigned at birth. While some children experience that they are nor girl nor boy, others have a strong identity as one of the two. In the TV documentary series *Født i feil kropp* ('Born in the Wrong Body'), which aired on TV 2 in 2014, a 10-year-old named Mats describes his experience like this (my translation):

I am 10 years old and I'm transgender. That means that I was born with a girl's body and everyone thought I was a girl, but in my heart and in my brain, I'm a boy.

41. See more about LGBTI children and the right to identity in Sandberg (2015).

42. International Monetary Fund, World Economic Outlook Database, April 2018.

Children who experience that the sex they were assigned at birth does not reflect their gender identity can experience distress and psychological pain because of their situation. The medical term for such psychological pain in distress is *gender dysphoria* (van der Ros, 2014). In van der Ros' research *Alskens Folk* (2013), one informant describes strong psychological pain from early age, leading to a suicide attempt at age six (my translation):

I realized it was not going in the right direction; I will not get the life I need. So in the summer before I started school I thought I could not handle starting school with my girl name and my girl identity. So I tried to commit suicide. I was admitted to child psychiatry.

The story is an extreme example but is still useful to illustrate the severe psychological pain children can experience due to gender dysphoria. However, it is crucial to underline that being transgender is not a mental illness. Nonetheless, children can still require mental health care, as well as medical treatment to make their bodies accord with their gender identity. Such treatment is to be considered 'necessary health service' cf. the Health and Care Services Act § 3-1,⁴³ which means this is health care that the state is obliged to provide without any form of discrimination. Such health care may include guidance, hormonal treatment delaying puberty, other hormonal treatment that will alter the body to be more feminine or masculine, and surgery.⁴⁴ Genital surgery is not conducted on transgender children.⁴⁵

The network model

For the youngest children exploring their gender identity, medical treatment is not necessarily needed. The child and the child's social network, including both children and adults, need information, support and guidance to provide a safe environment free from social stigmatization. Such a 'network model', including specialists, local health personnel and the social network of the child have shown promising results internationally.⁴⁶ In the TV documentary series 'Born in the Wrong Body', 13-year-old Emma describes a good childhood, as she has always been allowed to wear what she wants and have long hair. Her mother describes

43. Directorate for Health (2015).

44. Ibid.

45. Ibid.

46. Ibid.

that Emma has always been open and is now a confident girl.⁴⁷ She adds (my translation):

I feel this is a strong advantage in her situation. Especially when they are allowed to be themselves from early age, and find support at school, home and among friends. This will be important in the years to come. When they will go through puberty and treatment it's good to be open, and to be yourself.

Access to health care

Emma's mother also expressed that she hoped that her daughter would receive hormone treatment to postpone puberty, avoiding those extra challenges that puberty might mean for Emma. The only hospital offering treatment to transgender children in Norway is the Oslo University Hospital's National Treatment Service for Transsexualism. It is singularly empowered to give the diagnosis "transsexualism", which is necessary to access medical treatment related to gender identity.⁴⁸

The diagnosis used by the National Treatment Service is based on the diagnosis manual of the World Health Organization (WHO), which includes a spectrum of different diagnoses related to gender dysphoria.⁴⁹ However, in Norway, medical treatment to make the body more in line with the patients gender identity, is only offered to those who meet the criteria of T 64.0 "Transsexualism".⁵⁰ In the information video made by Queer Youth Norway, several youths describe how they were afraid of "saying something wrong" and even lying to give 'the right answers' when meeting with doctors.⁵¹

The practice of the National Treatment Service has been criticized in a report from a Government appointed expert group,⁵² where it is recommended that treatment is offered to a wider range of persons with gender dysphoria.

The expert group further recommends that such treatment should be provided by the public health service at the regional level. This recommendation would mean a decentralization of the health services for transgender children, making it more available for children outside the Oslo region. The expert group also

47. TV 2, 2014.

48. The Directorate of Health (2015).

49. World Health Organisation (2016).

50. The Directorate of Health (2015).

51. Queer Youth Norway (2014).

52. Norwegian Directorate of Health (2015).

strongly criticized the general health care services, *inter alia* for a worrying lack of knowledge among health care professionals.

The report from the expert group is best known for suggesting a fundamental change from a medical model to a declaration model for legal gender, meaning transgender people no longer have to go through medical treatment and mandatory sterilization to be able to change their legal gender.⁵³ This recommendation was followed by the Government, leading to a new Act on Legal Gender from 2016 which allows children under the age of 16 to change their legal gender with the consent of parents or legal guardians, and for children between 16 and 18 to decide their legal gender themselves.⁵⁴

Self-determination

The age of legal consent for health services is 16 years, cf. the Patient's Rights Act (Section 4(3)). Before this age, the child needs consent from the parents or legal guardians. While it should be safe to surmise that most parents listen to their children's wishes, it is possible to imagine cases where the parents will not support or agree with the wishes and needs of the child. For example, if the child wants to have hormonal treatment to postpone puberty, this must be started earlier than 16 years. This situation raises several complicated legal questions concerning the right of the parent's or legal guardian's right to make choices on behalf of the child. A possible way to solve this issue could be to establish a specialized complaints procedure for such cases, for example in the Tribunal for Child Protection and Social Affairs at the county level (Sondrup 2015). Another question is whether the Child Protection Services could consider intervention in the family if the child is refused necessary health care, cf. the Child Welfare Act.⁵⁵ According to Section 4-11, the Tribunal for Child Protection and Social Affairs can decide that a child with special need for treatment should be treated with the support of the Child Protection Services if the parents or legal guardians are not providing such treatment.

13.4.3 INTERSEX

Intersex characteristics

Intersex characteristics are bodily features that make the body neither typically male nor typically female. Such characteristics, which may be chromosomal, hor-

53. For an in-depth analysis of issues related to children and legal gender, see Sørli (2015).

54. Act of 17 June 2016 No. 46 on Changing Legal Gender.

55. Act of 17 July 1992 No. 100 relating to Child Welfare Services.

monal, and/or anatomical, lead to challenges in placing the child in one of the two categories boy or girl (Grasmo and Benestad, 2017). People with intersex characteristics often receive a medical diagnosis such as Turner or Swyer Syndrome.⁵⁶ For some children, uncertainty of biological sex is caused by visibly ambiguous genitals, while for others the intersex characteristics may be unknown until chromosomes or hormones are tested. For this reason, intersex characteristics are not always noticeable before puberty.

However, for those where intersex characteristics are observable at birth, assessments are made by doctors of the child's chromosomes, genitals and other bodily functions. Based on these factors, doctors give a recommendation concerning as to in which gender the child should be raised.⁵⁷ In most cases, the child then undergoes surgery, and in many cases the child is also given hormone treatment. The surgery is irreversible, and can lead to serious medical complications and lack of sexual function and damaged sensitivity (Kohler et al., 2012. See also Sandberg, 2015 for further references). Moreover, the child might also have a different gender identity than the one decided by the doctors shortly after birth.

International criticism

The practice of conducting irreversible surgery on intersex children has been strongly criticized by several international human rights bodies, including the UN Special Rapporteur on Torture⁵⁸ and the UN Committee against Torture.⁵⁹ The main objections against early 'genital normalising surgery' is that the treatment is not necessary from a medical perspective, and that it is a breach of the child's right to self-determination and personal integrity to conduct such surgery before the child is able to give its consent. The Committee on the Rights of the Child has raised this issue in several of their concluding observations to the member states,⁶⁰ and in 2015, the Committee, together with a number of international human rights bodies gave the following statement:

[I]ntersex children and young people may be subjected to medically unnecessary, irreversible surgery and treatment without their free and informed con-

56. Bjerknes et al. (2016).

57. Dagens medisin (2008).

58. Human Rights Council (2013).

59. The Committee against Torture (2011).

60. Committee on the Rights of the Child in their concluding remarks to Switzerland, 2015, Ireland, 2016b and France, 2016a.

sent. These interventions can result in severe, long-term physical and psychological suffering, affecting children's rights to physical integrity, to health, privacy and autonomy and may constitute torture or ill-treatment. States should prohibit such interventions.

The practice also contravenes the Yogyakarta Principle 18 para B:

States shall ... take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.

National policies

In 2016 there emerged, for the first time, a focus on the topic of intersex children in the national administration of Norway. The Ministry of Health contacted the two departments conducting such surgeries at Oslo University Hospital (the Children's Clinic) and Haukeland University Hospital in Bergen (Department for Child Medicine), requesting details concerning the surgery conducted on intersex children.⁶¹ In addition, the Directorate of Health gave a legal opinion on the situation for intersex children to the Ministry of Health.⁶² In the opinion, the Directorate finds that surgeries often lead to infertility and reduced sexual function, particularly if internal gonads are removed. This makes it necessary for the child to embark on long-term hormone treatment, which can cause medical problems at any point in its life. Furthermore, the Directorate is critical of the National Guidelines for Paediatricians (my translation):⁶³

All healthcare offered in Norway should be professionally sound, i.e. of proven utility. According to the guidelines that the service has prepared (Bjeknes 2005), the main aim of the treatment is 'to strengthen the gender role'. Furthermore, Bjerknes writes that 'In this process there are a number of considerations that need to be taken, such as the child having a happy childhood and adolescence, an assured gender identity and the opportunity to have

61. Helse Vest (2016).

62. The Norwegian Ministry of Health (2016).

63. Bjerknes et al. (2016).

and enjoy sexual relationships.' However, there is no research documenting that the treatment gives such effect. The lack of medical indication and scientific basis for health care may be problematic when viewed against the requirement of sound health care.

In October 2016, the Norwegian Directorate of Health and the Norwegian Directorate for Children, Youth and Family Affairs co-organized a symposium on the topic, inviting several relevant stakeholders, including doctors, researchers, authorities and civil society.⁶⁴ A key issue in the discussions at the symposium and in the relevant correspondence between health services and the authorities, is the distinction between operations due to *medical necessity*, and operations based on *psycho-social indicators*. However, it shows from the documentation and the discussions that the definition of what is 'necessary due to medical reasons' remains unclear. More research on this issue is of high importance to obtain a clear picture of what surgeries are conducted on what grounds, and to clarify which surgeries could safely be postponed until the child is old enough to express its own views.

13.5 EDUCATION

13.5.1 THE RIGHT TO EDUCATION

According to Articles 28 and 29 of the CRC, education should be aimed at developing respect for human rights and fundamental freedoms. The right to education must be read in conjunction with Article 17 on access to information, stating that the state parties shall ensure that the child has access to information and material. The provisions are broadly formulated making it somewhat difficult to crystallize the precise obligation of the state to provide accessible information to children concerning sexual orientation, gender identity/expression and sex development. However, the Yogyakarta Principle no. 16 para D, concerning the right to education provides useful guidance:

States shall ... ensure that education methods, curricula and resources serve to enhance understanding of and respect for, inter alia, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds;

64. Bufdir (2016).

15.5.2 NATIONAL EDUCATION LEGISLATION

According to the Section 1(1) of the Education Act, the purpose of the education is as follows: ‘Education and training shall be based on fundamental values in Christian and humanist heritage and traditions, such as respect for human dignity and nature, on intellectual freedom, charity, forgiveness, equality and solidarity, values that also appear in different religions and beliefs and are rooted in human rights.’ The Independent Schools Act has a similar regulation in Section 1(1).⁶⁵ The 2018 Equality and Anti-Discrimination Act, also obliges schools to ensure that teaching and learning material builds upon the purpose of the law, which is ‘to promote equality and prevent discrimination on grounds of gender, (...) sexual orientation, gender identity, gender expression. The required content of the education in primary and secondary school is further specified in administrative regulations and curricula.

13.5.3 CURRICULA AND LEARNING MATERIAL

According to the national curricula, Norwegian children shall be able to have a conversation about differences in gender identity and variations in sexual orientation in natural science class after seventh grade.⁶⁶ After tenth grade, they should be able to formulate and discuss issues related to sexuality, sexual orientation and gender identity.⁶⁷ In social studies, children shall be able to have a conversation about love and respect, variation in sexual orientation and relationships and family and discuss consequences of lack of respect for differences. In addition, children shall have a conversation concerning ethics in relation to different ways of being a family, the relationship between genders and different gender identities.⁶⁸

However, in Norwegian classrooms, the teaching about diversity in sexual orientation and gender identity, if there is given any, is often deficient (Røthing 2013). Due to vague or general formulations in the national education plans, the school or teacher is often free to consider if this kind of education should be provided or not. Røthing (2013) finds that in textbooks, gay people are often described as ‘others’ that need to be accepted by the community. She also finds that in sex education there are no books or teaching materials describing sex between two people of the same gender.

65. Act of 4 July 1984 regarding Independent Schools.

66. The Directorate of Education – National Curricula.

67. Ibid.

68. Ibid.

13.5.4 KNOWLEDGE AMONG TEACHERS

To be able to provide students with a solid education in issues relating to diversity in gender, sexuality and sex development, and to meet children that might have more questions about this topic in a safe and respectful way, the teachers need to have the knowledge to handle these situations. This is also particularly highlighted in the 2016 Government Action Plan on LGBT.

In 2016, the Ministry of Education published new regulations concerning the master's studies for teachers.⁶⁹ The regulation mentions rights of children in relation to bullying but does not mention diversity or anti-discrimination. Each institution of education providing the master programme for teachers have to develop a programme/plan outlining the more detailed content of the education. The education to become a teacher is offered by a number of different universities and college universities in Norway and divided in two different master's degrees; one for grades 1 to 7 and one for grades 5 to 10.

The curricula which include specific learning goals concerning sexual orientation and gender identity/expression as mentioned above, relates to grade 5 through 10, and it is therefore relevant to look into the programme plans of this degree. For Oslo and Akershus University College, the master's programme plan includes a chapter concerning the 'Perspective of gender, equality and diversity', where the following reflection is made (my translation):⁷⁰

A pervasive norm-critical perspective in the education can help students understand how bullying, harassment and violations often relates to several identity categories instead at the same time, such as gender, sexual orientation, disability, ethnicity and religion. Students should be able to recognize and challenge the norms and discourses that reproduce and reinforce a 'we' and 'they' sentiment. This opens up for establishing standards in the classroom that promote community, diversity and democratic citizenship.

Oslo and Akershus University College have also developed a publication on how questions relating to sexual orientation can be highlighted in the different programmes provided by the University College.⁷¹ However, it seems that this college is the only education institution stressing the topic of sexual orientation, gen-

69. The Ministry of Education (2016a).

70. Oslo and Akershus University College (2016).

71. Smestad (2010).

der identity and expression in their programme.⁷² This is not to say that the topic is not discussed in the relevant courses, but it does show that diversity does not seem to be an overarching focus in the education of teachers.

13.6 CONCLUSIONS

From a law and policy perspective, the main impression from the sources studied, is that children are well protected in the legislation and that national authorities do have a particular focus on the rights of LGBTI children in their policy work. Furthermore, the Norwegian Government promotes diversity in gender and sexuality and seeks to combat discrimination and harassment in particular in the education setting. At the same time, this chapter shows that children who challenge traditional conceptions of gender and sexuality are subjected to discrimination, harassment and bullying. Challenging the society's heteronormative understanding of sex, gender and sexuality also affects current access to necessary health services, and some children might be subjected to unnecessary surgeries with that aim of 'strengthen the gender role'.

Many rights are still not realized in practice, and there is a lack of remedies for violation of rights. In particular, children experiencing discrimination or harassment are dependent on the consent of their parents or legal guardians in order to file a complaint, and the existing procedures cannot be considered child-friendly. Given the low number of complaints concerning discrimination of children, it would have been useful to see more research on the level of discrimination against children, in particular more comprehensive studies and surveys on experienced/perceived discrimination and bullying/violence.

When it comes to violence, including harassment and bullying, awareness of sexual orientation and gender identity/expression as a vulnerability factor is lacking in the Government's policies concerning bullying and violence against children. There is also reason to suggest more research exploring the relationship between heightened exposure to violence and the child's sexual orientation and gender expression/identity.

For trans children, a serious challenge is access to necessary health services in relation to gender dysphoria. While Norway generally has a well-functioning and patient-centric health care system (OECD, 2014), the health care service for trans children is not adequate, and knowledge among health care professionals needs to

72. Based on information about the programmes available at the webpages of the 8 university colleges, 11 March 2017.

be strengthened in order to interact with children in a safe and respectful manner. Furthermore, Norway is seemingly still following a practice of 'normalizing' surgeries on intersex children, which has been strongly criticized by a number of international human rights bodies. While there are positive developments concerning the focus and awareness on the issue, there is still a need for the national authorities to take an explicit stand on the abolition of medically unnecessary and possibly harmful surgeries.

Finally, modernized learning material that "promote equality and prevent discrimination" in line with the new Ant-Discrimination Act, as well as a greater awareness and competence in educational institutions and teachers, and measurements of this competence, could improve the realization of the rights of LGBTI children.

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14

Human Rights Education

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ABSTRACT This chapter examines the realisation of human rights education in Norway, as defined by Article 29 (1) b) and d) of the Convention on the Rights of the Child. It examines the 1) the legal commitments of Parliament, 2) efforts of the government and 3) and data on outcomes concerning attitudes and prejudice against ethnic and religious minorities, children with disabilities, sexual minorities and Sámi people. The outcome evaluation also includes empirical data on bullying of children belonging to these groups. The findings suggest that Norway needs to review the effectiveness of its HRE, but also measure to what extent the teaching is effective in practice.

KEYWORDS human rights education | children's rights | outcome indicators | curriculum plan | bullying

14.1 INTRODUCTION

Human rights education (HRE) does not feature significantly in Norway's international reporting of its implementation of the Convention on the Rights of the Child (CRC). In the state's reports to the UN Committee on the Rights of the Child in 2016, the topic received a sum total of two lines. The text appears under the heading '*Education on human rights*' and states that: 'The school's role in preventing violence and sexual abuse has been strengthened. A number of competence aims have also been drawn up concerning gender equality' (Government of Norway, 2016, p. 36). On the contrary, the Committee devoted significant attention to the topic in its concluding observations on the country. They emphasise that the government should increase its efforts to conduct disaggregated research on discrimination, develop a new plan of action for promoting gender equality and prevent ethnic discrimination, implement a zero-tolerance approach for discrimination, combat discrimination, hate speech and violence against Sami children and children belonging to Roma and other minorities, and take measures to

strengthen knowledge about indigenous and minorities and their rights (Committee on the Rights of the Child, 2018: paras. 9, 12b, 12c, 29a and 33c).

This stark juxtaposition suggests that human rights education remains an under-prioritised area of children's rights in Norway. The purpose of this chapter is to provide a more substantive answer to the question of realisation of HRE in Norway. Section 2 seeks to operationalise outcome indicators for measuring the realisation of HRE in Norway. Section 3 provides a brief overview of Norwegian law and policy with a critique that HRE has been poorly incorporated. Section 4 then analyses the outcome indicators that seek to illustrate whether children have developed a respect for others human rights. Section 5 concludes.

14.2 HRE AND INDICATORS

14.2.1 OUTCOME-BASED MEASUREMENT

There are many definitions of human rights education and the concept used in this chapter will be briefly clarified.

The CRC contains two articles on education: Article 28 on access to education and Article 29 on the content of education. This chapter is concerned with Article 29 (1), with a specific focus on the realisation of subparagraph (b). It provides that education shall be directed to: 'The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.' This provision should be seen in relation to subparagraph (d), which emphasises that education shall be directed to: 'The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.'

There is a vast body of literature and opinion on the content of HRE (see Osler 2016; Vesterdal 2016; Starkey 1991; Tomasevski 2006; Alen et al. 2006; Eide, Krause and Rosas 2001; Lenz, Brattland, Kvande 2016).¹ This chapter simply concerns the realisation of Article 29(1)(b), read with sub-paragraph (d).

In my view, the obligation in Article 29(1)(b) can or should be evaluated based on two simple indicators:

1. Sometimes, for instance, one is talking about HRE in relation to police officers, lawyers, nurses, etc and the legal justification for HRE can be drawn from many sources. For instance the Ministers of the Council of Europe has called for HRE through Recommendation R (87) 7 on 'Teaching and Learning about Human Rights in Schools' (Starkey 1991). In this chapter I only seek to interpret CRC Article 29 (1), not define HRE in general.

- ▮ The proportion of majority students in Norway that learn to respect the rights of vulnerable groups, ethnic and religious minorities and indigenous (Sámi) people
- ▮ The proportion of prejudice and intolerance towards vulnerable groups, minorities and indigenous (Sámi) people

These two indicators are legal conclusions and I will in the following text provide justification for why I have formulated them like this.² In addition, when it comes to issue of the Sámi people I have formulated this indicator (which is justified later in section 3.3):

- ▮ The proportion of majority children that have learned about the Norwegianisation policy and the struggle for Sámi rights in a fair, accurate and informative way.

14.2.2 PROMOTING RESPECT AND COMBATING PREJUDICE

What is the legal justification for indicator one and two? If one examines the wording of CRC Article 29(1)(b) and Article 26(2) of the Universal Declaration of Human Rights (UDHR), it is stated in both that education shall be directed to the development of ‘*respect for*’ human rights. It does not say that education shall be directed to the development of knowledge ‘*about*’ human rights. The CRC provision also refers to the development of *respect for* principles of the UN Charter. One of the fundamental aims of the UN enshrined in the UN Charter Article 1 (3) and Article 55 is to promote ‘*respect for human rights*’. Again, the aim is not to promote knowledge ‘*about*’ human rights, but the word ‘*respect*’ is emphasised. When Article 29(1)(b) is read together with subparagraph (d), it becomes clear that HRE is first and foremost to be directed at changing hearts and minds, especially fighting prejudice stereotypes against minorities and marginalised groups. It is about creating the normative and cultural foundation for the rule of human rights law in society. The Committee on the Rights of the Child emphasise that: ‘The education to which every child has a right is one designed to ... promote a culture which is infused by appropriate human rights values’ (Committee on the Rights of the Child, 2001: 2).

2. For more on how I think indicators should be designed and why I regard indicators as legal conclusions, see Lile 2017.

In 2011, the UN adopted an official definition of the concept of human rights education (HRE) in the UN Declaration on Human Rights Education. In Article 2, the concept is defined as follows:

1. Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, *inter alia*, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.
2. Human rights education and training encompasses:
 - (a) Education about human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection;
 - (b) Education through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners;
 - (c) Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.

In examining this definition, attention should be drawn to references to education '*about*', '*through*' and '*for*' human rights, elaborated in paragraph 2 (a)-(c), and it must be interpreted in light of the first paragraph, which states that HRE is education 'aimed at promoting universal respect' for all human rights, 'developing their attitudes and behaviours' for the promotion of a 'universal culture of human rights'. This is important to stress. If it is enough for a government to teach children something 'about' human rights in general, not only will the implementation of the obligation of HRE become rather simple, but the whole purpose of HRE would be lost and obscured. Racism, xenophobia, prejudices and intolerance towards certain groups can more easily flourish. This declaration is also not legally binding and must be read together with legally binding conventions like the CRC. Moreover, the UDHR's provisions on HRE remain relevant. Like the CRC, it provides that education must be directed to 'strengthening of respect for human rights and fundamental freedoms. The Declaration remains a weighty document, clarifying States' human rights obligations in the UN Charter and it has arguably gained status as an expression of customary international law (Høstmælingen 2003: 38).

Why do the text of the CRC and UDHR emphasise ‘*respect*’ and the promotion of tolerance and understanding? This becomes clearer if one look at the history behind these formulations. During the negotiations of the UDHR, some states argued that the right to education should be limited to specifying a right to *access to education*, leaving the question of *the content* of education to the discretion of each state. However, the question of content was of tremendous importance for the representatives of the Jewish people. The World Jewish Congress pressed for a provision on the content of education and their representative, went so far as to proclaim that the importance of the provision on the ‘spirit of education’ was ‘Possibly greater than that of all the other articles of the Declaration’ (UN Commission on Human Rights, 1948a: 13). The argument might seem curious as the rights to life, protection from torture or a fair trial may seem more important. But it is arguably based on the need to create a foundation for the rule of law. Human rights provisions are not automatically realised by themselves; realisation of law will depend on the social, economic and normative landscape within which it is supposed to function (Mathiesen 2011:75). The World Jewish Congress presumably understood that the UDHR rights would not result in real ‘living law’ unless the attitudes and norms of the majority population changed (Ehrlich 1936:493).³ The key role of the World Jewish Congress in pushing this provision also underscores its importance for ensuring respect for minorities: the Jews in Germany in 1933 comprised only 0.75% of the total German population but faced the most brutal forms of discrimination at the hands of the majority.⁴ Thus, it strengthens the idea that the litmus test of HRE must be how the ‘*majority children*’ learn to ‘*respect the rights of vulnerable groups, ethnic and religious minorities and indigenous (Sámi) people*’.

The proposed text of UDHR Article 26 (2), based on the proposal from the World Jewish Congress, that was sent to the General Assembly for its approval, was formulated like this:

Education shall be directed ... to strengthening of respect for human rights and fundamental freedoms and to combating the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere (UN Commission on Human Rights, 1948b: 13).

3. According to Eugene Ehrlich Living law is ‘[...] *the law which dominates life itself even though it has not been posited in legal propositions*’. (Ehrlich 1936:493).

4. Holocaust Encyclopedia. ‘Jewish Population of Europe in 1933: Population Data by Country’: <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005161>

The Congress emphasised here the fight against prejudice. However, the Third Committee of the General Assembly thought it would be better for the educational aims to be formulated in a more positive manner, promoting specific values and attitudes rather than 'combating' something. Thus, the final wording was changed from intolerance to tolerance, and so on (Arajärvi 1999:553–554). Accordingly, education shall be directed to: 'promote understanding, tolerance and friendship among all nations, racial or religious groups.' However, although the text was made to promote certain values, the challenge of combating hatred and intolerance towards racial and religious groups remained embedded in the challenge of promoting the values of both UDHR Article 26 (2) and CRC Article 29 (1) (b) and (d). Again, this is why I argue that for the second indicator, education should 'combat prejudice against and promote tolerance and understanding' towards 'vulnerable groups, minorities and indigenous (Sámi) people'.

14.2.3 PREJUDICE

What is prejudice? According to a classical definition: 'Ethnic prejudice is an antipathy base upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group.' (Allport 2000:23) One should distinguish particularly between prejudice and stereotypes. Stereotypes are faulty over-generalisations of groups or individuals because they belong to a group, but without the '*inflexible*' part. Prejudice has this attitudinal component, making it resistant to change. According to Allport: 'Prejudgments become prejudices only if they are not reversible when exposed to new knowledge' (Allport 2000:23).

In my view, human rights violations often occur because the majority regard their own cultural, religious and moral norms as more important than the legal norms of human rights conventions. Minority and indigenous peoples' legal rights are ignored, distorted or successfully opposed, partly because the voices of the minorities are drowned, ignored or rendered insignificant in the public debate by the majority – because they are not seen as being important. Issues, on the other hand, involving minorities or indigenous peoples doing something perceived to be violating the norms of the majority can often be given significant attention.⁵

14.3 LAW AND POLICY

Even if the ultimate determination of Norway's compliance must come down to outcomes, it is importantly to briefly review how Norway has sought to implement

its HRE obligation. It may also provides some clarity on why (or why not) Norway is in compliance with Article 29 of the CRC.

14.3.1 CONSTITUTIONAL ENSHRINEMENT

On 13 May 2013, the Norwegian Parliament (Stortinget) adopted a range of new provisions in the Constitution of Norway. Amongst the new provisions, was Article 109 on the right to education. The provision includes not only the right to access to education, but also a sentence on the content and aims of education. It provides that, ‘education shall safeguard the individual’s abilities and needs, and promote respect for democracy, the rule of law and human rights.’ This wording is, to a significant degree, in conformity with CRC Article 29(1)(b), and apparently ensures HRE in Norway constitutional legal protection. However, in my opinion, as will become clear, the commitment of the legislator is somewhat obscured by a lack of clear direction on how this constitutional provision should be interpreted. In addition, there are repeated statements in educational law and actual legislations suggesting that Norwegian majority values (of Christian and humanist heritage and tradition) has a preference over human rights, defines what human rights are and how it should be interpreted.

The Constitutional Commission, that drafted the new constitutional human rights provisions, emphasized that Article 109 will function as a legal barrier for the legislator to ensure that education will not fall short of the minimum standards of the constitution (Stortinget, 2011: 225). Worryingly, however, the Constitutional Commission argued (without evidence) that Article 109 of the Constitutions only reflected the aims of education enshrined in the purpose clause of the Education Act, Section 1-1.⁶ Thus, the government was not to worry about implementing new policies on education in Norway.

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5. As I see it, conventions are contracts between the States. Human rights laws are man-made political compromises, in an unfair world (here, “unfair” is defined according to my own subjective norms, which have nothing to do with the law). Human rights law is not based on the highest moral principles of morality of some sort of objective or natural moral standard; it is the set of agreements left when the negotiations are over – the compromises of a broken world. The alternative is an international ‘State of Nature’ (Hobbes 1985). This position on jurisprudence is based on international legal positivism. River Hustad explains, in her PhD, that ‘Remaining within the canonical method of legal analysis is essential in order to maintain the basic credibility of this study. It is for these reasons that this study adopts as its methodology International Legal Positivism’ (Hustad 2017, p. 20). According to Stephen Ratner and Anne-Marie Slaughter this jurisprudence ‘remains the lingua franca of most international lawyers’ (Ratner & Slaughter 1993, p. 293).
 6. Ibid, 225.

14.3.2 EDUCATION ACT

Does the purpose clause (section 1-1) of the Education Act promote respect for human rights and does it fulfil the aims of HRE? The concept of *human rights* is mentioned only once in the Education Act. It appears in the second paragraph of the all-important Section 1-1 of the Education Act (the purpose clause). It is stated that:

Education and training shall be based on fundamental values in Christian and humanist heritage and traditions, such as respect for human dignity and nature, on intellectual freedom, charity, forgiveness, equality and solidarity, values that also appear in different religions and beliefs and are rooted in human rights.

A plain reading of the text itself makes it hard to see how the purpose clause promotes respect for human rights. Education shall be based on ‘Christian and humanist heritage and traditions’. A set of examples of this heritage are indicated by the words “such as”. Then, it is merely stated that these examples also appears in “different religions” and are “rooted in human rights”.

As there is no case law that elaborates the concept of human rights in the purpose clause, one must analyse the preparatory works.

Before the present clause was adopted, a government-appointed research commission was mandated to investigate the issue and to present a law reform proposal to the Parliament. The Bostad Commission was deeply divided between members that wanted to promote Christian and humanistic values and those who wanted to emphasize human rights values (Ministry of Education, 2007: 19–25). As a compromise, they proposed the following text, in relation to human rights:

Education in schools [...] shall be based on respect for the human dignity, intellectual freedom, charity, equality and solidarity, as these core values are expressed in Christian and humanistic heritage, different religions and faiths and as they are rooted in human rights (ibid: 14).

In this proposal, the *core values* of education were supposed to be ‘respect for the human dignity, intellectual freedom, charity, equality and solidarity’. However, the parliamentary majority was not satisfied with the relegation of Christian and humanistic values to an apparent secondary position in education. They insisted it should be the core value. Thus, they replaced the core values of education in the proposal with *Christian and humanistic heritage and tradition*.

Section 1-1 of The Education Act also states that:

Education and training shall provide insight into cultural diversity and show respect for the individual's convictions. They are to promote democracy, equality and scientific thinking. [...] All forms of discrimination shall be combated.

Again, however, there are no preparatory works or case law that can provide insight into how these sentences should be understood. Although human rights are not mentioned one could argue that these sentences amount to HRE. However, it is unclear how far this argument can be taken in the light of legal silence on the topic (including the fact that human rights are not mentioned elsewhere in the Act).

Moreover, the words '*insight into cultural diversity*' is not necessarily the same as promoting respect for the rights of minorities and people with different cultures. To promote '*equality*' and combat '*discrimination*' might mean that all human beings have the same rights and that the rights of minorities and indigenous people should be respected equally. But the proliferation of specific human rights conventions on the rights of minorities, indigenous peoples, persons with disabilities, women's rights and children's rights suggests that it is not simply fostering a general antipathy towards discrimination. The premises for what 'equal' means often leads to misunderstandings and disagreements – for example, formal equality is not regarded as sufficient in international human rights law.

14.3.3 PRIVATE SCHOOLS AND THE HUMAN RIGHTS ACT PROCESS

The Convention on the Rights of the Child was incorporated into the Human Rights Act in 2003, making the convention a part of Norwegian law, with a higher legal status than the Education Act. However, when the Parliament incorporated the convention, the aims of education enshrined in CRC Article 29(1) were not discussed in relation to Section 1-1 of the Education Act (Ministry of Justice, 2003). Interestingly, the Parliament did change the purpose clause for private schools (Section 1-1 of the Private Education Act), and adopted a text very similar to that of CRC Article 29(1). However, no changes were made for the purpose clause for public schools (Section 1-1 of the Education Act); and most students in Norway attend public schools (Ministry of Justice, 2003: 57–58).

14.3.4 CURRICULUM PLAN

The purpose clause (Section 1-1) of the Education Act constitutes the primary law for the design of the curriculum plan, which is the basis for all activity within schools. There are two parts of the curriculum plan – the overriding part and the detailed parts. The former specifies the overriding normative principles of education in Norway and sets out the specific aims of each subject in the detailed Norwegian Curriculum Plan (Utdanningsdirektoratet, 2017). The curriculum plan as a whole provides the foundation for all the subjects, the textbooks and teaching materials and the teacher education, including the teacher education curriculum, in-service training schemes and most of the school policies in general.⁷

On 1 September 2017, the government adopted the new *overriding part* of the curriculum plan, based on a report by a government appointed committee led by the professor in pedagogy, Sten Ludvigsen. He was appointed to review the plans on the basis of the purpose clause of the Education Act (Ministry of Education, 2015). However the Committee contained no members with legal competence or a background in human rights; and no mention is made of any international human rights conventions, or Article 109 of the Constitution (NOU, 2015). The word 'rights' is mentioned twice in the report – once in a sentence about democracy (Ibid. p. 32), and once in a sentence about what “*may be relevant*” in relation to social environmental issues (Ibid. p. 50). The primary emphasis is on innovation, adaption to the working life, relevance to businesses and economic improvement. Following the report, the relevant parliament committee recommendation for a new overriding part contained no mention of rights. Nonetheless, there is a section in the Overriding part of the curriculum plan focused on the dignity of human beings and which mentions the CRC.

Human rights are founded on human dignity and are an important basis for the rule of law. They build on universal values, which applies to anyone no matter who they are, where they come from or where they are. The Convention on the Rights of the Child is a part of human rights and gives children and young people special protection. Education must be in conformity with human rights,

7. See: Section 1 of the Regulations on the completion of the overall aims and the principle of education in primary and secondary education and in the high school education. And see (Utdanningsdirektoratet, 2017: 2–3).

Regulations Relating to the Framework Plan for Primary and Lower Secondary Teacher Education for Years 1–7, Section 1 (2) and Regulations Relating to the Framework Plan for Primary and Lower Secondary Teacher Education for Years 5–10, Section 1 (2). They can be accessed here: <https://www.regjeringen.no/no/tema/utdanning/hoyere-utdanning/rammeplaner/id435163/>

while at the same time providing students with knowledge about human rights (Utdanningsdirektoratet, 2017, p. 5).

This formulation is, however, very general and provides no concrete directions for the curriculum, only the duty to provide student with knowledge ‘about human rights’ not respect human rights.

The *detailed curriculum* plan is divided into concrete learning outcomes and overall aims for each specific subject according to each grade. This, however, has not been revised and is based on the old General part of the curriculum plan. That said, parts of this detailed plan have been revised during the course of political debates in Norway on certain subjects. In light of the publication of Lile (2011), the Sami Parliament pushed successfully for the inclusion of specific learning outcomes on the rights of Sámi people and to include learning outcomes on the history of oppression and the fight for Sámi rights.⁸ This led to these two learning outcomes in social science for 10th grade students:

- ▀ Present the main features of the history and culture of Sámi from the mid-19th century until today and the consequences of the Norwegianization policy and the Sámi peoples fight for their rights.⁹
- ▀ Give an account of the main principles of the UN Charter, the Universal Declaration of Human Rights and the most essential UN Conventions, including the ILO Convention on the Rights of Indigenous Peoples, show how these appear in legislation, and discuss the consequences of human rights violations.

These formulations should be seen in relation to the recently added main educational aims of the subject social science, which among other things states that: ‘Central to the work of social science is understanding of and support for fundamental human rights, democratic values and equality.’ Some of the learning outcomes do not mention rights specifically, but may contribute to attitudes of respect. For instance students should be able to: ‘Converse about love and respect, variation in sexual orientation and relationships and family, and discuss consequences of lack of respect for differences.’ Again, however, questions can be raised to whether this is sufficient. The concern is not that the concept of human

8. Sami Parliament (30.4.2013) Sametingets vedtak om reviderte læreplaner og anmodning om konsultasjoner om reviderte læreplaner: <https://www.facebook.com/photo.php?fbid=10151416449866403&set=pb.531231402.-2207520000.1507215096.&type=3&theater>

9. The Norwegianization policy was an assimilation policy that lasted more than a hundred years (Minde, 2005).

rights is missing, or that students are not supposed to learn respect for minorities and people whom are different (Sørumshagen 2017), but rather that the inclusion of human rights in the curriculum plan is fragmeneted and somewhat random.

14.3.5 SCHOOLING AND THE RIGHT TO A GOOD PSYCHOSOCIAL ENVIRONMENT

A school environment, according to the CRC committee, 'must' reflect the values of HRE. They emphasise that: 'A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of Article 29 (1)' (Committee on the Rights of the Child, 2001: 6). According to Section 9a-2 of the Education Act, all students have the right to a safe and good school environment that promotes health, well-being and learning. Furthermore, according to Section 9A-3 schools shall have 'zero tolerance for offences such as bullying, violence, discrimination and harassment'.

Initially the government did not consider that it was realistic to legislate for a 'right' to a good psychosocial environment and zero tolerance on bullying (Ministry of Education, 2002: 22). However, the Norwegian parliament insisted on making legislative provisions safeguarding the individual's right to a good psychosocial environment and the law was strengthened with a 'zero tolerance' clause in 2017 (Stortinget, 2003: 3; Stortinget, 2017). While a background study concerning complaint cases on the right to a good psychosocial environment to the County Boards concluded that the problem was not the text of the law, but its realization (Welstad and Warp, 2011:5), the Parliament, based on the Ministry's proposal, decided nevertheless to strengthen the text of the law.

The link between this provision and human rights is also weak. One might argue that in order to realise zero tolerance on bullying one must promote respect for human rights, including the rights of minorities. However, Chapter 9A of the Education Act places the responsibility for realizing the right to a good psychosocial environment and zero tolerance on bullying squarely on each school alone. The focus is on combating bad behaviour and monitoring the schools to make sure they take this task seriously. Chapter 9A of the Education Act does not mention the promotion of specific attitudes, including respect for human rights.

The reason for this might be because bullying is viewed as a sub-category of aggressive behaviour and prejudice is not included in anti-bullying programs (Olweus, 1993). According to Dan Olweus (2003:14), one of the leading anti-bullying psychologist in Norway: 'Many also believe erroneously that students who are overweight, wear glasses, have different ethnic origin, or speak with an un-

sual dialect are particularly likely to become victims of bullying. All of these hypotheses have thus far failed to receive clear support from empirical data.’ Roland (2007:44–45) comes to a similar conclusion.

However, international studies point in a different direction. Minton (2016) reviews studies of self-reported bullying by lesbian, gay, bisexual and transgender (LGBT) students in Canada, Ireland, Northern Ireland and Norway; and students with sensory and physical disabilities in England, Ireland and Northern Ireland. He finds that these minority groups report higher incidence rates of being subjected to school bullying (see also Minton 2014; Minton, O’ Mahoney, and Conway-Walsh, 2013). Some of the research discussed in section 4 below also suggests this connection.¹⁰

14.3.6 INTERNATIONAL CRITIQUE OF NORWAY’S POLICIES

To promote respect for the rights of people subject to prejudices in society is a pedagogical challenge. If the didactical and pedagogical strategy is superficial, the result may worsen attitudes despite the good intentions (See Fishman and McCarthy 2005; Vaughta and Castagnob 2008; Housee 2008; de Freitas and McAuley, 2008; Welply, 2017; McCully and Reilly, 2017). The former Special Rapporteur on Education, Katarina Tomaševski (2001), explains that:

The words of caution about educational programmes merit repeating: “Forcing a prejudiced person to read or hear exhortations on tolerance may only increase his prejudice. Overenthusiastic appraisals of the contributions of a minority may create a reaction of distaste for members of that minority; and programmes improperly presented, even with the best intentions, may create an awareness of group difference that did not previously exist” (Tomaševski, 2002: 16)

The Committee on the Rights of the Child emphasises therefore that:

The effective promotion of article 29 (1) requires the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies. Approaches which do no more than seek to superimpose the aims and values of the article on the existing system without encouraging any deeper changes are clearly inadequate (Committee on the Rights of the Child, 2001: 6).

10. See below: 14.4.6 Sámi people.

That is why the Committee have also called upon states to develop a national plan of action that address all the aims of education in CRC Article 29 (1), including HRE objectives (Committee on the Rights of the Child, 2001: 7). However, the Government of Norway has not developed a national plan of action to realise Article 29 (1), and they have not addressed the issues dealt with in Article 29 (1) as part of any other plans either. Instead, it has attracted international critique.

During the 2009 Universal Periodic Review (UPR), Norway was criticised for its lack of attention to HRE. The Norwegian government promised in response 'to undertake a study to define any need for improved coordination and further reinforcement of human rights education in Norway' (Human rights Council, 2010: 14). The task was delegated to a consultant in the Norwegian Directorate for Education and Training. He wrote a report called a mapping of human rights democracy found in the Norway curriculum plan. The report is only four pages and lacks a legal analysis (any analysis) of what the obligation of human rights education entails and what it should include. It is simply based on a search for words in the curriculum plan that can be remotely associated with human rights or democracy. Based on this report, the consultant, somewhat surprisingly, concluded that democracy and human rights have been well integrated into the curriculum plan.

In the 2014-Universal Periodic Review at the UN Human Rights Council, Turkmenistan called upon Norway to 'develop a national action plan for human rights education that consists of a thorough needs assessment and programmes for human rights education at all levels' (Human Rights Council, 2014a: 17). Norway did not accept this recommendation, stating that:

An action plan is not considered the optimal measure at this point in time. The topic of human rights is well integrated into educational curricula. Higher education and teacher training institutions are particularly encouraged to increase their cooperation on human rights education. This is expected to lead to intensified efforts while preserving institutional autonomy in higher education (Human Rights Council, 2014b: 4).

However, teacher education curriculums are defined by government regulations specifying that the curriculum shall be based on the Education Act and the National Curriculum Plan, which includes some recognition of human rights but within Christian and humanistic heritage and tradition.¹¹ The government regula-

11. See paragraph 3.2 and 3.4 above.

tions do not mention the CRC nor the Constitution Section 109.¹² It is stated, in these regulations, that teachers should have knowledge ‘of child rights’, but not on how to teach *respect* for human rights,¹³ which is not the same thing.

These international concerns and critiques underscores the potentially underlying problem in Norway’s law and policy on HRE. Human rights are partly included in the Education Act and curriculum plan but it is difficult to argue that the state has taken sufficient steps to integrate human rights into its educational aims and plans. This may ultimately affect whether education is directed towards ensuring respect for human rights, to which we now turn.

14.4 OUTCOMES

What empirical data can shed light on the proposed outcome indicators (see section 2.1)? What is the proportion of majority students in Norway that learn to respect the rights of vulnerable groups, ethnic and religious minorities and indigenous (Sámi) people? And what is the proportion of prejudice and intolerance towards vulnerable groups, minorities and indigenous (Sámi) people? And how do we determine implementation on the third outcome indicator on Sámi history education?

There is only one socio-legal quantitative study that measures directly the realisation of HRE in Norway. That is my own PhD from 2011, which partly analysed HRE specifically in relation to the Sámi people. In order to present a broader picture, I have sought to assemble data on experienced discrimination, bullying and attitudes among primary, secondary and high school students in Norway.

To be sure, such outcomes data raises questions of causation. If students have learned the requisite respect, knowledge and skills, it might not be because of the law or the HRE-teaching in school. It may be drawn from a movie watched, social media engagement or a number of other factors. In this case, it does not matter. What I seek to do here is only to shed light on what the empirical data say about the reality out there, if it is in line with the aims of the law, regardless of the reasons. In any case, while the data is somewhat difficult to interpret, it seems there is a gap between the aims of HRE and the reality. Moreover, in section 3 above, I have indicated that while the legal basis for HRE seem strong on the surface, in

12. See Regulations Relating to the Framework Plan for Primary and Lower Secondary Teacher Education for Years 5–10 (FOR-2016-06-07-861), section 1 (2); and Framework Plan for Primary and Lower Secondary Teacher Education for Years 1-7 (FOR-2016-06-07-860), section 1 (2).

13. Ibid, section 2-(2) in both of the regulations.

reality it is rather weak, because it has not been considered as relevant in the design of curriculum plans. Furthermore, the government has refused to adopt any national plan of action to realise HRE, because it is not seen as necessary. However, if there is a gap between the aims of the law and results of the data that describe reality, then examining the HRE curriculum and the legal-policy superstructure might be one good place to start.

14.4.1 EXPERIENCE OF DISCRIMINATION

The most comprehensive quantitative data on discrimination in schools stems from the government's Student Surveys (Elevundersøkelsen) from 2007–2012, which partly measured experiences of discrimination. The data from the Student Survey 2012 is based on answers from 380,183 students (66%) in 5th grade to the end of high school (Wendelborg et al. 2012:3–4). Among other things, the students were asked if they had experienced unfair treatment or discrimination based on five different grounds: *Gender, disability, nationality, religion or faith and sexual orientation*. They were also asked how often it might happen: 'Never', 'occasionally', '2 to 3 times a month', 'approximately once a week' or 'many times during a week' (Wendelborg et al. 2012:70–72). As the survey was becoming too large, following 2012, the questions about these five grounds were removed from this yearly student survey. Thus, there are no published numbers from the Student Surveys on these aspects following 2012. However, the questions were kept in the survey as 'optional' and this data is accessible. I include the 2017 numbers in which approximately 30,000 (6.8%) students chose to answer each of these questions. The total number of students that participated in the 2017 Student Survey was 435 213 students.

If one takes the cumulative percentage of those 30 000 students who have answered the questions, based on their experience of unfair treatment or discrimination '2 to 3 times a month' or more often, the numbers vary from 6.1% based on gender, 3.1% based on disability, 6.3% based on nationality, 4.4% based on religion or faith and 3.7% based on sexual orientation. These numbers are slightly higher than in 2012 in which the questions were mandatory and included all the participating students. The Student Survey does not give any data on the proportion of students within these groups.

14.4.2 RELIGION

A total of 30,047 students chose to answer the question in the 2017 Student Survey regarding their experience of discrimination based on 'religion or faith'. Of these

students, 4.4% said they had experienced discrimination ‘2–3 times a month’ or more often. According to the 2009 International Civic and Citizenship Education Study, 81% of students in secondary school are either Christian (54%) or have no religion (27%). A further 9.4% report that they belong to a minority religion; 5% are Muslim, 1% are Buddhist, 0.4% are Jewish and 3% belong to an ‘other’ religion (Mikkelsen, Fjeldstad and Lauglo, 2011:56). If one can assume that the majority of those who have experienced discrimination based on religion or faith belong to this minority group of 9.4%, then 4.4% of the total population of students amounts to 46% of this minority group. Again, if one can assume that Muslims experience more discrimination than other religious minority groups, because of the general hostile environment towards Muslims, 4.4% out of 5% is an alarmingly high number. However, these are only very speculative rough estimations and the precise proportion is unknown.

A general study of attitudes in the Norwegian population, conducted by the Holocaust Centre, indicates that overall ‘34.1 per cent of the population displays marked prejudices against Muslims’ (Hoffmann and Moe, 2017:14). For instance 39% agree with the statement ‘Muslims pose a threat to Norwegian culture’ and 30% with the statement ‘Muslims want to take over Europe’. Nearly thirty per cent (27.8%) say they generally ‘dislike Muslims’, and overall 19.6% would dislike having Muslims as neighbours or in their circle of friends. However, it is also pointed out that older people in general are more negative than younger people. In addition, these attitudes have become slightly more positive since a similar study was conducted in 2011 (Hoffmann and Moe 2017). These findings correspond well with a quantitative study by Ottar Hellevik and Tale Hellevik. Their conclusion is that attitudes towards immigrants, and Muslims in particular, exhibit a positive trend in Norway (Hellevik and Hellevik 2017).

14.4.3 ETHNIC DIVERSITY

What is the proportion of majority students in Norway that learn to respect the rights of ethnic groups that are different from themselves? The 2009 International Civic and Citizenship Education Study included direct questions on student attitudes on ethnic diversity and immigrants. From a sample of 129 randomly selected schools approximately 3300 students in the 8th grade, and the same amount in 9th grade, answered questions about their views on democracy (Mikkelsen, Fjeldstad and Lauglo 2011:150–151). This included some general questions on the rights of *populations (ethnic groups)* and *immigrants*. The first set of questions concerned the rights of *populations (ethnic groups)* (Ibid: 46):

TABLE 14.1 Views on ethnic groups

Table 1	Strongly agree	Agree	Disagree	Strongly disagree
Persons from all populations (ethnic groups) should have the same rights and duties	51%	40%	7%	3%
Persons from all populations (ethnic groups) should be encouraged to stand for election	34%	50%	13%	3%
Schools should honour students and respect all human beings regardless the population (the ethnic group) they belong to.	57%	35%	6%	2%
Persons from all populations (ethnic groups) should have the same opportunity to get a good job in Norway	47%	44%	7%	2%
All populations (ethnic groups) should have the same opportunity to get a good education in Norway.	49%	45%	5%	2%

The overwhelming majority of students give answers that are generally very positive in the direction that one should respect the rights of all human beings. Seven to 16% of students disagree with these statements. However, the questions are so vague that they can be interpreted in multiple directions – students that answered negatively might have seen an exception to the general rule; students that answered positively might hold to an exception in some cases. Children, for instance, cannot vote and do not have the same rights as adults, but they are still ‘persons’.

These questions were followed by a number of questions on the rights of immigrants (Mikkelsen, Fjeldstad and Lauglo 2011:47). Instead of general questions along the lines of ‘everyone should be respected regardless of their nationality’, these questions are slightly more specific, focusing on immigrants. In this second set of questions, a higher percentage of students become more negative, especially in terms of the right to be different – to speak your own language, enjoy your own culture and practice your own religion in accordance with CRC Article 30 and CCPR Article 27. See Table 2.

TABLE 14.2 Views on immigrants

Table 2	Strongly agree	Agree	Disagree	Strongly disagree
Immigrants should have the same rights as everybody else in the country	48%	39%	9%	4%
Immigrants should be able to keep their own habits and their own lifestyle	30%	46%	16%	8%
Immigrants that have lived in a country for many years should have the right to participate in elections	38%	43%	14%	5%
Children of immigrants should have the same possibility of education as other children in the country	55%	38%	4%	3%
Immigrants should have the opportunity to continue to speak their own language	23%	50%	19%	8%

Twenty-two per cent of students disagree that immigrants should be able to keep their habits and lifestyle. It might be seen as a violation of CRC Article 30, but then again no groups have unlimited rights to their habits and lifestyles.¹⁴ Almost 30% of the student seem to think that immigrants should not have the right to speak their own language. The authors write that this might mean that students are of the opinion that immigrants should show willingness to integrate into the Norwegian society (Mikkelsen, Fjeldstad and Lauglo 2011:48). However, one might still learn Norwegian and be integrated without abandoning one's own culture. Some students, however, might have interpreted the question to be about the language at school.

Before turning to additional statistical studies on attitudes towards specific minority groups, it is useful to refer to a number of qualitative studies. This partly provides a richer picture on potential attitudes of the majority students.

Knut Vesterdal interviewed 27 teachers in secondary schools, most of them teaching social studies. In one of his interviews, the teacher talks about the attitudes of the students:

14. For example the Committee on the Rights of the Child emphasise that: 'In the case of children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group.' General Comment 11, para. 30.

There are other groups of people, also in this area, but we don't know them sufficiently. And a lot of the students have negative thoughts about other peoples. This includes a lot of them – a great number. It derives from their lack of knowledge about them. It is related to the lack of knowledge. And I try to say that we must meet them, talk with them and see them. (...) We have discussed crime now, and most people thought crime was committed by people with other ethnic origin (Vesterdal 2016:187).

This is an interview of a teacher in an upper secondary school in a rural area, with a minor degree of diversity among the students (Vesterdal 2016:172). One of the primary research questions of Vesterdal was to understand how HRE was taught by teachers. In one of his conclusions he explains that:

First, there is a clear tendency of presenting human rights through their negation, meaning that it is narratives concerning human rights *violations* that dominate their described practice. Here it is often the worst violations that are presented where genocide, ethnic cleansing, and mass atrocities in war-torn, authoritarian and totalitarian societies is the point of reference to discuss human rights. Moreover, there are basically violations outside the Norwegian border that are emphasized in the context of human rights, as the worst abuses occur 'there' and represent clear examples that are expected to motivate and engage the students to work with such issues and to develop solidarity (although freedom of speech and freedom of religion are referred to as a discussion topic in a national context) (Vesterdal 2016:249).

Vesterdal is very critical towards this 'tendency of dichotomization between the harmonic Norway as a human rights heaven and the chaotic, violent world outside' (Vesterdal 2016:249).

In another PhD-study, Heidi Biseth undertook a curricula- and policy study combined with qualitative interviews on *Democracy in Multicultural School Environments*. Her findings indicate that diversity present in the school population is rarely linked to democracy, and hence diversity is turned into an aberration rather than a natural consequence of democracy (Biseth 2012:91–83).

Carla Chinga-Ramirez (2015) spent seven months observing 21 students at three high schools in Norway. Her study was focused on how majority discourses on normality influence minority students. Her studies indicate that majority discourses on *normality* and *equality* creates an idea of equality as *sameness*, based on Norwegian heritage and origin. She argues that the equality principal within the

schools were based on a silent and invisible frame of ‘educational normality’ that favours the majority students (Chinga-Ramirez 2015).

14.4.4 SEXUAL ORIENTATION

In General Comment No.1, the Committee on the Rights of the Child emphasize that: ‘A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of Article 29(1)’ (Committee on the Rights of the Child, 2001: 6). HRE is not specifically about combating bullying, but if one can show that a specific group of students are being bullied, then that might be an indication of negative attitudes towards that group. According to Article 2 of the CRC ‘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.’ According to the Committee on the Rights of the Child, this includes sexual minorities. In fact, they urge:

States to eliminate such practices, ... discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying (Committee on the Rights of the Child, 2016: 10).

Roland and Austad (2009: 19–23), two leading scholars in the field of bullying-research, conducted a study on bullying among 10th grade bisexual and homosexual/lesbian students at 27 randomly selected schools. In the survey, bullying is defined for the students in this way:

We call it bullying when one or many (together) are unfriendly and unpleasant towards another person that cannot easily defend themselves, and when this happens repeatedly. For example this can happen by him/her being kicked, beaten or pushed. Bullying can also be when he/she is teased a lot or excluded from the company of the others (Ibid: 20).

The students were asked about different forms of bullying – including digital and direct bullying. According to Roland and Austad, the level of bullying among homosexual students is extremely high, especially among the homosexual boys. 48% of the boys report being bullied ‘two to three times a month’ or more often

digitally ¹⁵ or directly compared to 7.3% of the heterosexual boys (Roland and Auestad 2009:32). Here are the numbers for all the groups:

TABLE 14.3 Bullying and LGBT students

	Heterosexual	Bisexual	Homosexual/lesbian
Boys	109 (7.3%)	10 (23.8%)	24 (48.0%)
Girls	76 (5.7%)	11 (11.5%)	7 (17.7%)
All	186 (6.6%)	21 (15.2%)	31 (34.8%)

The authors also asked questions about homophobic name-calling, being called 'homo' or 'lesbian' and being maligned for this status. 50% of the boys said this happened 'two to three times a month' or more often (Roland and Auestad 2009:36). Here are the rest of the numbers:

TABLE 14.4 Name-calling and LGBT students

Table 4	Heterosexual	Bisexual	Homosexual/lesbian
Boys	72 (4.8%)	13 (31.0%)	25 (50.0%)
Girls	11 (0.8%)	1 (1.0%)	6 (15.4%)
All	83 (2.9%)	14 (10.0%)	31 (34.8%)

What is clear from the data is that homophobic name-calling and bullying based on sexual orientation is much higher among boys compared to the girls. Still the numbers are quite high among the girls. While the absolute number of students that are homosexual/lesbian or bisexual are quite small, somewhat compromising the statistical significance of the study, the differences are very high. It is safe to say that the rights of bisexual and homosexual/lesbian students are not sufficiently respected by the majority students.

In another study Bendixen and Kennair conducted a survey among 1713 student at 17 high schools in Sør-Trøndelag in 2013 to 2014. They found that 38% of the boys had been called 'homo', 'gay' or something similar during the last year. 30.1% had experienced this twice or more. 24.3% of the students reported that they had called a boy 'homo', 'gay' or something similar twice or more the last

15. Digital bullying includes bullying on the phone, text messages, videos, etc. In addition it includes internet based bullying, through social media, the spreading of videos, etc.

year. The number of girls being called these things is significantly lower (Bendixen and Kennair 2014).

14.4.5 DISABILITY

As mentioned above in the 2017 Student Surveys (Elevundersøkelsen) 3.1% of students have experienced unfair treatment or discrimination based on disability ‘2 to 3 times a month’ or more often. However, this says little about the proportion of students with a disability that have experienced this. Patrick Kermit et. al (2014) sent out written surveys to 785 parents with students that had a sensory disability (hearing or eye sight disability). 0.28% of student in Norway have sensory disabilities. 175 students completed the surveys and 10.7% of these students reported having been bullied ‘2 or 3 times a month’ or more often (Kermit, et al 2014:80). However, it is important to note that the question about bullying was much more rigid than the question about unfair treatment and discrimination. It was stated that:

Bullying means repeated negative and ‘vicious’ conduct from one or several others against one student that have trouble defending themselves. Repeated teasing in an unpleasant and hurtful way is also considered bullying.

17.8% of the students said that they had been bullied ‘*once in a while*’. These numbers are not that high compared to the rest of the student population. However, 7.1% of the students report being bullied 2 or 3 times a month compared to 3,2% of students in general, which is twice as many. The numbers must also be viewed in light of the fact that some students are in segregated schools, with other student with disabilities. A study by Jan Erik Finnvoid indicated that 17% of secondary school students with physical disabilities, are attending segregated schools (Finnvoid 2013:37).

14.4.6 SÁMI PEOPLE

Norway is based on the territory of two peoples, Norwegians and the Sámi.¹⁶ Today the Sámi people are quite few, due to harsh assimilation (Norwegianization) that lasted at least 112 years (Minde 2005; Dahl 1957:109). In my PhD-

16. On the 7th of October 1997 the King of Norway His Majesty King Harald, acting on behalf of the Kingdom of Norway, opened the Sámi Parliament by stating that: ‘The Norwegian state is founded on the territory of two people – Norwegians and Samis. Sami history is closely intertwined with Norwegian history. Today we must deplore the injustice the Norwegian state has previously inflicted on the Sami people through a harsh Norwegianization policy’ (Hætta, 1998, p. 20).

research, statistical data was collected in 2009, on whether HRE is realised in Norway in accordance with CRC Article 29 (1), based on a sample of 817 students in ninth grade at 15 schools in Sámi and non-Sámi areas from the North to the South of Norway. This research also included written surveys from 190 teachers (41.9% response rate) at the same schools (Lile 2011). The questions were based on a diligent legal analysis of CRC Article 29(1) to ensure a high score on legal relevance (Lile 2011:78–299). This methodology is published elsewhere (Lile 2017).

One of the first things I wanted to know was if students learnt anything about the Sámi people and how they evaluated that education. 73.5% said that they had received no education at all about the Sámi or that the education they had received was ‘not so good’ or ‘bad’. This was followed by questions on the content of education. A student may say that they have learned a lot, but learning ‘about’ the Sámi is not the same as learning the things that are important to ‘develop respect’ for the Sámi people and their rights.¹⁷

I had several questions on the content of education, but in this chapter, for the purpose of space, I have chosen to say something on history education. As mentioned above, I have concluded that one of the indicators for the evaluation of HRE with regard to the Sámi should be this one:

The proportion of majority children that have learned about the Norwegianisation policy and the fight for Sámi rights in a fair, accurate and informative way.

This indicator can be justified as follows. In order to combat prejudice and realise HRE the Committee on the Rights of the Child states that:

Emphasis must also be placed upon the importance of teaching about racism as it has been practised historically, and particularly as it manifests or has manifested itself within particular communities (Committee on the Rights of the Child, 2001: 4).

The Committee has also emphasised the importance of a fair history education in several concluding observations.¹⁸ In conformity with this, Article 31 of the ILO convention No.169 on Indigenous and Tribal Peoples (1989), which Norway was the first to ratify, emphasise that:

Educational measures shall be taken [...] with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts

17. See above, section 2.3.

shall be made to ensure that history textbooks [...] provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

Thus both the Committee on the Rights of the Child and the ILO Convention 169 emphasise the importance of history education to combat prejudice. And this history education should, according to the ILO-convention, be ‘fair, accurate and informative’.¹⁹

The Norwegian state had an assimilation policy called Norwegianisation, which in the words of the Norwegian King, was ‘harsh’, and it lasted at least 112 years (Minde 2005:7). That policy has significantly contributed to the fact that Sámi people today are quite marginalised in Norway. This history is just as much a part of Norwegian history as of the Sámi history. If history education in Norway is going to have a shot at being ‘fair, accurate and informative’, students must learn about this history. The question is; what is most important to learn about the Norwegianisation history? According to Henry Minde:

[I]t was not the advancement and the existence of a policy of assimilation, which made Norway different from other states, but rather the determined, continuous and long-lasting conduct of that policy. This is what makes the historical legacy of the norwegianisation policy morally problematic and politically sensitive even to this day (Minde 2005:7).

Thus, I have concluded that one of the most important things the students must learn to understand about this history, in order for it to be ‘fair, accurate and informative’, is the ‘determined, continuous and long-lasting conduct of that policy’. Thus, students and teachers were asked how long the Norwegianization policy

18. *Concluding observations: Bulgaria*, UN doc. CRC/C/BGR/CO/2 (2008), para. 72(c); *Concluding observations: Serbia* (2008) para. 74(d); UN doc. CRC/C/SRB/CO/1; *Concluding observations: Slovakia* (2007) UN doc. CRC/C/SVK/CO/2: para. 58 (c); *Concluding observations: Romania* (2003), UN doc. CRC/C/15/Add.199, para. 65 (c); CRC/C/15/Add.201: *Concluding observations: Czech Republic* (2003), para. 68 (c); *Concluding observations: Poland* (2002), UN doc. CRC/C/15/Add.194: para. 53 (c); *Concluding observations: Republic of Moldova* (2002), UN doc. CRC/C/15/Add.192, para. 50 (c); *Concluding observations: Estonia* (2003), UN doc. CRC/C/15/Add.196, para. 53 (b); *Concluding observations: Georgia* (2008), UN doc. CRC/C/GEO/CO/3, para. 77 (d).

19. For more legal sources on the importance of history education see for instance Article 12 (1) of the European Framework Convention for the Protection of National Minorities, artikkel 8 (1) (g) of the European Charter for Regional or Minority Languages. And for a more diligent analysis of these sources and several other legal sources see my PhD (Lile 2011), especially pp. 158–169 and pp. 202–203.

icy lasted. The alternatives were “more than” 20, 30, 50 or 100 years. Here are the results for the 9th grade students:

		How long did the Norwegianization policy last?					Total
		100 years	50 years	30 years	20 years	Don't know	
Total	Numbers	88	120	79	41	480	808
	Percentage	10.9%	14.9%	9.8%	5.1%	59.4%	100.0%

As one can see the majority of those who actually tried to answer the question made the wrong guess on 50 years. It is a big difference between 112 years and 50 years. 17 of the 28 students I interviewed about this matter said that they had never heard any talk about the Norwegianization policy. They did not know anything about what the question concerned.

Since then, following two years of pressure from the Sámi Parliament, the government has included a learning outcome on the Norwegianisation policy, in the curriculum plan.²⁰ However, there is no research that can shed light on whether these efforts have been effective. A recent positive development is also that on the 20th of June 2017, with 53 in favour and 47 opposed, the Parliament of Norway decided that there should be established a commission to investigate the history of Norwegianization of the Sámi and Kven people.²¹ The Committee on the Rights of the Child has praised the efforts of Canada and Australia to investigate past events and express regret for what happened during their assimilation policy toward indigenous peoples.²² Hopefully such a commission will raise the awareness of what happened to the Sámi and Kven people and contribute to increased understanding and respect for the struggle for indigenous human rights in Norway.

While majority children should learn about the Norwegianisation policy, I conclude that they should also learn about the ‘struggle for Sámi rights. Why? According to CRC Article 29 (1) (d) education shall be directed to ‘the preparation

20. See above, Section 3.4.

21. Stortinget, Dokument 8:30 S (2016–2017), Innst. 493 S (2016–2017) Representantforslag om en sannhetskomisjon for fornorskningpolitikk og urett begått mot det samiske og kvenske folk i Norge: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Vedtak/Sak/?p=67518> (accessed 30.04.2018).

22. Committee on the Rights of the Child, *Concluding observations: Canada* (2003), UN doc. CRC/C/15/Add.215, para. 58; *Concluding observations: Australia* (2005), UN doc. CRC/C/15/Add.268, para. 32.

of the child for responsible life in a free society, in the spirit of understanding [...] among all peoples [...] and persons of indigenous origin'. To develop 'understanding' for the Sámi people and develop respect for their rights, it is not enough to just learn about oppression. If history education is to be 'fair, accurate and informative' students must learn to 'understand' how Sámi people have fought for their rights. Sámi people are not just an anonymous group of faceless people. Thus, they should learn a little bit about who the protagonists are. Who is the Martin Luther King of the Sámi people? Ole Henrik Magga became the first president of the Sámi Parliament. He was one the most prominent leader of the Alta-river dam conflict that lead to the establishment of the Sámi Rights Commission, which formed the basis for many of the Sámi people's rights today. The establishment of the Sámi Parliament was a major victory for the Sámi people. Thus, I would argue that of all the protagonists of the Sámi human rights struggle, Ole Henrik Magga is perhaps the most import (Lile 2011). Therefore, one of the questions I asked was about the first president of the Sámi Parliament. Here are the results:

		What was the name of the first president of the Sámi Parliament?					Totale
		Nils Mattis Hætta	Mikkel Sara Gaup	Ole Henrik Magga	Aili Keskitalo	Don't know	
No.		126	50	103	84	446	809
Percent		15.6%	6.2%	12.7%	10.4%	55.1%	100.0%

The options Nils Mattis Hætta and Mikkel Sara Gaup were just random made-up Sámi names. Aili Keskitalo was the current president at the time. As one can see from the results, the fake made-up name "Nils Mattis Hætta" was the most popular guess among the students. 15.6% went for that. 12.7% of the students either knew the answer or made the right guess.

What was particularly disappointing was that students from two of the core Sámi areas seemed to be particularly unaware of this basic question. Out of 49 students, only two (2) students gave the correct answer. Among teachers a majority (except Oslo) gave the correct answer. The tendency was that the older and more experienced teachers knew the answer (80%) while a larger proportion of the inexperienced teachers (36%) did not know. That might suggest that their knowledge comes from following the news when they were younger, not from the curriculum.

Having asked general questions about the content and quality of the education and some central knowledge questions, I also asked questions concerning attitudes, which were based on the debate about Sámi people's rights. Some of the attitude questions were formulated as statements. The students and the teachers were given these options: 'fully agree', 'somewhat agree', 'neither or', 'somewhat disagree', 'fully disagree' or 'don't know'. I also asked some more direct questions about if they thought Sámi people are 'whiny' and demanding and if they had experienced prejudice against the Sámi people.

To sum up the results briefly, there were large differences between the North and the South. In the North, in Finnmark, the attitudes were significantly more negative among students and teachers compared to the rest of the country. In the South and in Trøndelag, students and teachers generally did not have any opinion due to lack of knowledge or they were quite positive towards the rights of Sámi people. In the North however, the attitudes were quite negative, sometimes quite aggressive, among a large sample of students and teachers.

Thirty-five per cent (35%) (21 out of 59) teachers in Finnmark 'fully' or 'somewhat' agreed that the Sami Parliament should be disbanded. The Sámi Parliament is the democratic voice of the Sámi people, protecting the right of indigenous peoples to speak on behalf of themselves. 28% of teachers 'fully' or 'somewhat' agreed that Sámi rights is '*a threat to democracy*', and 49% said that Sámi people are either 'very' or 'somewhat' '*demanding and whiny*'. If a teacher thought that Sámi people should not have the right to speak on behalf of themselves, that their rights are a threat to democracy and that they are demanding and whiny, it is not clear how they can promote respect for the rights of Sámi people. In the interviews, it became clear that some of these teachers felt that Sámi people had been given too many rights, and they felt that Norwegians were being marginalised and oppressed as a result of Sámi rights (Lile 2011:544). This corresponds well with a longitudinal study by Michael I. Norton and Samuel R. Sommers (2011) that followed 209 white and 208 black Americans from 1950 until 2010. They say that a growing proportion of the white informants felt as if they were victims of 'black racism' as a result of black rights. They reflect on this saying that:

This emerging perspective is particularly notable because by nearly any metric—from employment to police treatment, loan rates to education—statistics continue to indicate drastically poorer outcomes for Black than White Americans (Norton and Sommers 2011:215).

There is this perception among some teachers that Sámi people have been given special rights to land and water. However, there are no special Sámi rights to land or water in Norway.

Among the students in Finnmark, 18% of students ‘somewhat’ or ‘fully’ agreed that the Sámi Parliament should be disbanded, and 50% thought that Sámi people were ‘somewhat’ or ‘very’ ‘demanding and whiny’. In one of the municipalities in Finnmark 59 students (34%) said that they had experienced ‘quite many’ or ‘very many’ incidents of other students saying prejudice (ugly) things about the Sámi people. In the other municipality the number was a bit lower (14%), however in this municipality 52% said that Sámi people are ‘very’ or ‘somewhat’ demanding and whiny, compared to 42% in the other municipality in Finnmark. Thus, it seems clear that quite a large proportion of students in Finnmark have not learned much respect for the rights of the Sámi people. In most other parts of the country the proportion of students with negative attitudes were not as high as in Finnmark.

On the surveys, it was possible for students to provide some additional comments. Some of the students from Finnmark wrote quite disturbing things about Sámi people. A couple of students said that they ‘strongly hated’ and ‘detested’ Sámi people, others said that they were dirty, ugly, smelly, and/or greedy.

This study also covered bullying, but only through interviews with nine Sámi students. It was a difficult topic for interviews. It is very hard to gain the trust of students and create a safe space to talk about bullying. Three of them had been teased or bullied because they were Sámi or because they studied Sámi language. One of the students broke down during the interview and tears flowed down his chins as he told the most heart-breaking story of how he was bullied. The bully said things like ‘all Sámi people should die, and they do not belong in this country’. He was bullied on the internet, at school and on his way to school. At this particular school, the majority of teachers boycotted my survey. The rector said many of them had reacted to the tone in the survey. The school inspector was annoyed about the topic of the survey – it is much more important to do research on the Sámi people’s attitudes towards Norwegians, she said. According to her, Norwegians were victims of Sámi racism, which was a much bigger problem according to her. When I told her about the student who was being bullied she promised to deal professionally with it. However, after three months without news I contacted her to ask what had happened. She wrote to me in an email that she had talked to the parents and the boy and that everything was resolved. Sceptical, I made contact with the mother of the student. She was very surprised; she did not know that her boy was bullied at school. She was worried about him because he had quit his Sámi classes and his performance at school was not good. When I told

her about the email, she was amazed, saying *'that it is a lie; I have never heard anything about this.'* Following her intervention, the vice chancellor (rector) at the school took the matter very seriously. Nevertheless, this story illustrates how attitudes and bullying can be very much interrelated. And, studies by Ketil Lenert Hansen et al. have indicated that a large significant proportion of Sámi people report being discriminated against because of their ethnic identity (Hansen et al, 2008; Hansen and Sørli 2012).

14.5 CONCLUSIONS

On its surface, the legal foundations of HRE appear strong in Norway. The relevant provision of the CRC has been incorporated into law with preference over the Education Act. Additionally, the new section 109 in the Constitution specifically states that: 'The education shall [...] promote respect for democracy, the rule of law and human rights.' However, what matters for the actual education in schools is what laws give direction to the Overriding curriculum plan and the detailed curriculum plans. It is only the purpose clause of the Education Act (Section 1-1) that gives direction to these curriculum plans, not the Constitution Article 109, CRC Article 29 (1) nor CESCR Article 13 (1). It is based on 'fundamental values in Christian and Humanist heritage and traditions' – bracketing the potential reach of human rights. Human rights are only included in a fragmented and haphazard manner in the country's curriculum plans raising questions as to whether it is complying with its obligations to direct knowledge towards ensuring respect for human rights. In light of international critique, the Norwegian government should adopt an evidence-based national plan of action in order to revise the curriculum plan with the aim of realising its HRE obligations. Indeed, without any overall plan on HRE, and in light of international research, some of the curriculum learning outcomes might very well instil negative attitudes despite their good intentions.

The chapter then considered whether HRE is being realised in Norway? This was evaluated against two outcomes indicators:

- The proportion of majority students in Norway that learn to respect the rights of vulnerable groups, ethnic and religious minorities and indigenous (Sámi) people
- The proportion of prejudice and intolerance towards vulnerable groups, minorities and indigenous (Sámi) people

It was argued that these represent the most valid means of determining the effectiveness of Norway's implementation. The chapter reviewed different studies on discrimination and attitudes on children's views with a focus on religious and ethnic minorities, Sámi people and two vulnerable groups – sexual minorities and children with disabilities. The studies on respect for religious minorities suffer from data challenges, but assuming that students from minority religions are most likely to be targeted, a relatively high number of students report discrimination or harassment two to three times a month or more. Those who experience bullying the most in schools appear to be homosexual and lesbian students. According to Roland and Austad, the level is extremely high and claim that the evidence strongly suggests that bullying is related sexuality. My own study, that sought to specifically measure the realisation of HRE in Norway with respect to Sámi, found that students in ninth grade learn little about the Sámi people, let alone the things that are important to develop respect for their rights in a spirit of understanding. These findings suggest that Norway needs to review the effectiveness of its HRE but also measure to what extent the teaching is effective in practice.

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